

THE LARGE PROFESSIONAL SERVICE FIRM: A NEW FORCE IN THE REGULATIVE BARGAIN

JUSTINE ROGERS,* DIMITY KINGSFORD SMITH** AND JOHN CHELLEW***

I INTRODUCTION

This article charts the rise of a new force in the regulative bargain:¹ the large organisation or ‘professional service firm’. The ‘regulative bargain’ refers to the bargain, both theoretical and real,² between the professions and the state, on behalf of society. Increasingly, these parties actively negotiate the exchange of professional benefits and responsibilities, and how, where and for what purpose these will be allocated and enforced. This bargain is shaped too by the political climate and culture, and the access to the networks within which this agreement takes place.³ The classic bargain is the grant of self-regulation and other

* Lecturer, UNSW Law, MSc (Oxon), DPhil (Oxon). Correspondence to Dr Justine Rogers <j.rogers@unsw.edu.au>.

** Professor and Director of the Centre for Law, Markets and Regulation (‘CLMR’), UNSW Sydney, LLM (London School of Economics) LLB (Sydney) BA (Sydney).

*** Senior Research Fellow, UNSW Law. LLB (Monash), BA (Monash). Member of the CLMR, UNSW Law.

The authors acknowledge the support of the Australian Research Council and the Professional Standards Councils for this work. They are also grateful for the support of professional partners to the grant, law firms Allens and Corrs Chambers Westgarth. The authors also acknowledge the support of the CLMR at UNSW Law, particularly the work of CLMR interns, Deborah Hartstein and Jason Zhang. They are also grateful for the considered comments of two anonymous referees.

- 1 David Cooper et al, ‘Regulating the UK Accountancy Profession: Episodes in the Relation between the Profession and the State’ (Paper presented at Economic and Social Research Council Conference on Corporatism at the Policy Studies Institute, London, January 1988) is attributed in the literature with first coining the phrase ‘regulative bargain’: see, eg, Julia Evetts, ‘New Directions in State and International Professional Occupations: Discretionary Decision-Making and Acquired Regulation’ (2002) 16 *Work, Employment and Society* 341, 346. Often, the definition of the phrase used aligns with that given by Macdonald: when a body possessing abstract knowledge forms a group wherein they dominate that knowledge and its market, they are in a position to enter the ‘regulative bargain’ with the state, which grants them a monopoly over that market: K M Macdonald, *The Sociology of the Professions* (Sage Publications, 1995) 10.
- 2 Dietrich Rueschemeyer, ‘Doctors and Lawyers: A Comment on the Theory of the Professions’ (1964) 1 *Canadian Review of Sociology* 17.
- 3 Michael Burrage, ‘Revolution and the Collective Action of the French, American and English Legal Professions’ (1988) 13 *Law and Social Inquiry: The Journal of the American Bar Foundation* 225; Christian Joppke, ‘Explaining Cross-National Variations of Two Anti-nuclear Movements: A Political Process Perspective’ (1992) 26 *Sociology* 311, cited in Macdonald, above n 1, 34. Michael Mann, *The*

protections to professions in return for the promise of custodianship and advancement of a public good. The main actors here, and those most studied, are the professional associations representing the profession and the regulators representing the state.⁴ As we show in this article, these are the bodies that have driven two main models of professional regulation, self-regulation and versions of statutory regulation, respectively, and the meanings of professionalism they support.

The first aim of the article is to contribute to recent, growing scholarship examining professional organisations as a ‘site and source’ of professionalism.⁵ These writers have observed that professional organisations are amassing considerable power over what professionalism means and how it is practised, both within their firms, as the primary locus of professionalism,⁶ and within their wider professions. As we demonstrate, the organisations that wield the most influence in this respect constitute the top, commercial ‘hemisphere’. Their prestige is said to derive from their clients, which are mostly large corporations, rather than individuals.⁷ However, as we show in this article, these elite firms also advance their positions by shaping the regulative bargain through disrupting, escaping and modifying its terms,⁸ and maximising and aligning interests.⁹ This undertaking is ongoing, involving various stages of success. They are, in effect, reworking relationships between professional associations, the government and themselves as professional organisations,¹⁰ and in the process adjusting the promise of professionalism.

In the process of this study, the article provides a narrative analysis of the main models of professionalism and professional regulation for practitioners, policy makers and professional leaders. As they are the primary target audiences

Sources of Social Power (Cambridge University Press, 1986–93) vol I, vol II, cited in Macdonald, above n 1, 34.

- 4 Other groups commonly studied, though increasingly less so, are universities and end-users. For the case for focusing on professional organisations, see Daniel Muzio and Ian Kirkpatrick, ‘Introduction: Professions and Organizations – A Conceptual Framework’ (2011) 59 *Current Sociology* 389, 391–3.
- 5 John Flood, ‘The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation’ (2011) 59 *Current Sociology* 507, 510; Royston Greenwood, Roy Suddaby and C R Hinings, ‘Theorizing Change: The Role of Professional Associations in the Transformation of Institutionalized Fields’ (2002) 45 *The Academy of Management Journal* 58.
- 6 ‘Yet these are ever more important sites “where professional identities are mediated, formed and transformed” ... and indeed “those professional occupations that have more recently emerged ... structure themselves so as to accommodate corporate patterns”’: Daniel Muzio, David M Brock and Roy Suddaby, ‘Professions and Institutional Change: Towards an Institutional Sociology of the Professions’ (2013) 50 *Journal of Management Studies* 699, 703, quoting David J Cooper and Keith Robson, ‘Accounting, Professions and Regulation: Locating the Sites of Professionalization’ (2006) 31 *Accounting, Organizations and Society* 415, 416; M Tina Dacin, Jerry Goodstein and W Richard Scott, ‘Institutional Theory and Institutional Change: Introduction to the Special Research Forum’ (2002) 45 *Academy of Management Journal* 43, 49.
- 7 John P Heinz and Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Northwestern University Press, revised ed, 1994); John P Heinz et al, *Urban Lawyers: The New Social Structure of the Bar* (University of Chicago Press, 2005).
- 8 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 508.
- 9 Sida Liu, ‘The Legal Profession as a Social Process: A Theory on Lawyers and Globalization’ (2013) 38 *Law & Social Inquiry* 670, 687.
- 10 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 509.

of this collection, our second aim is to enhance their engagement with its themes. We also offer a framework for wider discussion by showing the socially-embedded nature of the individual circumstances for professionals,¹¹ and by tracing the multiple pressures and requirements they encounter.

The literature has illuminated how the professions' essential, continuous task through their associations is to maintain public interest legitimacy.¹² At the same time, and to draw on a prevailing framework for understanding professions, they must pursue the professions' (and the professional associations') economic and status interests. These professional 'projects' rely on the existence of common expertise, solidarity and commitment among their members,¹³ or at least the appearance of these features.¹⁴ For many reasons explored in this article, the large professional organisation challenges the associations' twin roles, roles already complicated by several lines of fragmentation among their members.¹⁵ Francis, writing in the context of the Law Society of England and Wales, is less than confident about the ability of the professional associations to maintain their collective control, identifying the commercial firm elite as a principal threat.¹⁶ However, these firms also challenge the regulators.¹⁷ As we examine, these bodies must find ways of governing the behaviour of these large firms, in particular where traditional, individual responsibility and discipline is insufficient, while also maintaining a unified regime.

The article draws on Flood's useful delineation, in the global law firm context, of the direct and indirect pressures exerted by the large professional organisation.¹⁸ Indirect influence refers to the organisations' own socialisation, cultures and operations, which then shape certain discourses and practices of professionalism. Direct pressure, meanwhile, is found in their engagement with

11 See Christine Parker and Tanina Rostain, 'Law Firms, Global Capital, and the Sociological Imagination' (2012) 80 *Fordham Law Review* 2347.

12 While this quality has been discredited, the notion that professionalism as entailing a proper balance between the self and the collectivity interest retains, as Evetts argues, immense and attractive symbolic power at the occupational level, as well as, we add here, for individuals and the state: Julia Evetts, 'The Construction of Professionalism in New and Existing Occupational Contexts: Promoting and Facilitating Occupational Change' 18 *International Journal of Sociology and Social Policy* 22, 28.

13 Richard L Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003) 478.

14 Andrew M Francis, 'Out of Touch and Out of Time: Lawyers, Their Leaders and Collective Mobility within the Legal Profession' (2004) 24 *Legal Studies* 322, 325.

15 There is a significant body of literature on the fragmentation of the legal professions and its implications. See, eg, Heinz and Laumann, above n 7; Heinz et al, above n 7; Richard L Abel, 'The Transformation of the American Legal Profession' (1986) 20 *Law & Society Review* 7; Gerard Hanlon, 'A Profession in Transition? – Lawyers, The Market and Significant Others' (1997) 60 *Modern Law Review* 798; Hilary Sommerlad, 'Researching and Theorizing the Processes of Professional Identity Formation' (2007) 34 *Journal of Law and Society* 190; Andy Boon, John Flood and Julian Webb, 'Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession' (2005) 32 *Journal of Law and Society* 473; Francis, above n 14.

16 Francis, above n 14.

17 See, eg, Flood, 'The Re-landscaping of the Legal Profession', above n 5; John Flood, 'The Re-organization and Re-professionalization of Large Law Firms in the 21st Century: From Patriarchy to Democracy' (2012) 36 *Journal of the Legal Profession* 415; Joan Loughrey, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77 *Modern Law Review* 732.

18 Flood, 'The Re-landscaping of the Legal Profession', above n 5.

regulatory processes as ‘institutional entrepreneurs’ who change regulations to suit their own particular activities and operations.¹⁹ This is achieved through established means such as lobbying, but also, as we demonstrate in this article, through ‘insider’ activity, like voting membership of professional associations, and through coercive influence, like the latent threat of withdrawing membership and subscription revenue from these bodies.

The large professional service firm and the corporate hemisphere it inhabits are, in many ways, contemporary problems for all professions.²⁰ However, to examine these themes, we aim our attention at the New South Wales (‘NSW’) legal profession. As one of the oldest professions, the legal profession is a good case to study and much of its theoretical relevance has comparability and connections to other professions considered in this collection. The situation of large commercial law firms is important to examine. Their work and the infrastructures they create facilitate almost every economic activity and business transaction in society, both locally and globally. A corollary of this, as Parker and Evans note, is that they are also in a special position as ethics ‘gatekeepers’ with the ability to advise the client against wrongdoing and potentially withhold their cooperation.²¹ Local and international cases and commissions, such as those into James Hardie Industries,²² the Australian Wheat Board,²³ McCabe²⁴ and the Catholic Church,²⁵ along with the numerous events in the finance sector that led to the global financial crisis,²⁶ have revealed the collective dynamics of ethical fallibility and passivity within organisational settings, outcomes that can no longer be regarded as simply a matter of individual imperfection.²⁷ Finally, here, the changes in regulation are leading to the development of new organisational structures.²⁸

19 See *ibid* 511.

20 Muzio and Kirkpatrick, above n 4.

21 Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2nd ed, 2014) 325.

22 See New South Wales, Special Commission of Inquiry into the Medical Research and Compensation Foundation, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004); *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345; Parker and Rostain, above n 11.

23 See Commonwealth, Royal Commission into Certain Australian Companies in Relation to the UN Oil-for-Food Programme, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2006).

24 See *McCabe v British American Tobacco* [2002] VSC 73; Matthew Harvey and Suzanne Le Mire, ‘Playing for Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics’ (2008) 34 *Monash University Law Review* 163; Camille Cameron, ‘Case Note: Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*’ (2002) 25 *University of New South Wales Law Journal* 768.

25 See Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015). See generally Kath Hall and Vivien Holmes, ‘The Power of Rationalisation to Influence Lawyers’ Decisions to Act Unethically’ (2008) 11 *Legal Ethics* 137.

26 See Dimity Kingsford Smith, Thomas Clarke and Justine Rogers, ‘Banking and the Limits of Professionalism’ (2017) 40 *University of New South Wales Law Journal* 411.

27 For an introduction to the interaction between individual and situation to explain ethical lapses, see Jennifer K Robbennolt and Jean R Sternlight, ‘Behavioral Legal Ethics’ (2013) 45 *Arizona State Law Journal* 1107. For an application, see Hall and Holmes, above n 26.

28 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 508.

Moreover, the NSW situation is important as part of Australia's move towards national regulation of the legal profession and, as we examine, the jurisdiction in which the regulator was the first to experiment with entity regulation. The National Legal Profession Reform ('National Reform') program, established by the Council of Australian Governments ('COAG') in 2009, sought to create a common legal services market across Australia by providing a single legal regime for the legal profession. The program culminated in the current regime, the *Legal Profession Uniform Law* ('*Uniform Law*'),²⁹ which commenced in July 2015, applying only to NSW and Victoria, though covering almost three-quarters of Australian lawyers. In this result, and in other dynamics and outcomes of the *Uniform Law*, we see evidence of this large firm power, most notably, in that of a group, originally called the Large Law Firm Group ('LLFG'),³⁰ but now called Law Firms Australia ('LFA').³¹ LFA represents the nine largest firms in Australia: Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, Minter Ellison and Norton Rose Fulbright Australia.³²

The national law process has yet to be reviewed and the final aims of our article are to offer a meaningful first study and instigate deeper investigation. Our analysis shows how the large firms' special, accumulated position appears to be at the expense of associational control, but that the firms also act in conjunction with the associations against external regulation. This is illustrated in the example we focus on below where an attempt by the NSW regulator to use the national law movement to introduce proactive entity regulation to all firms was successfully resisted by the LFA in conjunction with the Law Council of Australia ('LCA'), Australia's national professional association representing the various state and territory law societies and bar associations. In the regulative exchange, as we show, allegiances shift, interests are mutual, and it is not always immediately clear who has 'won' and for how long.

