

## WHAT TO PROSECUTE:

### ALLOCATION AND ADMINISTRATION OF SCARCE RESOURCES

G.T. Pagone\*

CORO Conference, Melbourne 26 August 2010

You may be as surprised as me to find me speaking at a conference of regulatory officers. That I have no qualifications for doing so need not detain us. That I have been billed for this task as a former special counsel to the Commissioner of Taxation may seem as irrelevant as my presence may surprise you. Tax lawyers have not always enjoyed a good reputation for regulatory compliance and they might not generally be thought to be a likely source of assistance to regulatory officers. Perhaps the notion of poacher turned game keeper lay behind the request that I should speak to you. Alternatively, perhaps the thought that a former tax lawyer might have little to say in support of professional ethics may reveal a hope that this session will be brief. One way or another I am bound to disappoint.

In Victoria the Legal Services Board has, with others, the objective of ensuring the effective regulation of the legal profession and the maintenance of professional standards.<sup>1</sup> The Board is given the many functions which are conferred upon it by the *Legal Profession Act 2004* (Vic) (“the Act”) or any other Act.<sup>2</sup> To that end it is given all of the powers necessary to perform its functions and to achieve its objectives including, but not limited to, all of the powers conferred upon it by the Act or any other Act.<sup>3</sup> These tasks and powers are expressed in broad terms and are intended to be as broad as is necessary to facilitate the objectives. They are conferred upon the Board in the express contemplation of a regulatory regime which

---

\* Judge of the Supreme Court of Victoria; Professorial Fellow, Law School, University of Melbourne.

<sup>1</sup> *Legal Profession Act 2004* (Vic) s 6.2.3(a).

<sup>2</sup> *Legal Profession Act 2004* (Vic) s 6.2.4(1).

<sup>3</sup> *Legal Profession Act 2004* (Vic) s 6.2.4.

is shared with others. The Legal Services Commissioner is also given important functions by the Act. Its functions include dealing in a timely and effective manner with disputes between lawyers and their clients,<sup>4</sup> education of the legal profession about issues of concern to the profession and to consumers of legal services<sup>5</sup> and to educate the community about legal issues and the rights and obligations that flow from the client/practitioner relationship.<sup>6</sup> To that end the Commissioner, like the Board, is given all of the powers necessary to perform his or her functions and to achieve the objectives conferred by the Act or any other Act.<sup>7</sup> The Board and the Commissioner are only two of many charged with the tasks of regulating the legal profession and maintaining its standards. The Supreme Court is another. It too has an important function to perform in the regulation of the profession and the maintenance of professional standards in a variety of ways. Some of the Court's functions and powers arise from statute, some from its inherent jurisdiction and some as a necessary incident of a body in charge of maintaining its own procedures. The Victorian Bar, the Law Institute, other RPAs each has a role in the regulation of the legal profession.

The fact that there is more than one regulator amongst many is important. It is a structural feature through which the Board and the Commissioner undertake their specific activities and select how best to use their resources. It is a structural feature which gives each of them a unique ability to plan projects strategically and permits the use of limited resources by focused targeting within a regulatory environment shared with others. I do not plan to list all the other bodies and institutions which effect regulation and maintain standards of the legal profession, but it is worth bearing in mind something of the range, number and impact in the environment through which the Board and the Commissioner undertake their functions and

---

<sup>4</sup> *Legal Profession Act 2004* (Vic) s 6.3.2(a).

<sup>5</sup> *Legal Profession Act 2004* (Vic) s 2.3.2(b).

<sup>6</sup> *Legal Profession Act 2004* (Vic) s 6.3.2(c).

<sup>7</sup> *Legal Profession Act 2004* (Vic) s 6.3.3.

exercise their powers. Regulation and the maintenance of standards is undertaken both directly and indirectly by many bodies and institutions. The Courts, including (if not especially) the Supreme Court, take an active and direct role in the regulation and maintenance of standards for the profession. That role is not merely formal through the admission of lawyers to practice and by striking off from the roll of practitioners, but extends from the Court's involvement in legal education through to its active participation in continuing professional development and, perhaps most fundamentally, in its daily involvement with practitioners who appear before its Judges presenting cases in accordance with accepted practices and permitted conduct. Bodies such as the Bar and the LIV publish standards of ethical behaviour and professional conduct and maintain active bodies to review the conduct of their members. They also create an environment through which regulation and standards are maintained through a whole range of informal contacts and peer group expectation which is often difficult to see and, ironically, perhaps for that reason, is profoundly effective. We should not forget the physical environment as an influence in maintaining standards. I remember Gerry Nash QC once telling me how powerful an impact upon the regulation of standards it was to have Barristers working closely together in a community where their conduct was exposed to peer group influence, expectation and guidance by the mere physical presence of barristers in close proximity in chambers. The same is true of solicitors in partnerships. The exposure to colleagues has a profound effect on behaviour and in setting often unstated standards of what is expected in professional practice.