Our analysis follows the stratified development from traditional self-regulation to contemporary statutory regulation of the professions, including 'clusters' of co-regulation, and then its extension in the national law. The image of sedimentation from institutional analyses of professions is important here since it emphasises how professionalism and its regulation have developed in layers, deriving from and building upon the institutional logics already in existence. It also signals that not every group or idea that influences professionalism is in conflict or opposition and there is coexistence and

29 *Legal Profession Uniform Law 2014* (NSW), enacted in NSW by the *Legal Profession Uniform Law Application Act 2014* (NSW) and in Victoria by the *Legal Profession Uniform Law Application Act 2014* (Vic).

30 Large Law Firm Group, Submission to National Legal Profession Reform Taskforce, *National Legal Profession Reform Project – Consultation on Proposed National Law*, 12 August 2010.

31 Law Firms Australia, as described in Law Council of Australia, *Constitution of Law Council of Australia Limited* (at 28 November 2015) cl 1.1 <http://www.lawcouncil.asn.au/lawcouncil/images/LCA_Constitution_-_as_adopted_on_18.6.16.pdf>.

32 Letter from the Large Law Firm Group to the Law Admissions Consultative Committee, Law Council of Australia, 30 March 2015.

hybridisation of different logics, professional, managerial and entrepreneurial.³³ Recognising this helps to explain how allegiances in the continuous negotiation of the regulative bargain can occur, but also that change can be slow-going.

The writing starts from the broad scope, historical and archetypal, charting some of the academic arguments in which the functions and ‘market control’ purposes of the professions are in focus. It then moves to illustrate the more detailed, social processes of professionalism; dynamic processes that include the negotiation of professional jurisdictions, including associational and regulatory jurisdictions, and how these lines are drawn and maintained, including through statute. Likewise, it addresses the ways in which the increasingly large and complex law firms are changing their practices of professionalism in relation to the demands and geography of external client groups. Centrally, we investigate the active political contestation over the regulative bargain and which groups have the most power to influence the exchange and derive benefit, often mutual, from it.³⁴

The article is structured as follows. Part II outlines the traditional model of self-regulation to show the power of the professional association and underscore the absence of the professional organisation. Part III discusses the ways in which the traditional model turning on individual responsibility is challenged, mostly indirectly, by the professional organisation and is particularly exposed by the ethos and activities of large, commercial firms. Part IV looks at the current regulatory trends: first the adjustment of the bargain through de-regulation and then re-regulation by statute, and then the development of discrete areas of co-regulation between regulators and professional associations. It illustrates the opportunities these changes offer for large firms. It also outlines the development of entity regulation, that is, the regulation of professional organisations, as distinct from simply (as opposed to individual practitioners by means of the traditional regime. Part V examines the national law reform process and outcomes. It reveals decisive aspects of the influence of the large firms as well as their current limitations. Finally, we contemplate what these suggest about the future of the profession, including its public interest validity.

II THE ABSENCE OF THE ORGANISATION IN THE TRADITIONAL REGULATIVE BARGAIN

For many reasons, the traditional regulative bargain, with its core attribute of self-regulation, did not include the large organisation as either a main actor in or target for professional regulation. This was because the professional association developed as the central body engaging with the state. Individual practitioners typically worked in sole or small partnership practices, not large firms, and with little access to government. The professions’ claims of public service and their mechanisms of enforcement were grounded in individual responsibility and

33 Muzio, Brock and Suddaby, above n 6, 703.

34 For a summary of the social process approach, including in a global context, see Liu, above n 9.

community. This Part explains these features in order to properly set up the challenge that the large organisation (here, the large commercial law firm) poses to the traditional professional bargain, and the professional associations' attempts to control these entities. In the process, the analysis also shows the changing, but continuing and formidable institutional power of the professional association, certainly in the NSW legal context. This situation is despite the thesis of their continuing loss of authority.³⁵ These are the fixtures and cultures the large firms must work with in a regulatory setting.

One of the dominant accounts of professions, and means of holding them to account, is that they are implicitly entrusted by the state on behalf of society to enact a paramount commitment to an important public good, including its quality and development. In the case of law, the legal profession promises custodianship of the rule of law and the administration of justice. In return, the state gives professions, largely through their associations, representative power, significant regulatory autonomy, and a monopoly or quasi-monopoly over their professional jurisdiction.³⁶ These privileges entail for practitioners autonomy, status and, for most, high income.³⁷ These models are to some extent archetypal. Traditional self-regulation encompasses in practice a mixture of traditional and modern qualities, and variable degrees of 'inter-legality'³⁸ through the mixing of statutory and self-regulatory rules. Moreover, and emblematic of the elusiveness of professionalism,³⁹ some of this framework is historically and empirically real, some normative and some rhetorical. As we show, the professional associations and the state have deposited onto it other markers of professionalism, such as technical expertise, and other mechanisms of enforcement, such as legislative contraventions rather than professional discipline.

Nevertheless, professions are distinguished as forms of social organisation that, among other things, allow for and have been advanced by relationships between people based on trust and a degree of altruism, along with the claims thereof. This generosity exists between professional and client; professional peers; professional and professional association; and profession, the state and society.

Until the 1960s, the professions were theorised as emphasising and accepting the professions' side of the promise: that their function is to serve society while also protecting it from commercialism and, as it was seen, moral degeneration. The comments of Carr-Saunders and Wilson made in the 1930s are often cited for their idealised, now outmoded view of the professions. However, their

35 Francis, above n 14; Abel, *English Lawyers between Market and State*, above n 13; Richard L Abel, *The Legal Profession in England and Wales* (Basil Blackwell, 1988).

36 Flood, 'The Re-landscaping of the Legal Profession', above n 5, 509.

37 Rueschemeyer, above n 2, 18.

38 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Butterworths LexisNexis, 2nd ed, 2002); Boaventura de Sousa Santos, 'Law: A Map of Misreading – Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279.

39 Daniel Muzio and John Flood, 'Entrepreneurship, Managerialism and Professionalism in Action: The Case of the Legal Profession in England and Wales' in Markus Reihlen and Andreas Werr (eds), *Handbook of Research on Entrepreneurship in Professional Services* (Edward Elgar Publishing, 2012) 369.

interpretation reveals how the social promise is a personal commitment involving individual mentalities and behaviour that can withstand commercial pressures. The professions, they said:

inherit, preserve and pass on a tradition ... [T]hey engender modes of life, habits of thought and standards of judgement which render them centres of resistance to crude forces which threaten steady and peaceful evolution ... The family, the church and the universities, certain associations of intellectuals, and above all the great professions, stand like rocks against which the waves raised by these forces beat in vain.⁴⁰

Scholars lean on Durkheim and Parsons for their more convincing defences of this template. Durkheim, in the late 1800s, saw the professions as a bulwark of ethical stability in an increasingly disrupted society due to industrialisation, arguing:

it is imperative that there be special groups in the society, within which these morals may be evolved, and whose business it is to see they be observed. Such groups are and can only be formed by bringing together individuals of the same profession or professional groups. Furthermore, whilst common morality has the mass of society as its sole substratum and only organ, the organs of professional ethics are manifold.⁴¹

He singled out the professional association as the primary organ of these ethics.⁴² Protected from the market forces through limited, mindful state regulation, professionals in their self-governing communities were portrayed as able to teach and support each other to be community-oriented and morally responsible towards their clients. Parker and Rostain point out that Durkheim's conception did not single out the special expertise of professions as making them suitable to a professional mode of organisation.⁴³ This thinking came later in the scholarship and, as detailed in this article, relates empirically to an important shift in our expectations of professionals, particularly in large organisations. For Parsons, professionals were marked out since they were 'trained in and integrated with, a distinctive part of our cultural tradition, having a fiduciary responsibility for its maintenance, development and implementation'.⁴⁴

According to the traditional model, regulatory prerogatives and monopolies given to the associations enable professionals to further cultivate their socially valuable knowledge and practice through training, certification, and peer discipline.⁴⁵ Further, the controls are said to incentivise their members to apply this knowledge and skill through the careful exercise of individual judgment in recognition of the considerable vulnerabilities of the client, who cannot assess the value and impact of their services. At their zenith, the professional associations have been entrusted as the group best able to cultivate, enforce and publicly

40 A M Carr-Saunders and P A Wilson, *The Professions* (Clarendon Press, 1933) 497, cited in Keith M Macdonald, *The Sociology of the Professions* (Sage Publications, 1995) 2.

41 Emile Durkheim, *Professional Ethics and Civic Morals* (Cornelia Brookfield trans, Taylor and Francis, 2003) 7 [trans of: *Leçons de Sociologie Physique des Moeurs et du Droit* (first published 1957)].

42 Ibid.

43 Parker and Rostain, above n 11, 2357.

44 Talcott Parsons, *Essays in Sociological Theory* (The Free Press, revised ed, 1954) ch XVIII, 381. See also *ibid.*

45 Parker and Rostain, above n 11, 2358.

project the existence of these professional duties and qualities. The Law Society of NSW included as its original justification for inception in 1842 a goal ‘to promote good feeling and fair and honourable practice among members of the profession so as best to preserve the interests and retain the confidence of the public’.⁴⁶

Arguably most closely fitting this paradigm is, or has been, the barristers’ profession of England and Wales. Its mechanisms of community and cohesion have historically been the most patrician and individualistic, and based on personal networks. Supporting its robust institutionalisation were its members’ elite backgrounds, common schooling and ascriptive affinities, the dining halls and related rituals of the Inns of Court, its cloistered geography in West London, the intensity of pupillage, and the authority of the courts over its ‘officers’.⁴⁷ All of this supported a singular, moral and morally consistent community based on close socialisation and personal accountability. Much of this aristocratic framework continues to apply to the London Bar and some also applies to the NSW legal profession, at least the barristers’ branch.⁴⁸

While the NSW legal profession did not have the Inns, a central part of its effective control over the community was the NSW Supreme Court’s legislated power over entry.⁴⁹ The purpose of judicial oversight is to ensure that only ‘fit and proper’ individuals enter and participate. ‘Fit and proper’ has tended to mean honest, trustworthy, courteous and traditionally ‘gentlemanly’, and has come to explicitly include competence. It is an ongoing obligation.⁵⁰ Some writers have criticised the fit and proper person test at the point of admission given its low predictive value for unethical behaviour in practice.⁵¹ However, it is this test of character that has exemplified the focus on the individual professional in the self-regulatory model. This ‘pledge to a self-controlled “collectivity orientation”’⁵² is signalled too by the oath or affirmation of fidelity made by the new professional on admission, here to the court. Swearing or affirming an oath, a person promises to be a particular sort of person for others, in this case the public, clients and peers.⁵³ It is a commitment that can only be made by an individual.

46 For example, the Law Society of NSW’s original justification in 1842 was ‘to promote good feeling and fair and honourable practice among members of the profession so as best to preserve the interests and retain the confidence of the public’: Law Society of New South Wales, *History* (2009) <<https://www.lawsociety.com.au/about/organisation/history/index.htm>>.

47 David Lemmings, ‘Ritual, Majesty and Mystery: Collective Life and Culture among English Barristers, Serjeants and Judges, c 1500–c 1830’ in W Wesley Pue and David Sugarman (eds), *Lawyers and Vampires: Cultural Histories of Legal Professions* (Hart Publishing, 2003) 25.

48 Justine Rogers, ‘Representing the Bar: How the Barristers’ Profession Sells Itself to Prospective Members’ (2012) 32 *Legal Studies* 202.

49 See, eg, *Legal Practitioners Act 1898* (NSW) s 4.

50 *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) r 5.1.

51 Deborah L Rhode, ‘Moral Character as a Professional Credential’ (1985) 94 *Yale Law Journal* 491. For another critique of the requirement, see Alice Woolley, ‘Can Good Character Be Made Better? Assessing the Federation of Law Societies’ Proposed Reform of the Good Character Requirement for Law Society Admission’ (2013) 26 *Canadian Journal of Administrative Law & Practice* 115.

52 Rueschemeyer, above n 2, 17.

53 John R Boatright, ‘Swearing to be Virtuous: The Prospects of a Banker’s Oath’ (2013) 71 *Review of Social Economy* 140.