The law has generally allowed regulators to determine for themselves how best to allocate resources and the Courts have been relatively generous in construing powers in favour of the regulator. The experience in the 1980s of the Commissioner of Taxation is illustrative of the degree of strategic thinking available to a regulator and of the support which the Courts have

given to a regulator in that regard. The 1980s may seem a long time ago to some in this audience but some may recall the fundamental strategic changes in tax compliance techniques adopted by the Tax Office. For a long time the regulation of individual and company tax liabilities depended upon each taxpayer lodging a return which was individually checked and assessed by a tax officer. In the 1980s that changed dramatically. Checking an assessment by government officials was substituted, albeit gradually, by a system of self assessment. It was a dramatic change that freed up significant administrative resources. At the same time the Commissioner of Taxation announced a policy of random audits of the top 100 companies. The companies were not chosen because of any irregularity or dispute with the Commissioner. Industrial Equity Ltd (“IEL”) was one company chosen at random by the Commissioner of Taxation for an audit. In that context the Commissioner purported to use statutory powers to enter certain premises and to require officers of IEL to attend to produce documents and to give information.<sup>8</sup> The only reason given by the Commissioner for seeking access to premises and documents was that IEL was a client of Bankers Trust and that IEL had been chosen for random audit pursuant to a policy of the Taxation Office to audit the top 100 companies in Australia.

IEL unsuccessfully challenged the Commissioner’s exercise of power in that way relying upon earlier dicta of the High Court suggesting that the Commissioner could not engage in mere fishing expeditions. The High Court upheld the Commissioner’s power to act as he had. It held that the provisions could be used for the purposes of the Act and that whether a purpose was a purpose of the Act was to be considered in the context of the Commissioner’s duty to levy tax and in the context of a provision charging the Commissioner with the general

---

<sup>8</sup> *Income Tax Assessment Act 1936* (Cth) ss 263, 264.

administration of the Act.<sup>9</sup> The Court observed that, clearly enough, the resources of the Australian Tax Office did not extend to auditing the return of every taxpayer and that it was “entirely consistent with the Act that the Commissioner should, at one time, decide to look more closely into the affairs of particular categories of taxpayer as well as of particular taxpayers”.<sup>10</sup> The random selection of IEL for audit was not beyond the purposes of tax legislation so as to disentitle the Commissioner to exercise his powers. The majority observed in that connection:

It may be the top hundred companies this time, primary producers another time, and property developers yet another time. IEL did not argue that the selection of the top hundred companies as a category for inquiry was necessarily improper; rather, the complaint was of the selection of IEL merely because it fell within that category. Inevitably, there will be a random aspect to those who are finally selected for closer examination; but the Commissioner will still be acting for the purposes of the Act so long as he is endeavouring to fulfil his function of ascertaining the taxable income of taxpayers.<sup>11</sup>

The relationship between function and power is important. The latter must be linked to the former but the former (namely function) was not construed narrowly. A consequence is that the power is as wide as is necessary to enable the function to be performed.

A practical impact of this decision was to sanction a strategic use of resources permitting the power of a regulator (in that case the Commissioner of Taxation) to be moulded to broadly defined functions. Similarly, the *functions* of the Board, the Commissioner and many other regulators are expressed broadly and not proscriptively. What may come within the objective of the effective regulation of the legal profession and the maintenance of professional

---

<sup>9</sup> *Industrial Equity Ltd v Deputy Commissioner of Taxation (Cth)* (1990) 170 CLR 649, 659 (Mason CJ, Brennan, Deane, Dawson Toohey and McHugh JJ).

<sup>10</sup> Ibid 660.

<sup>11</sup> Ibid 661.

standards and such other functions as may be conferred upon regulators are likely to be flexible and extensive. The *powers* given to regulators may similarly be moulded to enable the functions to be performed as may be appropriate.