While admission and its educational and character requirements have traditionally been under the control of the courts, some of this control has been adjusted due to widening participation in higher education and the law schools' increased control over knowledge and standards. The court's role has also increasingly been supplanted by government regulatory requirements. For example, while the Supreme Court still retains the final say on admissions, it must take into account and normally follows the recommendation of the Admissions Board,⁵⁴ which controls admission requirements,⁵⁵ including academic, vocational and practical training requirements. In this way, the traditional mechanisms have been added to with more formal, contemporary modes, demonstrating an increasing emphasis on technical competence. Nonetheless, the Supreme Court retains ultimate authority over its 'officers' including who is admitted to, or struck off, the roll.⁵⁶ Perhaps more importantly for this article, such demands of professional entry have developed with little connection to, or accommodation for, the professional entering organisational workplaces that may present challenges to this exercise of individual commitment. It is a central question of this article as to whether this can continue.

More typical across the professions, the professional associations – the Law Society for solicitors and the Bar Association for barristers – have become the day-to-day authority, rather than the courts. Formed in 1884, the Law Society's original purpose was 'to reform the law, represent the profession and encourage the study of law'.⁵⁷ As the then *Legal Practitioners Act 1898* (NSW) was amended over the decades, it gave the Society power to issue, suspend and revoke annual Practising Certificates, regulate solicitor's trust accounts, and administer the Legal Practitioners Fidelity Fund for compensating individuals harmed due to solicitor dishonesty.⁵⁸ Central to its enduring status was a requirement that practitioners pay a 'single fee ... [to cover] both the licensing

54 *Legal Profession Uniform Law 2014* (NSW) s 16; Legal Profession Admission Board, *Admission as a Lawyer* (19 December 2016) <<http://www.lpab.justice.nsw.gov.au/Pages/admission-lawyer/admission-lawyer.aspx>>. See also the previous *Legal Profession Act 1987* (NSW) s 11. The Admission Board is a statutory body with functions including:

- determining the eligibility of people seeking to be admitted as a lawyer in NSW;
- accrediting academic law courses and practical legal training courses in NSW; and
- maintaining the Roll of Lawyers in NSW

Legal Profession Admission Board, *About Us* (23 August 2016) <<http://www.lpab.justice.nsw.gov.au/Pages/about-lpab/about-lpab.aspx>>.

The Board has around 10 members made up of Supreme Court judges, deans of law schools, barristers, solicitors, and an officer of the NSW Department of Justice: Legal Profession Admission Board, 'Annual Report 2014–15' (30 October 2015) 5, 15.

55 *Legal Profession Uniform Admission Rules 2015* (NSW) pt 2.

56 *Legal Professional Uniform Law 2014* (NSW) s 16(4), 23(1).

57 Law Society of New South Wales, *History* (2009) <<https://www.lawsociety.com.au/about/organisation/history/index.htm>>.

58 For details, see Law Society of New South Wales, *Legal Practitioners Fidelity Fund* (2009) <<http://www.lawsociety.com.au/community/makingacomplaint/Legalpractitionersfidelityfund/>>

and membership activities' of the Law Society.⁵⁹ As holding a practising certificate was mandatory for practice in NSW, this coupled fee required that all licensed practitioners also pay for Law Society membership, despite the fact that membership was not technically compulsory.⁶⁰ Like the associations of other professions, the Law Society exercised disciplinary powers over its members.⁶¹

The professional associations have made and enforced rules of participation as well, that is, conduct and practice rules. Giving detail to the commitment of the oath, the code of conduct represents the most salient expression of a profession's traditional values and commitments. Learned in the past through shared education, affinity and on-the-job training such as articles or readerships, code content controls individual lawyers' relationships with clients, peers, and the profession itself. Expressed as rules in this hybrid regulatory world, codes are supported with more or less developed systems of ethical training, technical support, guidance, resources, and now even phone hotlines to support professional members in difficult decision-making.⁶² Again, this regulation of participation has been increasingly formalised. Other rules (conventional, statutory and court rules) were designed to limit competition between practitioners. They included scale costs (or set prices), rules against advertising, and rules requiring enlisting a junior barrister as well when a silk⁶³ was retained.⁶⁴ Part IV reveals how this particular part of the social bargain attracted immense criticism from the 1980s onwards in a wider attack on and de-regulation of the traditional self-regulatory model.

Indeed, by the 1970s, scholars and other commentators began to reject the public interest trait of the traditional model as taking the professions' self-definitions at face value. Ethnographic studies portrayed a picture of professionals characterised by dominance and self-interest rather than the orthodox image of high standards and altruism.⁶⁵ This interrogation of the power of the professions shifted the focus of writers to the agency of the professions pursuing their collective interests; a framework that informs this piece. Of enduring influence was Larson's (1977) presentation of the professions as using concerted strategies to dominate markets in areas of social concern to

59 Attorney-General's Department, *Review of the Legal Profession Act Final Report: Self and Co-regulation: Chapter 5: Co-regulation, Self Regulation and the Role of Professional Bodies Representing Lawyers* (1999) <http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncpf_5>.

60 Ibid.

61 Although it is now the NSW Civil and Administrative Tribunal that has the power to cancel a lawyer's practising certificate: *Legal Profession Uniform Law 2014* (NSW) s 300; Office of the Legal Services Commissioner, *Disciplinary Action* (10 August 2015) <http://www.olsc.nsw.gov.au/Pages/lsc_complaint/lsc_disciplinaryaction.aspx>.

62 For example, regarding professional support, see Law Society of New South Wales, *Ethics* (2009) <<https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/index.htm>>.

63 A senior barrister, also known as Queen's Counsel or, more recently, Senior Counsel.

64 Edward Shinnick, Fred Bruinsma and Christine Parker, 'Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands' (2003) 10 *International Journal of the Legal Profession* 237.

65 Eliot Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (University of Chicago Press, 1986).

advance the financial and status interests of their members.⁶⁶ In this context, the conception of the ‘professional project’ – the systematic attempt to translate a scarce set of cultural and technical resources into a secure and institutionalised set of rewards – has been central.⁶⁷

Overlaying Larson’s framework on the above description of the traditional model presents self-regulation as primarily a means of control over ‘producers’, that is, who can practise, how one qualifies, and how one is ejected, to help maintain monopoly over how professional services are ‘produced, distributed and consumed’.⁶⁸ The main targets of this critique were the professional associations and individual practitioners.⁶⁹ However, naturally, firms within the professions have also long had their own ‘projects’ or activities to pursue and shore-up their own economic rewards and status. Indeed, as Flood reminds us, law firms have existed since the mid-19th century.⁷⁰ However, the professional organisations and the commercial/corporate sectors were not yet of interest to either regulators or scholars. Moreover, as we examine in Part III, specific recent changes entailed by the large firm are especially challenging professional commitment and community.

This more critical writing has led to broad agreement among scholars that the demarcating quality of a profession is organisational control; control over professional expertise and work, including its definition, organisation, execution and evaluation,⁷¹ and who and what type of person is able to conduct or ‘produce’ this work.⁷² It is not intrinsically the public interest commitment that is defining, though this may be part of the political and symbolic means by which this control is sustained. The issues have become, then, who maintains this control, how and to what ends, and, in particular, whether control remains centred in the associations or whether it has moved elsewhere.

Notwithstanding, the ‘trustee’ model inherent in this traditional version of the regulative agreement was the steady template until the 1980s.⁷³ It is worth pointing out that self-regulation and the monopolies it entailed were in the interests of the state, which helped establish them.⁷⁴ Supporting the imagery of professionalism as sedimentary change, rather than detached logics and

66 Magali Sarfatti Larson, *The Rise of Professionalism: Monopolies of Competence and Sheltered Markets* (Transaction Publishers, revised ed, 2013)

67 Ibid 49–52.

68 Abel, *The Legal Profession in England and Wales*, above n 35, 177.

69 According to this critique, the long professional training and ethics requirements we have discussed can and should be regarded as exclusive strategies that professions use for their ‘professional project’. For example, the fact that professional codes came late in the professions’ histories is evidence for some writers that they were primarily to exclude certain entrants, maintain legitimacy and further consolidate status: Abel, *The Legal Profession in England and Wales*, above n 35.

70 Flood, ‘The Re-organization and Re-professionalization of Large Law Firms in the 21st Century’, above n 17, 415–16.

71 Parker and Rostain, above n 11, 2358.

72 For a short summary, see Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 509; Larson, above n 66, 166–77.

73 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 509–10.

74 Liu, above n 9, 680.

practices,⁷⁵ this model is still sustained and enjoyed by professions and professionals in a myriad of forms. It maintains its supporters – those who argue that without these protections of self-regulation and monopoly, and the ownership these encourage, high professional standards of expertise, ethicality and independence of mind struggle to flourish. Getting on with being a professional, that is, with true, independent judgment, client fidelity, collegiality, and the development of professional institutions, is something professionals cannot do if they are preoccupied with competition and status.⁷⁶ Indeed, there remains a strong perception among professionals, professional leaders, and writers that the professional world contrasts, at least to some extent, with the world of business and, by extension, increasingly the world of large commercial law firms. This world is ‘dominated by large bureaucratic organizations, competitive markets, managerial control, deskilling or dehumanizing tendencies and a markedly for-profit logic’.⁷⁷ Traditional professionalism is identified as divergent from, and even a corrective to, this ‘brutal’ environment.⁷⁸

Nevertheless, there are many reasons why the traditional model of self-regulation and its reliance on individual responsibility to, and within, a community are less suited to contemporary professional practice than they once were. Indeed, one of the main reasons why law firms are an increasing challenge to traditional regulation, and are intent on influencing regulation themselves, is that they have become their own sites and sources of professional meaning and discipline. In the next section, we look at the ways in which the traditional model is ill-suited to the large professional firm, and the indirect pressures these firms exert on this model.

III LARGE PROFESSIONAL ORGANISATIONS: INDIRECT CHALLENGES TO THE SELF-REGULATORY MODEL

Up until the early 20th century, lawyers in law firms largely saw themselves as professionals in contrast to business people.⁷⁹ Of course, this does not mean that the traditional, trustee professionalism outlined above was ever uniformly enacted in practice and, as Flood points out, it was not a matter of a sudden shift from a ‘moral state of professionalism to an amoral state of commercialism’.⁸⁰ Indeed, in many ways, traditional practice remains the norm. By far, the majority of Australian solicitors and NSW solicitors (both around 70 per cent) still work

75 Francis, above n 14, 324.

76 See Freidson, above n 65.

77 Muzio and Flood, above n 39, 369.

78 Ibid.

79 Flood, ‘The Re-organization and Re-professionalization of Large Law Firms in the 21st Century’, above n 17, 417.

80 Flood, ‘The Re-organization and Re-professionalization of Large Law Firms in the 21st Century’, above n 17, 428. See also Justice James Allsop, ‘Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?’ (2010) 84 *Australian Law Journal* 765, regarding how this is an unhelpful dichotomy.

in private practice,⁸¹ with 76 per cent of Australian law firms being sole practices and 17 per cent having only 2–4 partners.⁸² In contrast, only 0.6 per cent of firms (that is, 70 firms) have more than 40 partners.⁸³ While there is a movement towards ever larger firms and fewer sole practices,⁸⁴ the traditional model of the sole practitioner or very small firm still thrives. Nonetheless, the partnership model is undergoing immense and varied change.⁸⁵ The large firms, such as those in the LFA, operate with delegations to managing partners and a board with a chair, functioning in many ways like the corporate form. Crucial here are their indirect influence on the language and practices of professionalism, and the fact that they have become a segment of the profession which has diverged from the subject matter concerns and traditional controls exercised by associations.

While all professionals must earn a livelihood while pursuing their profession, large organisations operating in a hybrid of traditional and business modes do so more decidedly by prioritising commercial and managerialist logics commonly associated with non-professional occupations. The positive connections between their practices or ‘projects’ and legal institutions and the public interest are less direct or conspicuous than they are for smaller practices where protecting the individual’s life, liberty or property is more common. The public interest activity of large firms is in interpreting and, where necessary, reforming the complex legal system that supports the infrastructure of modern commerce, finance, and corporate activity, and which facilitates the transactions of everyday life for millions.⁸⁶ It is also in their significant, but largely unrelated, pro bono work. The connection to the public interest is broken when legal work flagrantly substitutes the interest of clients, themselves or their firms for an interpretation that is true to the principles of cases or the purpose of statutes, or is in the interests of the legal system and the community. For reasons we are examining, in an organisational setting it is becoming more difficult for individuals to discharge professional obligations to realise the public interest in their daily legal work.

These indirect pressures on associational and other external controls are materialised through several express forms. They include staff selection, socialisation, training, performance review and other forms of ‘identity work’, professional fees, and the emphasis on ‘whole-of-firm’ and team approaches to work operations.⁸⁷ These practices are altered and enhanced by the increasing possibilities of technology. Moreover, as elaborated below, the largest firms,

81 Law Society of New South Wales, ‘2014 Law Society National Profile: Final Report’ (April 2015) 15.

82 Ibid 18.

83 Ibid.

84 For example, in 2001, over 80 per cent of NSW firms were sole practitioners: Law Society of New South Wales, ‘2001 Profile of the Solicitors of New South Wales’ (Report, 2001) 2.

85 See David M Brock, Hüseyin Leblebici and Daniel Muzio, ‘Understanding Professionals and Their Workplaces: The Mission of the *Journal of Professions and Organization*’ (2014) 1 *Journal of Professions and Organization* 1, 6 for an outline of the variations across and within professional organisations.

86 It has then both mundane and sublime components: see, William Twining, *Law in Context: Enlarging a Discipline* (Clarendon Press, 1997) ch 4 ‘Pericles and the Plumber’, 64–5.

87 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 510.

such as the nine LFA firms, now join the international elite of the legal profession, towering above other firms in terms of power, wealth and scale.

In contemplating these instances of indirect pressure, it is important to note that many of these activities and the threats they then pose to traditional regulation can be traced to the most powerful corporate clients of these firms. These firms are chiefly responding to their own business environments and their need for legitimacy, and therefore work, within those environments, rather than the professional and public communities. Most of the safeguards within traditional self-regulation assumed the vulnerability of the client. However, through their demands for 'total commitment' to their values and goals within a wider, enabling climate (which we examine in Part IV), it is often the clients that exert considerable influence on traditional professional values. First, the relationship between lawyer and client tends not to fit the trustee-advisor category of traditional professionalism. They are now temporary and transferrable, based on expertise, often that of the firm as a whole. Today's large-firm clients 'shop around' for the 'right legal advice at the right price',⁸⁸ which can imperil professional independence. More significant, this shift in client behaviour alters the notion of professional service. The alteration relates to Parker and Rostain's observation about expertise not being intrinsic to Durkheim's 19th century conception of professionalism.⁸⁹ For Greenwood, once the lawyer came to be seen and self-identify as an expert technician and less a fiduciary, a process that evolved over the last half of the 20th century, professional services themselves came to mean serving those who could pay, not those in need.⁹⁰

As additional examples of client clout, while hourly fees still govern professional remuneration, it is incontrovertible that there is pressure on firms to agree on success-fees where nothing is paid if the case is lost or the transaction does not proceed and the professional earns an 'uplift' bonus on success.⁹¹ These bonus approaches are one of the obvious adoptions of commercial practices pushed for by powerful clients.⁹² They provide temptation to cut ethical corners, such as by winning regardless, using excessively adversarial tactics, and may cause undue concentration on the things lawyers are being paid for (potentially resulting in over-servicing), rather than on what may be in the true interests of the client. This is all the more so if internal formulas for turning partnership revenue into individual profit-shares also provide incentives to sideline ethical

88 Parker and Evans, above n 22, 332; Chief Justice James Spigelman, 'Are Lawyers Lemons? Competition Principles and Professional Regulation' (2003) 77 *Australian Law Journal* 44.

89 Parker and Rostain, above n 11, 2356–7.

90 Royston Greenwood, 'Your Ethics: Redefining Professionalism? The Impact of Management Change' in Laura Empson (ed), *Managing the Modern Law Firm: New Challenges, New Perspectives* (Oxford University Press, 2007) 186.

91 This is a common remuneration approach used by plaintiff and class action firms and has an 'access to justice' justification. It is also an approach sometimes used by banking and finance firms with their professional advisers, including legal advisers, on large transactions.

92 Colin Jasper, *The End of the Hourly Rate*, Law Society of New South Wales <<http://www.law.society.com.au/ForSolicitors/SmallPracticePortal/Profitability/articles/Theendofthehourlyrate/index.htm>>.

obligations.⁹³ The latter can also be divisive between peers when professional ethics rely on shared purposes.

Further, there are increasing ethical pressures on lawyers related to client demands and ‘shopping around’ as well as the adaptations firms have made to this competitive environment. It is increasingly the professional organisation, its blend of expertise and its brand that the client retains, rather than individual professionals. Meanwhile, most large firm lawyers are employees, not principals. Once retained, because of the specialised, complex nature of the work as well as client expectations, teamwork involving professionals across the firm constitutes an increasing proportion of legal activity.⁹⁴ Teamwork may be efficient, but it separates people from the complete task, and from one another, the client, and others affected by their decisions. The partial responsibility and knowledge of a team member may decrease the individual awareness of, and the possibility for discussions about, risks to ethics and other professional standards.⁹⁵ Moreover, they diffuse an individual’s sense of personal, professional obligation. Team members can believe that responsibility for ethical issues lies with someone else,⁹⁶ contrary to traditional ideals and hallmarks of independent, individual judgment. Additionally, the service demanded by these clients and offered by these firms is increasingly non-court, advisory and transactional work, outside the traditional surveillance of the judge and adversary-colleagues outlined above. In this way, a regulatory framework built on long-term, trusting relationships is no longer suitable. Social sanctions come from forceful clients and competitor firms, not the wider professional community. Moreover, when professional lapses occur, these clients are unlikely to report on them to the associational bodies or to the external regulators as discussed in the next Part. Instead, they negotiate new terms, end the relationship, shop elsewhere or, very occasionally, sue.

Finally, on this question of client influence over professionalism and professional discipline, in Part IV below we discuss how the professional regulative bargain has been transformed by de-regulation through competition policy, along with re-regulation in line with changes in community attitudes and the consumer movement. This promotion of competition between professions and professionals intensifies the sway of the powerful client and makes real client threats of ‘exit’ from the professional relationship.⁹⁷ The power imbalance is often the reverse of that in the traditional setting or, at least, the balance can no longer be assumed to be in the lawyer’s favour.

93 For example, a ‘lock-step’ formula for sharing profit according to holdings of partnership equity is less risky than an ‘eat what you kill’ formula. Here a partner may be motivated to take on matters without corresponding expertise or to ‘hug work’ and supervise it poorly rather than distribute it to other partners.

94 Heidi K Gardner and Melissa Valentine, ‘Collaboration among Highly Autonomous Professionals: Costs, Benefits, and Future Research Directions’ in Shane R Thye and Edward J Lawler (eds), *Advances in Group Processes* (Emerald Group Publishing, 2015) 209.

95 Christine Parker et al, ‘The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour’ (2008) 31 *University of New South Wales Law Journal* 158, 163–5.

96 Robbennolt and Sternlight, above n 27, 1149.

97 Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

Of course, these firms are not simply victims of their demanding clients. These changes are reproductions and adaptations of corporate modes for the firms' own organisational, profit-driven interests and particular business models. As a form of 'defensive professionalism' in response to this environment, the hierarchies have been elongated with the result that their employees are without the job security and rewards that partnership once offered, while equity partners maintain traditional conditions and premiums.⁹⁸ The firms' own tests of entry and participation include traditional yardsticks, like educational qualifications, character referees and other status markers, but, increasingly also include client recruitment skills and business and entrepreneurial nous.⁹⁹ They have in-house training programs to deepen their particular blend of firm expertise and bargain with law schools to create courses and content to further prepare their next cohort of trainees. Francis questions how the professional associations can maintain their grip over the accepted knowledge and technical standards of their profession when their commercial firm members work using the 'cognitive bases' or special knowledge of their clients, usually corporate finance and banking, and test entrants for such knowledge.¹⁰⁰

Further, to support their own interests here, the big firms have brought in performance management structures for partners and staff to control access to rewards¹⁰¹ and to direct larger numbers of people working together to service their mainly corporate clients. The use of billable hours is a particular threat to traditional values and relationships. At first, this system was criticised for its perverse incentives and potential for client abuse, through tampering,¹⁰² or simply through rewarding the 'slow-witted'.¹⁰³ As Campbell and Charlesworth have demonstrated, it has transformed in the large law firm into not only a billing system but also 'a powerful tool for measuring and controlling the work of employee solicitors through setting of high targets, close time recording, careful monitoring and a supple set of sanctions'.¹⁰⁴ Billing systems are now the firm's disciplinary tools, outside associational, 'clan' or 'collegial' control. They contribute to, and express, the limited autonomy and low decision latitude of most lawyers in large firms.¹⁰⁵ These forms of audit tend to involve increased workloads and longer hours,¹⁰⁶ which then deplete the reserves required

98 Parker and Evans, above n 22, 350; Daniel Muzio and Stephen Ackroyd, 'On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process' (2005) 32 *Journal of Law and Society* 615.

99 Fernanda Pirie and Justine Rogers, 'Pupillage: The Shaping of a Professional Elite' in Jon Abbink and Tijo Salverda (eds), *The Anthropology of Elites: Power, Culture, and the Complexities of Distinction* (Palgrave Macmillan, 2013) 139.

100 Francis, above n 14, 328.

101 Muzio and Ackroyd, above n 98.

102 *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408.

103 Michael Kirby, 'Billable Hours in a Noble Calling' (1996) 21 *Alternative Law Journal* 257, 259.

104 Iain Campbell and Sara Charlesworth, 'Salaried Lawyers and Billable Hours: A New Perspective from the Sociology of Work' (2012) 19 *International Journal of the Legal Profession* 89, 92–3.

105 Martin E P Seligman, Paul R Verkuil and Terry H Kang, 'Why Lawyers Are Unhappy' (2005) 10 *Deakin Law Review* 49.

106 Campbell and Charlesworth, above n 104, 101–7.

to identify and address issues of ethicality and competence.¹⁰⁷ All of these disciplinary practices reinforce the new language and priorities of professionalism, including client service over notions of public service and efficiency over discretion.¹⁰⁸

Indeed, part of the challenge to the traditional regime based on individual responsibility and professional ethos is that large law firms often have similar goals, structures and cultures to the clients they serve. Some writers have explored extreme instances of this in which lawyers and their clients collude in unethical behaviour. Rather than the lawyer or the client being the 'bad apple', unethical behaviour then arises because it serves the interests of both.¹⁰⁹ Within this environment of commercial immersion, whose causes are elaborated upon below, senior lawyers can exercise undue influence on juniors. Meanwhile, there would seem to be less incentive than ever for colleagues to question the ethicality of their peers' decisions,¹¹⁰ countering the ideals and mechanisms of traditional professionalism. These dynamics of firm internal solidarity and their related ethical blind spots were identified in the Commission into James Hardie Industries in relation to its corporate restructure, which enabled a significant shortfall in funds to compensate people harmed by its asbestos products: 'What is ... disturbing, however, is that with solicitors acting for [James Hardie Industries] ... and for the incoming directors, no one expressed any view on the merits of the underlying transactions'.¹¹¹

In this way, there has been 'a gradual divergence between the commercial pressures of the firm from the ethical standards of professionalism'.¹¹² The major political sources of these developments are examined in the next Part. For Greenwood, the firms' adoption of management structures and practices of the types just discussed are directly linked to breakdowns in professional behaviour.¹¹³ Simon would probably moderate this argument since he sees the problem of lawyers' morality as predating any of these changes. The moral weakness of the lawyers' role derives from, he argues, its formalism, mechanistic norms, and categorical judgment, conventions requiring a deferral of the

107 For examples of how 'the tolls of law practice' diminish ethical sensitivity, see Robbennolt and Sternlight, above n 27, 1140–3.

108 See, eg, Valérie Fournier, 'The Appeal to "Professionalism" as a Disciplinary Mechanism' (1999) 47 *The Sociological Review* 280; Fiona Anderson-Gough, Christopher Grey and Keith Robson, 'In the Name of the Client: The Service Ethic in Two Professional Services Firms' (2000) 53 *Human Relations* 1151; Laura Empson, 'Organizational Identity Change: Managerial Regulation and Member Identification in an Accounting Firm Acquisition' (2004) 29 *Accounting, Organizations and Society* 759.

109 On how these relationships evolve and are rationalised, see Robbennolt and Sternlight, above n 28; Doreen McBarnet, 'After Enron will "Whiter than White Collar Crime" Still Wash?' (2006) 46 *British Journal of Criminology* 1091.

110 Parker and Evans, above n 21, 325.

111 New South Wales, Special Commission of Inquiry into the Medical Research and Compensation Foundation, above n 22, vol 1, 548.

112 Flood, 'The Re-organization and Re-professionalization of Large Law Firms in the 21st Century', above n 17, 428.

113 Greenwood, above n 90, 193.

immediate good for a supposed contribution to justice overall.¹¹⁴ Yet, as Moorhead argues, this ‘moral minimalism’ is particularly pronounced among corporate lawyers.¹¹⁵

Meanwhile, placing further strain on the professional associations’ control and commitments, these managerial structures and values, and the belief that they are necessary, have spread throughout the profession. Studies suggest that, at least in solicitors’ firms, the ‘bottom hemisphere’, private-client sector remained committed to traditional practices for a time. However, in order to stay alive in the context outlined below, its organisations have also introduced streamlined and commodified work practices, and integrated the language of business into their work.¹¹⁶ In summary, these developments have meant that traditional regulation centred on the independent individual and the oversight of colleague, court, and association is insufficient and increasingly obsolete.¹¹⁷ Indeed, as we now show, certain features of de-regulation support many of these transformations in large firm practice and the potential for their leaders to accumulate more wealth, status, and a greater ability, as we argue in Part V, to control their external regulation.