The law of standing has frequently been used to deny a litigant a right to challenge administrative action or to enforce the law. Mr Blackburn was a frequently disappointed litigant in the U.K. seeking to compel government agencies to apply the law. In one case he sought mandamus against the Chief Commissioner of Police to take more effective action to enforce the law against gaming clubs and pornography.<sup>12</sup> The National Federation of Self-Employed and Small Business Ltd similarly sought to compel the U.K. revenue authorities to administer tax laws fairly as between different classes of taxpayers.<sup>13</sup> The failure of litigants in many of these cases<sup>14</sup> is in part to be explained by the Courts' recognition that government agencies and regulators have a significant measure of discretion about whether to exercise a discretion and how a discretion may be exercised. Discretions are frequently coupled with duties but within the ambit of the discretion there is typically a broad measure of discretion for a regulator to develop and implement policies about whether and how to exercise a power.

What regulators of the legal profession may prosecute, and how they may exercise their powers, are matters which the regulators may legitimately decide by reference (at least in part) to the allocation and administration of what are undoubtedly scarce resources. In that regard it may take into account strategic intervention in a variety of ways which enable its objectives and functions to be pursued without being bound to a single model of how it may act. Game theory provides one body of learning which shows how rich and broad our

---

<sup>12</sup> *R v Metropolitan Police Commissioner, Ex parte Blackburn* [1968] 2 QB 118; Sir William Wade and Christopher Forsyth, *Administrative Law* (9<sup>th</sup> ed, 2007) 689.

<sup>13</sup> *R v Inland Revenue Commissioner, Ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617.

<sup>14</sup> Many examples are given in Wade and Forsyth, above n 12, 695-700.

choices may be about how to influence and regulate behaviour.<sup>15</sup> Too much emphasis may be placed by regulators in themselves undertaking individual investigations and audits. The existence of other bodies regulating the profession, and setting standards, gives regulators unique opportunities to achieve their objectives through these other bodies by various forms of assistance, collaboration and strategic intervention. The Bar, for example, devotes extraordinary resources to the maintenance of standards of its members and to their regulation. A close collaboration between the Board, the Commissioner and the Bar to facilitate the Bar's tasks might more effectively secure the Board's and the Commissioner's objectives than by them dedicating their own, and necessarily duplicate, resources in checking individual complaints or undertaking individual investigations for itself. The resources of the Commissioner and the Board might best be served in satisfying themselves that the Bar's internal procedures secure the Board's and the Commissioner's objectives and in supporting the Bar. That would not only save costs and remove duplication but, and perhaps more importantly, would enhance the confidence of the community in the integrity of an interlocking system designed to achieve the same objectives. The provision by the Board of funds, or other forms of assistance, for its objectives to be secured through others is something which the Board should actively consider as a more effective means of securing objectives and of better allocating scarce resources.

It might, for example, be much more effective for the regulators to fund education programmes conducted by the Bar or the LIV to maintain ethical standards. CPD programmes run by the profession have much to offer. One tangible benefit has been the introduction of accredited specialisation from which the profession and the public benefit. Our confidence in those programmes in part depends upon the self interest of those that

---

<sup>15</sup> Eric Rasmusen (ed), *Readings in Games and Information* (2001).

produce them and those who use them. Accreditation can be used as a marketing tool as a sign of distinction and, therefore, may be commercially valuable if the accreditation regime is robust and reputable. On the other hand, CPD programmes run solely by the profession often lack rigorous educational evaluation. The programmes typically provide information with no evaluation of whether the programme has had, or is having, any effect. In that regard the community might be better served by the regulators devising programmes designed to increase skills rather than simply provide information. I have sat through many, and have sometimes conducted, ethics lectures which convey information but do little to develop skills. None of the regulatory authorities have particularly distinguished themselves by devising ethics programmes which are educationally directed to developing and evaluating the development of improved ethical standards. Although this may sound like criticism, its occurrence is easy to understand. The regulators and the profession are not educators and their focus has traditionally turned to regulation by application of quasi curial investigation and determination rather than educational development and evaluation of the educator's/regulator's effectiveness in skills development. The Board and the Commissioner might direct some of their resources to maintain standards in the profession by developing CPD programmes which achieve better, and measurable, outcomes. Sitting in a lecture, like this, listening (or giving the appearance of listening) is no guarantee that the lecture has conveyed its information or improved the standard of those who attended its delivery. Those attending are not at fault if those who devise and deliver do not achieve what are, or should be, their objectives.

The more general challenge for regulators may ultimately be in how best it is able to evaluate their own effectiveness. There is an enormous temptation for any regulator to judge its own effectiveness by looking busy. That task is frequently undertaken by adopting traditional

models which are expected and are readily understood by others. Investigating and prosecuting offenders is conceptually easy to understand and relatively easy to rely upon as proof of effectiveness. The harder task is to devise effective programmes for maintaining standards and regulating the profession which are capable of evaluation. The focus of enquiry for that task is upon the regulator and to determine whether the measures adopted by the regulator are actually effective and working. It is, perhaps, one of the many (predictable) ironies of regulation that its focus is upon the regulated rather than whether the regulator is doing its task effectively.

In more recent days the tax office has embarked upon a conscious programme of assisting tax agents in the discharge of their tasks as an effective means of securing greater compliance rather than the tax office merely seeking to detect and punish non compliance. Such programmes recognise that effective regulation can sometimes best occur not by investigation and sanction but by systematic infrastructural assistance at the points where things might go wrong. Similar reasoning might suggest to regulators of the legal profession that their resources might in part best be used in novel ways. Case files will probably reveal to regulators that problems arise with lawyers who lack resources to deal with problems as they arise in practice. I am sure that we have all known, or heard, of practitioners who have run into trouble because they lack appropriate systems to deal with problems when they arise. Sometimes the problems arise from circumstances outside of legal practice but which eventually impact upon the conduct of legal practice adversely. Not everyone is well equipped to deal with emotional strains, relationship breakdown, juggling of time pressures, and the like. There may be insufficient attention being taken by regulators to provide systems that enable such problems to be dealt with. I was always conscious as a barrister of how little systematic support there was for my colleagues who encountered emotional or financial

difficulties which might develop into larger problems that might have been avoided had there been structural support at an earlier time. Regulators might do well to consider how to assist the Bar, the LIV and other RPAs in establishing useful support to anticipate such situations and intercept the problems before they develop into misconduct and lead to sanction. I was always struck as a barrister by how much we expected our colleagues to cope with the inevitable stress of conducting a case. Debriefing is relatively unknown in legal practice beyond the occasional stiff scotch after a hard day in court. Litigation, and intense commercial or domestic negotiations, frequently engender the most intense emotional tensions amongst the lawyers, their clients and witnesses but we have no training to deal with those tensions. We assume, rather, individual robustness which not all have and which is frequently the cause of a regulator's subsequent intervention and sanction. How much more effective would regulation be if there were put in place support for those who might find it useful to engage in, or refer others to, counselling whether emotional, financial or otherwise. There are some such services provided in the Courts, largely through volunteers, but regulators should see these measures as crucial to their primary functions.

I want to conclude with some remarks that are bound to be unwelcome to some. They are to caution against regulation by populism. The legal profession is rightly exposed to public scrutiny. The practice of law is not a private right but a public privilege given to us by public policy expressed in statute and law. The public, therefore, has a right to demand that we all adhere to high standards and that it can be confident in what we do. Sometimes, ironically, that requires education of the public and not adherence to what we might think the public wants. Public confidence is sometimes obtained by the law steadfastly refusing to do what we might think the public wants or what the public might be seen to demand. The best service I gave to many of my clients was advice they did not want to hear. Sometimes

regulators of the legal profession are in the same position in relation to the public which they serve. In this country the public is extraordinarily well served by the legal profession and its regulators. We might do well to emphasise that more often than we do even though we may be criticised for doing so. Sometimes the role of regulator might best secure and further public confidence not by punishing but by standing in support of those who may have erred along the way. In that regard, and at the grave risk of being out of step with the mores of the times, may I caution against populist selection of cases for prosecution. Some categories of offenders are easy targets for prosecution. No one feels the need to befriend a tax cheat (to say nothing of paedophiles) but they are “easy” targets in the sense that their offences, after conviction, are known and rightly incur our opprobrium and criminal punishment. They are not the hard targets whose identification and pursuit is likely to make a structural and tangible difference in legal practice. Taking steps against practitioners who fall below acceptable practice is likely to raise standards across the board and to help clients, their adversaries and the public.

In the end, if there is one thought which I might usefully leave with you, is the remark of Albert Einstein that imagination is more important than knowledge.