IV DE-REGULATION, RE-REGULATION, CO-REGULATION AND THE LARGE PROFESSIONAL ORGANISATION

The challenge of professional organisations to the traditional model just discussed occurs within a context in which the professions have undergone a fundamental reworking of their bargain with the state and their relationships with wider society.¹¹⁸ Although they overlap, far more devastating to the traditional model than the academic critique sketched out in Part II has been the government’s attack and its de-regulation of the professions. This is important for three reasons. First, the corporate sector of the legal profession in which large firms operate came out ahead in the new regulative bargain and its advantages at the top have escalated since then. Second, the changes and the ways this sector has responded mean traditional professional control is weakening. Third, the activities of, and variability of attitudes towards, entity regulation, particularly among professional associations, need to be seen against this backdrop of external pressure on professional associations to reform themselves and their professions, along with internal pressure to maintain collective control and legitimacy in the face of their members. It is not easy for the professional associations to juggle their roles,¹¹⁹ including regulating the large firms, while

114 William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Harvard University Press, 1998), 1-4.

115 Richard Moorhead and Victoria Hinchly, ‘Professional Minimalism? The Ethical Consciousness of Commercial Lawyers’ (2015) 42 *Journal of Law and Society* 387.

116 Sommerlad, above n 15, 192.

117 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 510.

118 Brock, Leblebici and Muzio, above n 85, 9.

119 See Francis, above n 14, on the twin goals of professional bodies.

keeping everyone happy.¹²⁰ They must prioritise. The large law firms are an important member-group to keep on side, or inside, when they have an increasingly dominant and direct presence in the regulatory arena, but the associations also have their traditional commitments.

As part of a wider process of liberalisation that started in the 1980s, the self-regulatory model is being de-regulated and re-regulated on two grounds: one, that the traditional self-regulatory model is protectionist and anti-competitive; and two, that it is failing to serve the interests of the ‘consumer’. In moves that mimicked the activities set by the Thatcher government with respect to all the status professions,¹²¹ market-based incentives and consumer protection regulation were introduced to the Australian profession. A number of reports which saw the professions, including the legal profession, as obstacles to a national competition policy and others critical of the level of client care offered by professionals and their high fees, provided the economic and consumerist justifications for change.¹²² Driven by the federal and state governments and the Australian Competition and Consumer Commission, the reforms ‘sought to weaken professional monopolies, dismantle restrictive arrangements, and challenge entrenched privileges’.¹²³ Rather than guarantees of ethicality, civility and high standards, these were now seen as simply self-serving arrangements and ideology of the kind identified in Larson’s exposition. The consumerist view, meanwhile, was that professions must deliver on their promise.¹²⁴ The reforms also sought to deal with consumerist claims of poor service and, in the case of law, lack of access to legal services. Leading professionals may be world-class, however, many, even most, are not and the face-to-face manner of work (not to mention cost) means few will be served by such leaders.¹²⁵ This predicament gives weight to those who argue that the professions do not have a monopoly over fidelity, reliability and competence,¹²⁶ in turn giving traction to demands for greater competition. In sum, the professions were no longer seen as materially different from other occupational groups requiring microeconomic reform.

In the case of NSW lawyers, and in pursuit of the benefits of greater competition and access to legal services through reduced prices, many restraints administered by the professional associations were removed. Constraints on advertising solicitors’ services were lifted, and below-scale fees¹²⁷ and

120 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5.

121 Gerard Hanlon, *Lawyers, the State and the Market: Professionalism Revisited* (Macmillan Press, 1999); Abel, *English Lawyers between Market and State*, above n 13, 2–8; Abel, *The Legal Profession in England and Wales*, above n 35.

122 The Australian reforms up to the ‘Hilmer Report’: Independent Committee of Inquiry into National Competition Policy, Parliament of Australia, *National Competition Policy Review* (1993). See also Shinnick, Bruinsma and Parker, above n 64, 244.

123 Muzio and Ackroyd, above n 98, 622.

124 Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015) 36.

125 *Ibid* 36.

126 *Ibid* 235.

127 *Legal Profession Regulation 1987* (NSW) reg 20, amended by *Legal Profession Act 1987 – Regulation 1991* (NSW).

subsequently scale fees themselves, were abandoned.¹²⁸ Certain work practices, for instance the requirement to also brief a junior when retaining senior counsel, were abolished.¹²⁹ As part of this wider reform program, solicitors lost their monopoly over conveyancing,¹³⁰ barristers were permitted to take retainers directly from clients¹³¹ and ‘no win, no fee’ conditional cost agreements were permitted.¹³² Large personal injury firms particularly benefitted from the latter and along with the advent of litigation funders. While many of these changes were necessary, competition has the potential to cause ‘financial concerns’ and threaten ‘the sense of a collective profession’.¹³³

In addition, the professional associations for the legal profession, as in other professions, were no longer trusted to run their professions’ affairs exclusively, especially the dual roles of representation and regulation. In NSW, the Law Reform Commission raised concerns that

[i]ndividual lawyers were often unhelpful to clients and showed insensitivity to client needs, particularly in explaining their billing practices. In addition, the profession’s regulatory structure failed to address the issues that most frequently concerned clients, such as, delays, negligence, poor communication and problems with charging.¹³⁴

As a result, substantial regulative power was granted to regulators and government agencies.¹³⁵ In the case of law, the NSW Office of the Legal Services Commissioner (‘OLSC’) was established in 1993 as a statutory body for handling complaints and misconduct. While the OLSC is independent of the associations,¹³⁶ it works in a co-regulatory arrangement with them.¹³⁷ The OLSC consists of the Legal Services Commissioner (‘LSC’) and staff who receive all complaints made about NSW lawyers. They conclude all ‘minor’, consumer complaints, that is, those that involve delays, costs and poor communication or

128 See *Legal Profession Reform Act 1993* (NSW) sch 3, amending *Legal Profession Act 1987* (NSW).

129 See *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) s 105(j); Tom Altobelli, *Working with Barristers: A Solicitor’s Guide to Relations with the Bar* (Law Society of New South Wales, 2nd ed, 2007) 20. See generally Julian Disney et al, *Lawyers* (Law Book, 2nd ed, 1986) 141–5.

130 *Conveyancer’s Licensing Act 1992* (NSW). See also Joanne Barker, ‘Conveyancing Fees in a Competitive Market’ (Research Report, Justice Research Centre, December 1996) 1.

131 *Legal Profession Act 1987* (NSW) s 38I, as amended by *Legal Profession Reform Act 1993* (NSW).

132 *Legal Profession Act 1987* (NSW) s 186, as amended by *Legal Profession Reform Act 1993* (NSW).

133 Francis, above n 14, 335.

134 Shinnick, Bruinsma and Parker, above n 64, 243, citing New South Wales Law Reform Commission, *The Legal Profession*, Background Paper No 3 (1980); New South Wales Law Reform Commission, *Second Report on the Legal Profession: Complaints, Discipline and Professional Standards*, Report No 32 (1982).

135 For example, medical practitioners in Australia, along with other allied professions such as nursing, dentistry and psychology, are now regulated by the *Health Practitioner Regulation National Law*, a national scheme, where each profession is predominately regulated by the relevant government body – in the case of medicine, the Medical Board of Australia – with the role of the various professional associations now having very limited scope.

136 *Legal Profession Reform Act 1993* (NSW), amending the *Legal Profession Act 1987* (NSW).

137 Victoria and Queensland have a co-regulatory scheme; South Australia and Western Australia have independent regulators; and Tasmania and the legal professions in the two territories are self-regulated.

rudeness,¹³⁸ which make up about two thirds of all complaints. Of the conduct complaints, the OLSC is likely to handle those ‘that are in the public interest, arise out of referrals from courts or tribunals or involve a conflict of interest for the professional associations’.¹³⁹ However, the OLSC refers complaints alleging serious solicitor misconduct to the Law Society,¹⁴⁰ which make up over 20 per cent of all complaints, with misleading conduct, ethical matters, negligence, and trust funds being the most common complaints referred.¹⁴¹ In exceptional circumstances, the OLSC is able to review a decision of the Law Society, such as, for example, where the Society has dismissed a matter without taking any action.¹⁴²

One of the main consequences of the consumer movement has been, then, diminished control wielded by the associations as arbiters of entry and exit. However, in the case of NSW lawyers, the reduction of the professional associations’ powers has been less dramatic than it has been for those in other states. Indeed, in some respects, as we suggest in Part V, the Law Society’s authority has consolidated. At the same time, NSW has been singled out, among all the Australian states, as being the most comprehensive in its reform to make the professional more transparent and accountable.¹⁴³ Yet, there are questions about whether or not it is still the case that the professional association ‘remains too dominant in the power-sharing arrangements, notwithstanding the lack of major scandals affecting the NSW profession in recent years’.¹⁴⁴ It seems that the most drastic loss for its own ‘project’ has been less about regulatory power and more about membership or those they can in fact regulate. By mid-2004, legislative clarification and changes in practice ‘de-coupled’ the payment for practising certificates from Law Society membership, undoing the de facto compulsory Society membership entailed by the ‘single fee’ requirement and thus allowing membership to be truly voluntary.¹⁴⁵ We take up this last change in the next Part.

Turning back now to the wider competition and consumer reform picture, this long program has not impacted all segments of professions equally. As an overall point, the large law firms came out ahead in the new regulative bargain, a superior position that has since become more exclusive. Alongside the changes to

138 *Legal Profession Uniform Law 2014* (NSW) s 270. This is distinguished from ‘consumer matters’, defined in s 269 to be those about the provision of legal services or costs disputes. The same issue may be dealt with as both a consumer matter and a disciplinary matter.

139 Office of the Legal Services Commissioner, ‘What Happens When You Complain to the OLSC?’ (Fact Sheet No 1, July 2015) 1.

140 *Ibid.* Examples given include ‘allegations of fraud or serious breaches of the trust account provisions’. Complaints may also be referred where they relate to non-solicitor misconduct (for eg, paralegals posing as solicitors).

141 Office of the Legal Services Commissioner, *2015–2016 Annual Report* (2016) 26.

142 Office of the Legal Services Commissioner, *Reviews* (1 July 2015) <http://www.olsc.nsw.gov.au/Pages/lsc_complaint/lsc_reviewinginvestigations.aspx>.

143 Shinnick, Bruinsma and Parker, above n 64, 245.

144 Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 3rd ed, 2017, forthcoming) ch 3 ‘The Responsibility Climate: Professionalism and the Regulation of Lawyers’ Ethics’.

145 *Legal Profession Act 1987* (NSW) s 57MA(2), as amended by *Legal Profession Amendment (National Competition Policy Review) Act 2002* (NSW) sch 1 item 32.

professional control just considered was an economy-wide agenda which de-regulated financial markets,¹⁴⁶ removed currency controls,¹⁴⁷ de-mutualised and floated established companies,¹⁴⁸ and privatised many government corporations or at least converted them into public-private partnerships.¹⁴⁹ For large professional organisations of accountants and management consultants, actuaries, engineers, and also corporate lawyers, this resulted in a dramatic widening of their markets.¹⁵⁰ Further, large firms in all these professions have been able to create and take advantage of the regulatory and intellectual property opportunities that have accompanied the explosion of technology industries. Perhaps because of this, as Shinnick, Bruinsma and Parker point out, in the context of the Australian large law firms, the sector was quick to accept the demands of competition policy.¹⁵¹

At the same time, some of the main targets of the re-regulation were conveyancing, probate and legal aid, and the organisations and lawyers specialising in them. These areas and those other sectors of law that deal with personal, rather than business matters, such as family law, are at the heart of traditional legal practice. The first two of these largely private-client practice areas have been stripped of their traditional legal monopolies. The publicly funded sectors have come out far worse in the process and are, in many ways, finding themselves positioned at the mercy of the government. For example, Commonwealth funding for legal aid fell from \$171 million in 1997–98¹⁵² to \$103 million the following year, a 40 per cent reduction.¹⁵³ The cut was accompanied by changed agreements, announced in 1997 by the Attorney General's department, placing increased funding liability on the states and territories.¹⁵⁴ These cuts have been followed by a series of political moves to establish a managerialist legal aid system with commercial aims.¹⁵⁵ The renegotiated contractual arrangement saw increased corporatisation of legal aid commissions, particularly those in NSW, Victoria and Queensland.¹⁵⁶ Legal aid now operates under the prescripts of competition, flexibility and consumer

146 See Ric Battellino, Deputy Governor, Reserve Bank of Australia, 'Australia's Experience with Financial Deregulation' (Speech delivered at the China Australia Governance Program, Melbourne, 16 July 2007) <<http://www.rba.gov.au/publications/bulletin/2007/aug/pdf/bu-0807-3.pdf>>.

147 Ibid.

148 For example, National Roads and Motorists Association, AMP and St George Building Society.

149 For example, Commonwealth Bank, Telstra, Qantas and Australia Post.

150 Hanlon, *Lawyers, the State and the Market*, above n 121, 32–7.

151 Shinnick, Bruinsma and Parker, above n 64, 258.

152 \$279 million in 2016 terms, adjusted for inflation: Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (1999) 327–8 [5.55].

153 Ibid.

154 Where previously the Commonwealth had partnered with states/territories in the funding for national benefit, these agreements shifted its role 'to being a principal contracting with the legal aid commissions to deliver legal aid services in matters only involving Commonwealth law': Mary Anne Noone, 'The State of Australian Legal Aid' (2001) 29 *Federal Law Review* 37, 40.

155 For example, the pursuit of 'innovative commercial arrangements' in *Legal Aid Queensland Act 1997* (Qld) s 3(1); *ibid* 46.

156 Noone, above n 154, 42–3.

access, and a belief in ‘the superiority of private-sector management practice’.¹⁵⁷ Analytically, the managerial language of ‘legal service’ ‘delivery’¹⁵⁸ seems to go with an emphasis on competence at the expense of virtue. It has been criticised for disempowering lawyers, devaluing relationships with clients, and reducing the meaning of ethical service to a version that privileges efficiency and the interests of financially powerful sectors.¹⁵⁹

Of course, large legal firms have no monopoly on corporate and commercial work. Indeed, as we have discussed, they must continuously defend it, for the old jurisdiction lines between and within professions are increasingly fragile. Regardless, the size and complexity of matters, the highly technical character of their work, and the teams of employed professionals required to cover the mix in expertise and meet time limits make it very difficult for smaller practices to compete with large firms for the larger clients and projects. Furthermore, as well as competitive pressures, smaller firms have been subject to more complaints and constitute the primary concern of the OLSC. In the same context for the United Kingdom (‘UK’), Flood puts it plainly: in this reform process, there was no government invasion on corporate lawyers or big firms because they served and helped liberalise capital.¹⁶⁰ Their knowledge, corporate law, is especially valuable to government and business;¹⁶¹ as distinct from the life and liberty knowledge for individual clients that used to mark out professionalism.

Indeed, and strengthening the developments and ‘indirect’ pressures described in the last Part, these trends have presented further opportunities for the largest firms. The additional opportunities from de-regulation have led to the opening up of global markets in international trade in goods and services. Law firms seeking to represent international clients have engaged in strategies of global expansion to keep up with their clients’ activity. Fasterling notes that ‘in this sector, law firms have proved most successful when they have systematically embraced and implemented strategic management concepts to achieve competitive advantages, installed a central [governance] structure, and heavily invested in human resources’.¹⁶²

To illustrate, each of the firms in the LFA now has extensive global reach with offices or partner firm offices worldwide. Many have significantly increased their size by merging or forming alliances with much larger UK or China-based law firms in the early 2010s. Prior to the mergers, *Business Review Weekly* estimated the annual turnover of each of the then ‘Big Six’ – King & Wood Mallesons, Ashurst, Herbert Smith Freehills, Allens, Clayton Utz and Minter

157 Bill Doolin, ‘Enterprise Discourse, Professional Identity and the Organizational Control of Hospital Clinicians’ (2002) 23 *Organization Studies* 369, 385.

158 *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015* (NSW) r 4.1.

159 Hilary Sommerlad, ‘“I’ve Lost the Plot”: An Everyday Story of the “Political” Legal Aid Lawyer’ (2001) 28 *Journal of Law and Society* 335.

160 Flood, ‘The Re-organization and Re-professionalization of Large Law Firms in the 21st Century’, above n 17, 430.

161 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 512.

162 Bjorn Fasterling, ‘The Managerial Law Firm and the Globalization of Legal Ethics’ (2009) 88 *Journal of Business Ethics* 21, 21.

Ellison – to be between \$400–\$600 million.¹⁶³ They had hundreds of partners and thousands of employed lawyers working for them in chains of offices around the world and, with merging, these numbers increased significantly. For example, King & Wood Mallesons, a merger of the Australian firm Mallesons Stephen Jaques with the China-based firm King & Wood, now has over 2000 lawyers across 27 international offices,¹⁶⁴ with global annual revenue in excess of US\$1 billion, it is now one of the top 25 law firms globally.¹⁶⁵ The firm Blake Dawson merged with the UK firm Ashurst LLP and now has 25 offices in 15 countries and over 1600 partners and lawyers.¹⁶⁶ Herbert Smith Freehills, a merger of the Australian firm Freehills and the UK firm Herbert Smith, has 26 offices spanning Africa, Asia, Australia, Europe, the Middle East and the US.¹⁶⁷ The longest established of all Australian legal firms, Allens, now has over 130 partners located not only throughout Australia,¹⁶⁸ but also in Vietnam, Singapore, Indonesia, and Papua New Guinea,¹⁶⁹ and has entered into an ‘integrated alliance’ with the UK firm Linklaters, resulting in a combined global network of 39 offices across 28 countries.¹⁷⁰

The size and geographical spread of these global firms, and their purposes, put further strain on the solidarity required for the professional associations to agree upon and defend, if not enact, their collective social promises. This also complicates their joint status agendas. Professional communities were once more clearly internally bounded, including geographically, with more predictable hierarchies and were therefore better able ‘to accommodate internal stratification while maintaining the facade of homogeneity’.¹⁷¹ As indicated in the introduction, it is often only the appearance of professional uniformity and community that is needed to secure collective professional identity and advancement.¹⁷² This further challenges effective regulation.¹⁷³ Remoteness from the simpler scenarios of litigation in which there is adversary and judicial oversight is even greater in global lawyering, in which the governing professional ethics are not explicit. Compliance is most problematic in international arbitration, seen as the ‘Wild West’.¹⁷⁴ Moreover, in the UK, Flood has found that global firms use a number of strategies to avoid local regulatory problems.¹⁷⁵ Their clients, often global

163 Ben Woodhead, ‘Australia’s Top Law Firms Revealed’, *Business Review Weekly* (Sydney), 1 August 2012.

164 King & Wood Mallesons, *About Us* (2017) <<http://www.kwm.com/en/au/about-us>>.

165 King & Wood Mallesons <http://www.kwm.com/~media/SjBerwin/Images/Go%20Deeper/king%20and%20wood%20mallesons%20infographic_eng.ashx?la=en>.

166 Ashurst, *About Ashurst* <https://www.ashurst.com/about-ashurst.aspx?id_Content=66>.

167 Herbert Smith Freehills, *About Us* (2017) <<http://www.herbertsmithfreehills.com/about-us>>.

168 Allens, *People* (2017) <<http://www.allens.com.au/experts/search.asp>>.

169 Allens, *Offices* (2017) <<http://www.allens.com.au/offices/index.htm>>.

170 Allens, *Our History* (2017) <<http://www.allens.com.au/about/his.htm>>; Allens, *Our Global Alliance* (2017) <<http://www.allens.com.au/about/alliance.htm>>.

171 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labour* (University of Chicago Press, 1988) 106, cited in Francis, above n 14, 325.

172 Francis, above n 14.

173 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 510.

174 As described to Justine Rogers recently by one prominent Sydney lawyer.

175 See Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 513, for a list of strategies.

corporations, do not see themselves ‘under a yoke of monopoly restraint’.¹⁷⁶ Since neither party may have contact with the regulator, this also means the behaviour of global firms is effectively invisible to the outside. While they may test the mechanisms of professional community and accountability, some writers are not convinced that these changes mean erosion of core professional commitments and, for lawyers, of the rule of law in particular.¹⁷⁷ Flood meanwhile concludes that the global law firms in the UK have outgrown the reach of their own professional association and have escaped professional regulatory control.¹⁷⁸

Notwithstanding, attempts have been made to adjust the balance of professional control by focusing on the professional entity as a subject for conduct standards in a further adjustment of the regulative bargain. For example, in 2004, entity regulation was introduced in NSW making ‘principals’, such as partners, potentially subject to discipline where ‘the practice contravened’ the legislation.¹⁷⁹ This innovation was first introduced in 2001 in a somewhat different form, as we discuss below, for the newly allowed incorporated legal practices (‘ILP’). Depending on the severity, and regardless of actual knowledge of the contravention by the principal, the breach by an employee or another principal, a failure to supervise, a defective management system or a combination of these could amount to ‘professional misconduct’ by the principal.¹⁸⁰ The operation of these provisions (and similar provisions in the UK) has been dogged by uncertainties of interpretation. They were, however, a step towards what was intended,¹⁸¹ namely, that individual principals would be, in essence, vicariously liable for the breaches of the practice.¹⁸² This liability for failures in the management of the firm, or those authorised to act for it, could be mitigated by due diligence or other defences.¹⁸³ Despite this, no cases that rely on this provision to impose disciplinary liability (or its later national law version) are

176 Ibid.

177 Fasterling argues that ‘global consolidation of core values is brought about not only by the proliferation of international legal ethic codes and the cooperation among international bar organizations, but also by academic work and professional training’: Fasterling, above n 162, 28.

178 Flood, ‘The Re-landscaping of the Legal Profession’, above n 5.

179 *Legal Profession Act 2004* (NSW) ss 7(3), 719.

180 *Legal Profession Act 2004* (NSW) s 719(3).

181 Per the second reading speeches, this director was to be ‘generally responsible for the management of the legal practice’ and could be disciplined for failure to ‘discharge his or her management responsibilities, or in connection with other failures to report and deal with misconduct by employed solicitors or other directors of the incorporated legal practice’: New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2000, 7625 (Jeff Shaw). Furthermore, the solicitor director was to ‘ensure that all solicitors in the practice discharge their professional obligations’: New South Wales, *Parliamentary Debates*, Legislative Assembly, 31 October 2000, 9408 (Bob Debus). These explanations appear to suggest that the solicitor director’s liability was intended to be for management of the firm as a whole, general conduct of solicitors and other (solicitor or non-solicitor) directors of the practice and the professional obligations of employees.

182 This was something of a statutory reversal of the usual position in Anglo-Australian common law that one individual cannot be responsible for the criminal or disciplinary liability of another: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

183 *Legal Profession Act 2004* (NSW) ss 719(1)(a)–(c). However, the types of knowledge involved are very wide being ‘actual, imputed or constructive’ or else ‘all due diligence’ is required.

recorded.¹⁸⁴ Parker suggests this is in part because the co-regulators and the court possess ‘little capacity or skill to examine the extent to which firm management practices and cultures may have [led] to misconduct where responsibility for that misconduct is fragmented throughout the firm’.¹⁸⁵

As mentioned, the leading effort at ensuring entity standards stemmed from a regulatory innovation introduced a few years earlier, in 2001, for the newly permitted ILPs. The ground-breaking legislation stipulated that every ILP appoint at least one ‘solicitor director’ to be responsible for the management of the legal services provided by the practice.¹⁸⁶ This responsibility included implementing and maintaining ‘appropriate management systems’ (‘AMS’) to guarantee the provision of legal services by the organisation in accordance with the professional rules and other legislative requirements.¹⁸⁷ Both the Commissioner and the Law Society, as co-regulators, were given the power to conduct a compliance audit with the requirements of, or made under, the Act. The AMS requirement also involved self-reporting to the OLSC. If an ILP did not self-report, the Commissioner and the Law Society had the power to review the quality of its management systems regardless of whether or not a complaint had been made.¹⁸⁸

184 In cases concerning facts before this legislation, Parker notes that principals were on occasion disciplined for failure to supervise junior professionals or non-legal staff (see, eg, *Cheney v Old Law Society Inc* [2001] QSC 338; *A-G v Delaney* [2000] QCA 504; *Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238); Christine Parker, ‘Law Firms Incorporated: How Incorporation Could and Should Make Firms More Ethically Responsible’ (2004) 23 *University of Queensland Law Journal* 347. ‘But this duty to supervise is mainly in relation to a lawyer supervising work that is done by others directly in relation to that lawyers’ own clients’: Parker et al, above n 95, 176. For responsibility for management of systems in relation to billing, see *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 422–3, where Kirby P in dissent held that the firm’s ‘charging strategy was, to say the least, influenced by a system of time charging and by budget requirements within the firm which were not of [Foreman’s] individual making’. In cases where the facts occurred after 2001 for ILPs or 2004 for partnerships, there has been a reluctance to impose disciplinary liability on principals for management, for example management of computer systems which led to gross over-charging. In *Legal Services Commissioner v Keddie* [2012] NSWADT 106, the principal accepted responsibility for ‘grossly excessive costs’ so there was no need to find liability for ‘management’ failures as such. However the Tribunal remarked: ‘Mr Keddie and his partners were responsible for the computer system of costing adopted by the firm and for its use by both senior and junior solicitors and other fee earners. There was no clear line of responsibility for ensuring that the entries in the costs ledger and as finally charged were a correct and proper reflection of the work performed’: at [88]. Likewise in *Legal Services Commissioner v Devenish* [2006] LPT 008, the ‘firm problem’ was characterised as a single failure to notify the Law Society of the misuse of trust money to pay stamp duty, rather than a failure by the management of the firm to have a system which ensured that that was done.

185 Parker, ‘Law Firms Incorporated’, above n 184, 360. The position in the UK with similar provisions shows the courts are slightly more willing to impose liability on principals for systemic failure in firms, especially if they are owners: *Anderson v SRA* [2013] EWHC 4021; *Solicitors Regulation Authority v Nowell Meller Solicitors Ltd* [2014] SDT (20 November 2015).

186 *Legal Profession Act 1987* (NSW) s 47E.

187 *Legal Profession Act 1987* (NSW) s 47E(3)(a) required them to ensure that ‘appropriate management systems are implemented and maintained to enable the provision of those legal services in accordance with the professional obligations of solicitors and the other obligations imposed by or under this Act’.

188 *Legal Profession Act 1987* (NSW) s 47P. See also Christine Parker, Tahlia Gordon and Steve Mark, ‘Regulating Law Firms Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales’ (2010) 37 *Journal of Law and Society* 466, 473.

The then LSC, Steve Mark, described the AMS program as an ‘education towards compliance strategy’,¹⁸⁹ as distinct from traditional and reactive, ‘complaints-based regulation’.¹⁹⁰ Mark said further that the ultimate aim of this regulation was to ensure the practice had ‘an ethical infrastructure’,¹⁹¹ being ‘formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour’.¹⁹² It is worth pointing out here that the proposed AMS was not an especially strong example of an ethical infrastructure.¹⁹³ It was in certain respects formalistic and conservative, and other criticisms could be made of it.¹⁹⁴ Nevertheless, by targeting management, it recognised the collective nature of professional practice and the systemic, non-individual factors of professional breaches. The experiment was welcomed by writers in the field as an ideal regulatory in-between. It was a more friendly approach than direct firm discipline, but a more assertive approach than waiting for the organisations to build infrastructures themselves and a smart way of locating within large practices whom to hold to account.¹⁹⁵ Having someone responsible for their practice’s ethics management gets closer to having an ethics counsel and compliance experts, roles Chambliss and Wilkins identify as crucial to a robust ethical infrastructure.¹⁹⁶

On top of that, early research on the NSW provision,¹⁹⁷ though limited,¹⁹⁸ indicated it had had some effect in reducing complaints and that most of the ILPs

189 Steve Mark, ‘Views from an Australian Regulator’ [2009] *Journal of the Professional Lawyer* 45, 48.

190 Ibid 46.

191 Parker et al, above n 95, 174; Parker, Gordon and Mark, above n 188, 468. The practice of ILPs developing AMSs covering off a required 10 points each year and then self-reporting would develop greater aptitude for professional practice management.

192 See Adrian Evans et al, Submission to the National Legal Profession Reform Taskforce, *National Legal Profession Reform Project – Consultation on Proposed National Law*, 22 June 2010, 7–8.

193 The AMS did include some more traditional requirements: communication with clients and conflicts of interest. Overall though, most of these rubrics are directed to client service and to managing the business risk of the practice itself, for example, costs and financial matters, and record keeping. Content which directly addresses the professionals’ public interest duty to the court, the administration of justice or wider public interest duties regarding access to justice was subtle.

194 Entity regulation supporting the obligations of individual professionals had to start somewhere and the proponents of the AMS requirement likely hoped that in time, through its educational function, it would extend to deeper issues of professional ethics and organisational culture that better support the ethicality (as well as the business management) of individual practice. But see Parker, Gordon and Mark, above n 188, 475 for discussion of the ‘pessimistic view’.

195 Ted Schneyer, ‘Thoughts on the Compatibility of Recent UK and Australian Reforms with US Traditions in Regulating Law Practice’ [2009] *Journal of the Professional Lawyer* 13; Loughrey, above n 17.

196 Elizabeth Chambliss and David B Wilkins, ‘The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms’ (2002) 44 *Arizona Law Review* 559.

197 For a summary of the research, see Susan Fortney and Tahlia Gordon, ‘Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation’ (2012) 10 *University of St Thomas Law Journal* 152, 165–168; Parker, Gordon and Mark, above n 188.

198 The main limitation of the Parker, Gordon and Mark research, in particular, was that its measure of impact was complaints made to the regulator, an imperfect indicator of ethical culture and routine behaviour, ethical issues that are not directly client concerns, and whether or not the AMS was decisive. Nonetheless, they concluded that there was value in the process of self-assessment, and it instigated the learning and changes irrespective of the ratings the organisations gave themselves. See strengths and weaknesses: Parker, Gordon and Mark, above n 188, 478–80.

themselves recognised its value for different aspects of practice.¹⁹⁹ The initiative also sparked the interest of regulators in other Australian States and overseas, some of which introduced similar approaches. For example, the UK *Legal Services Act* now requires all ‘alternative business structures’ to appoint a Head of Legal Practice, who is responsible to take ‘reasonable steps’ to ensure the practice complies with the Act and reports annually.²⁰⁰ As a type of risk management typical of professional firm liability approaches, its distinctive quality here was as a program to motivate and help practices develop their own ethics capacities with the regulator as consultant and collaborator.²⁰¹ To illustrate the sedimentary nature of this area, the objective for law firms to take responsibility is in many ways the core of professionalism. Otherwise, conduct standards are left ‘largely to external forces – malpractice liability, litigation sanctions, the practice regulations of government agencies, and the marketplace’, which are all at the expense of self-regulation.²⁰² In short, the AMS’s educational function appeared to support traditional professional constituents of autonomy and regulation of the self within a contemporary context.

The former LSC’s goal, in the subsequent National Reform project was to subject principals of all law firms to the same management obligations as directors of ILPs.²⁰³ The plan was for the regulators to have, in this context, additional powers to conduct an audit and to issue ‘management system directions’,²⁰⁴ where the regulator considered it ‘necessary’, without any reasonable cause requirement.²⁰⁵ However, as we examine in the next part, it has been very difficult to marshal all the segments of the NSW legal profession to agree on the control of entities and the will to do so seems primarily to fend off legislative action. Indeed, in looking at the National Reform project as a legislative process, we can detect here the direct pressures that the large firms exert on the priorities and terms of the regulative bargain, buoyed by the political moves just analysed.

199 Particularly firm management and risk management: Fortney and Gordon, above n 197, 181- 182.

200 *Legal Services Act 2007* (UK) s 91(3). See also Loughrey, above n 17, 749, 754; Flood, ‘The Re-organization and Re-professionalization of Large Law Firms in the 21st Century’, above n 17, 435–6 for some examples of alternative business structures, including the legal arm of a supermarket chain, that have implemented arrangements to some effect.

201 Schneyer, above n 195, 34.

202 Ibid 22.

203 Around 2008, during the development of the uniform reform, it was proposed by the then LSC, Steve Mark, that this requirement be extended to all legal practices, including firms.

204 See Frances Moffitt, ‘Principals: Why It’s So Important to Set the Right Tone’ (2016) 29 *Law Society of NSW Journal* 84.

205 National Legal Profession Reform Taskforce, ‘National Legal Profession Reform Project – Legal Profession National Law – Consultation Draft’ (14 May 2010) 102, [4.6.2].

V THE NATIONAL LAW PROCESS: DIRECT CHALLENGES TO SELF-REGULATION IN A CO-REGULATORY SETTING

The National Reform program was driven by a desire for a national legal services market through uniform legislation and a unified, efficient and effective regulatory scheme.²⁰⁶ The moves toward such a regime gathered pace in 2009, when it was brought onto the COAG microeconomic and regulatory reform agenda. Its goals, therefore, were limited to focusing on ‘increased competition, reduced compliance costs and billing arrangements that are simplified and more transparent’²⁰⁷ due to having the same law throughout Australia. It did not pertain to other consumer issues like access to justice or the costs of litigation.

From 2009–11, the National Reform Taskforce and the Consultative Group released a series of publications including an initial background paper, a number of specific issue discussion papers, a draft National Law, a revised draft National Law and eventually draft legislation. As mentioned, the process culminated in what is now the *Uniform Law*, which commenced in July 2015 and to which NSW and Victoria subscribed, the other states and territories ultimately deciding not to join.²⁰⁸ One main reason given for not signing-on was a federalist concern: that legislation should, where possible, be state rather than Commonwealth, and that this scheme would effectively supplant the states’ parliamentary procedures.²⁰⁹ A second reason was the additional cost and ‘red tape’.²¹⁰ The added ‘national’ layer of regulation, where pre-existing state-based regulators were retained,²¹¹ was deemed ‘an unnecessary duplication’.²¹² The *Uniform Law* did create new ‘national’ regulatory bodies, in particular, the Legal Services

206 National Legal Profession Reform Consultative Group, ‘Background Paper’ (4 August 2009) 14–16, 20.

207 Ibid 20.

208 There is information on the participation and attitudes of Queensland and Western Australia. Information regarding other states’ participation is scarcer. As at March 2013, ‘[t]he ACT Attorney-General [had] reserved his position in respect of the national law’, citing local loss of admission fees (due to the creation of national bodies) and the ongoing costs versus ‘supposed benefits’ of the scheme: Chase Deans, ‘National Legal Profession Reform’ [2013] 227 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 10. No public statements from the Tasmanian or South Australian Governments could be found, however, commentary from the time suggests their opposition from at least 2012: Justin Whealing, ‘Divided We Stand’, *Lawyers Weekly* (online), 30 March 2012 <<http://www.lawyersweekly.com.au/features/9898-divided-we-stand>>. While it appears as though the Northern Territory government was initially approving of at least some aspects of the scheme, it has not been enacted: see, eg, Barbara Bradshaw, ‘I’m Still Standing ...’ [2010] 5 *Balance* 8 <<http://www.austlii.edu.au/au/journals/BalJINTLawSoc/2010/78.pdf>>.

209 Michael Mischin, Attorney-General (WA), ‘National Legal Profession Reform’ (Speech delivered to the Law Council of Australia, November 2011) 4 <<https://www.lawsocietywa.asn.au/wp-content/uploads/1970/01/AG-Speech.pdf>>. The Queensland Attorney-General also expressed commitment to ‘competitive federalism’, an ideology generally opposed to adoption of national schemes: Jarrod Bleijie, Attorney-General and Minister for Justice (Qld), ‘Queensland Not Signing Up to National Legal Profession Reform’ (Media Statement, 3 October 2012) <<http://statements.qld.gov.au/Statement/2012/10/3/queensland-not-signing-up-to-national-legal-profession-reform>>.

210 Bleijie, above n 209.

211 Marianna Papadakis, ‘Only NSW, Victoria Agree to Aussie Rules for Lawyers’, *The Australian Financial Review* (Sydney), 28 March 2014 <<http://www.afr.com/news/only-nsw-victoria-agree-to-aussie-rules-for-lawyers-20140327-ixad8>>.

212 Bleijie, above n 209.

Council, which among other things now makes the various *Uniform Law Rules* such as the *Solicitors' Conduct Rules* and the *Admission Rules*,²¹³ and the Commissioner for Uniform Legal Services Regulation, who also acts as CEO of the Legal Services Council. These circumstances, in which only two States joined, reveal and reinforce the two 'hemispheres' divided by values, subject matter, and routines of practice between large and small firms. They also institutionalise, at least for now, related 'east coast' versus 'west coast' geographical divisions in both professional association and regulation.²¹⁴

In Part III, we examined the large law firms' significant, indirect power over the traditional venues, meanings, and mechanisms of professionalism through their 'internal' activities in response to their own environments. In this Part, we look at how the organisation representing Australia's nine largest firms, the LFA, had the capacity to engage with the national reform regulatory agenda and legislative process. The fact that the largest law firms have formed a collective body with the intention of lobbying seems to satisfy a necessary part of what Flood terms 'institutional entrepreneurs': actors who *directly* challenge and change national and transnational regulations to suit their own particular activities and operations.²¹⁵ Whether this has Australian parallels in terms of lobbying international bodies it may be too early to say. However, at the national level in Australia, large firms seem to have pursued their own interests and fairly successfully too. During the National Reform process, as mentioned above, this body was called the LLFG, but in recognition that all its members operate internationally and to signal its designs to influence global regulation too, it changed its name to LFA.²¹⁶ We discuss how the large firms exerted direct influence on the regulative bargain and the institutional relationships they involved. We show how some of the means of influence are more subtle than simply lobbying, a primary strategy that has been observed among other large and global firms.²¹⁷ Of course, the National Reform process was long and involved, informally spanning decades and attracting wide interest. There were, for instance, well over two hundred submissions responding to the initial draft National Law alone. Naturally, all of the casual factors, dynamics and desired goals (including common goals among different segments of the profession) and their evaluation cannot be examined here. While the discussion below sets out some facts and inferences that make the dominant role of the LFA plausible,

213 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW); *Legal Profession Uniform Admission Rules 2015* (NSW).

214 Queensland intended to join the Uniform Law along with NSW and Victoria, but decided against it, that last State to do so, due to concerns about 'the impact of the scheme on sole practitioners as well as uncertainties relating to the costs of establishing and operating the national Legal Services Board and office of the National Legal Services Commissioner': Michael Mischin, Attorney-General (of Western Australia), 'National Legal Profession Reform' (Speech delivered to the Law Council of Australia, November 2011) 4 <<https://www.lawsocietywa.asn.au/wp-content/uploads/1970/01/AG-speech.pdf>>.

215 Flood, 'The Re-landscaping of the Legal Profession', above n 5, 511.

216 See Stefanie Garber, 'Lobby Group Rebrands to Law Firms Australia', *Lawyers Weekly* (online), 21 July 2015 <<https://www.lawyersweekly.com.au/news/16851-large-law-firm-group-rebrands-to-law-firms-austral>>.

217 See studies listed regarding national and international lobbying in Flood, 'The Re-landscaping of the Legal Profession', above n 5, 508.

deeper research is needed. One of the main, early and salient themes of this regulatory exchange is of coordination and mutual benefit and, using a macro lens, of a flow on from the competition agenda. This contrasts to intense struggle, images usually associated with the assertion of professional interests and boundaries.²¹⁸ However, another theme bubbling beneath is of fitfulness, interim agreement, and the continuation of internal divisions and frustrations.

In the most straightforward sense, the reason the LFA was influential in the regulatory arena was because its goals, and therefore underlying notions of professionalism, were compatible with those of the government reformers: to allow law practices to operate nationally and practitioners to move freely between jurisdictions. Using the same language we have observed driving the government's competition policies, the LFA's objectives were, and still are, to ensure 'microeconomic reform and the ability to deliver services efficiently and under the lowest possible cost structure'.²¹⁹ The LFA firms are those with the largest national presence and thus able to make the easiest market extension to other states and overseas jurisdictions. They had the most to gain from national uniformity, though they argued, quite rightly, that any law firm that operates in more than one state or territory would also benefit. This raises the third, public reason why certain states withdrew: the vast majority of their practitioners, including 85 per cent of Queensland solicitors, were sole practitioners, who, they saw, would gain nothing from the reform, 'other than increased costs'.²²⁰ The two States that fused, NSW and Victoria, contain the main offices of the big firms and usually the major clients. It is also largely only the LFA member firms that have overseas offices. A stated primary objective of the Reform agenda was to provide a framework that 'supports and promotes Australia's increasingly significant participation in the international legal services market'.²²¹ This priority for unfettered global markets also represents a continuation. In this way, there may not have been many points of conflict or a great need to bash out common accord, in reality. There was already considerable 'present advantage'²²² or a compatible course by the time the debate about national law actually took place.

That is not to say the LFA did not actively assert its interests. Indeed, the resources and energy that the LFA brought to the promotion of the agenda it advocated marks it out. The LFA was prolific in the size and detail of its submissions. During the various consultation periods during 2009 and 2010, LFA's submissions totalled over 320 pages,²²³ whereas the LCA and all the State

218 Liu, above n 9, 687.

219 Garber, above n 216.

220 This objection was raised in particular to costs that would have been involved in establishing a national regulatory board, considered unnecessary for sole practitioners, in Bleijie, above n 209.

221 National Legal Profession Reform Consultative Group, above n 209, 16. See also at 14-16, 20.

222 'Present advantage' is a term used by economist, sociologist and philosopher, Vilfredo Pareto, referring to the systemic advantage of the power elite, the product of an 'infinite of minor acts', that, he argues, largely carries the will of individuals within it. *The Mind and Society: A Treatise on General Sociology* (Andrew Bongiorno and Arthur Livingston trans, Dover Publications, 1935) para 2254 [trans of: *Trattato di Sociologia Generale* (first published 1916)].

223 See submissions by Robert Milliner, chair of the LLFG, under both the Public Submissions and Consultative Group Submissions headings: New South Wales Government, Department of Justice,

and Territory law societies combined made submissions of only around 240 pages.²²⁴ In 2009, the LFA presented its ‘wish list’ to the Task Force for a streamlined regulatory system to maximise the mobility of their members’ staff, allowing them to practise anywhere, and the flexibility and cost-savings of their operations. This, it submitted, would be achieved through admissions, practising certificate renewals, practice and conduct rules, continuing professional development requirements, trust accounts, and Fidelity Funds, administered on a truly singular, national basis, instead of different rules, forms, and processing requirements in each State. The LFA also wanted the regulators’ power to be limited largely to consumer matters and have exemptions from existing practice rules. Most notably, and in line with the lawyer-client relationships described in Part III, the LFA members did not want to be subject to cost disclosure requirements for their ‘sophisticated clients’, who, they argued, did not need the same level of regulatory intervention as more vulnerable ‘consumers’. As the least prone to information asymmetry, large corporate and government clients are, they submitted, best placed to use market incentives and sanctions²²⁵ and did not need their disputes mediated by the regulator. The LFA also sought a range of changes to tax and stamp duty arrangements to incentivise new business structures.

As outlined, the LFA’s success was in instigating and achieving some level of uniformity of professional legislation. Although only two states ultimately joined, they are by far the largest. An unanticipated finding given the theme of power discussed is that the LFA did not have success, or not total success, on many of the practical and surrounding details, including for admissions, trust accounts, and other elements.²²⁶ Its request for changes to costs rules and costs disputes resulted in only partial victories.²²⁷ Perhaps most salient, it did not succeed in establishing a single regulator or a related complaints handling process or Fidelity Fund.²²⁸ The associational, regulatory and enforcement bodies

National Legal Profession Reform: Document Library (20 October 2014) <<http://www.justice.nsw.gov.au/for-students-legal-profession/national-legal-profession-reform/document-library>>.

224 See submissions by the LCA and the various state and territory law societies listed: *ibid*.

225 Shinnick, Bruinsma and Parker, above n 64, 238.

226 For example, LFA wanted a single, national admissions system: Large Law Firm Group, above n 30, 3. It also wanted the ability to have a trust account covering more than one state, but not necessarily all states: National Legal Profession Reform Taskforce and Consultative Group, *Consultative Group – Summary of Issues* (Council of Australian Governments, 11 August 2010) 21 (‘*COAG Summary of Issues*’), summarising submissions made by Robert Milliner, chair of the LLFG. However, the *Uniform Law* did not adopt either of these, with it retaining state-based Admissions Boards: see, eg, *Legal Profession Uniform Law Application Act 2014* (NSW) s 19, and generally requiring a legal practice that receives trust money in NSW to maintain it in a NSW trust account: *Legal Profession Uniform Law 2014* (NSW) s 136.

227 For example, LFA argued that the legal costs regime should not apply to commercial or government clients and that for other clients, the requirement should be that costs are not ‘grossly excessive’, and further that a costs assessor should not be required to substitute their own view of what is fair and reasonable for what has been freely agreed between the parties: Large Law Firm Group, above n 30, 2; *COAG Summary of Issues*, above n 226, 28. While the first suggestion was adopted, the second and third were not: see *Legal Profession Uniform Law 2014* (NSW) ss 170(1)(a), 172, 199(2)(b).

228 As already noted, the *Uniform Law* has retained the pre-existing arrangements for administering the regime by the state-based regulatory bodies and professional associations, including complaints handling

in NSW and Victoria remained the same as before through a ‘delegation’ model where the Legal Services Council assigns its functions to the pre-existing State-based regulators and solicitor and barrister professional associations.²²⁹ Confirming the thesis of professional continuity and adaptation,²³⁰ these goals may have been simply too ambitious given the institutional history of the associations along with the state governments’ greater attachment to smaller firms’ practices and ideas. There was strong desire among the associations to retain their jurisdictions and they did so in part by adopting the national law agenda – a fact that had initially played in the LFA’s favour, but was then resisted by the associations in a paradoxical and adaptive move, as we show below. From the LFA’s perspective, then, national uniformity has not yet been achieved.

In Part IV, we discussed the requirement for ILPs of the maintenance and audit of AMS, a form of ethical infrastructure for entity regulation. The LFA managed to resist moves by the OLSC to extend this form of regulation to all practices, including partnerships (the business form of the LFA members). This must have been pushed back early on, since the draft National Law did not include any mandatory AMS requirement for partnerships or even ILPs. The draft version did, however, retain traces of it, with a new requirement on the principals of all practices, not just ILPs, to be ‘duly diligent’ against the practice breaching the law.²³¹ More controversially, it retained a wide-ranging discretion for the Commissioner²³² to investigate any practice without needing reasonable cause and to issue ‘management system directions’ where he or she ‘considered it necessary’ and without reasonable grounds.²³³

Academic submissions to the consultations supported this widening of the existing Commissioner’s discretion to all practices, citing the early research into the reduction of complaints against ILPs we mentioned.²³⁴ In contrast, the LFA²³⁵

and Fidelity Funds: see, eg, *Legal Profession Uniform Law Application Act 2014* (NSW) ss 22, 31; Law Society of New South Wales, *Complaints Process* <<https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Complaints/Complaintsprocess/index.htm>>; Law Society of New South Wales, *Legal Practitioners Fidelity Fund*, above n 58.

229 See *Legal Profession Uniform Law 2014* (NSW) s 397.

230 Eliot Freidson, *Professionalism, the Third Logic: On the Practice of Knowledge* (University of Chicago Press, 2001); Muzio and Ackroyd, above n 98.

231 National Legal Profession Reform Taskforce, ‘National Legal Profession Reform Project – Legal Profession National Law – Consultation Draft’, above n 205, 29 [3.2.4].

232 In the Consultation Draft the Commissioner is called an ‘Ombudsman’: *ibid* 166, pt 8.3.

233 National Legal Profession Reform Taskforce, ‘National Legal Profession Reform Project – Legal Profession National Law – Consultation Draft’, above n 205, 102 [4.6.2].

234 Evans et al, Submission to the National Legal Profession Reform Taskforce, above n 192.

235 ‘The Ombudsman may decide to conduct an audit whenever the Ombudsman “thinks it necessary”, for any reason or for no reason, and whether or not a complaint has been made’. It described the power to give a management system directions as ‘unacceptably paternalistic, draconian and intrusive, especially in the case of an unincorporated practice whose principals have unlimited liability in respect of their practice’ and argued: ‘[i]t is inappropriate that a third party, not intimately involved in the management of a law practice, should be able to give directions to the practice to implement management systems specified by that third party’. Further, the LFA argued that the Commissioner’s wide discretion should be limited by a requirement to establish ‘reasonable grounds’ before an audit of management arrangements in a practice entity could take place: *Large Law Firm Group*, above n 30, pt 3.

and the LCA,²³⁶ along with a group of mid-sized firms²³⁷ and the Tasmanian Law Society,²³⁸ were united in strenuous opposition. The essential complaint appeared to be the Commissioner having the power to audit and make management systems directions for all law practices without a complaint against a firm or other just cause. The LFA's 2010 submission argued that '[t]he power to give a management system direction is unacceptably paternalistic, draconian and intrusive, especially in the case of an unincorporated practice whose principals have unlimited liability in respect of their practice'.²³⁹ In addition, and revealing aspects of how the government regulator is perceived, the LFA resented the possibility of a 'third party' without the intricate 'capability and expertise' required to manage a large firm practice, which varies across practices, giving management directives and assessing their compliance.²⁴⁰ There was a similar sense among the members of the City of London Law Society, the UK-equivalent of the LFA, that the regulators' own expertise and culture needed to change to be able to properly administer the new, equivalent strategy.²⁴¹ Until more research is conducted into the discussions and range of attitudes of the LFA and others, given the similar pressures and objectives, it seems likely that some of the arguments raised in the UK 2009 Smedley Review of the Regulation of Corporate Legal Work were deployed by the LFA to turn down the Australian reform. These included arguments that (UK) corporate firms' need to move quickly in an environment of 'fierce, global competition' and avoid the dangers of costly regulation that could fetter this freedom and global competitiveness.²⁴²

Meanwhile, the academics, in their submissions, pointed out the connection between the controversial audit and practice management directions power, and the liability on principals for practice contraventions discussed in Part IV, a similar version of which was in the draft National Law.²⁴³ It made no sense, they argued, to give 'principals' or 'supervising legal practitioners' an obligation to ensure that all reasonable action is taken to ensure legal services are provided in accordance with the relevant obligations without expecting them to put in

236 The LCA argued it 'does not support compliance audits as they are currently envisaged. The Law Council supports a compliance audit power *where there are reasonable and demonstrable grounds* for believing there may have been, based upon complaints, systematic breaches of the National Law': Law Council of Australia, Submission to the National Legal Profession Reform Taskforce, *National Legal Profession Reform Project – Consultation on Proposed National Law*, 13 August 2010, 11 (emphasis added).

237 Cornwall Stodart et al, Submission to the National Legal Profession Reform Taskforce, *National Legal Profession Reform Project – Consultation on Proposed National Law*, 14 May 2010, [2.2]. The mid-tier firms were Cornwall Stodart, Hall & Wilcox Lawyers, Herbert Geer, Maddocks, Hunt & Hunt, Mason Sier Turnbull and Rigby Cooke Lawyers.

238 Tasmanian Law Society, Submission to the National Legal Profession Reform Taskforce, *National Legal Profession Reform Project – Consultation on Proposed National Law*, 2 July 2010, [4.6].

239 Large Law Firm Group, above n 31, 63.

240 Ibid.

241 Flood, 'The Re-landscaping of the Legal Profession', above n 5, 518. See also Schneyer, above n 195, 34, who, when guessing how United States ('US') lawyers would receive a NSW model of entity-regulation, predicted a similar initial response, though in plainer terms. They would, he said, see it 'as a highly intrusive scheme administered by an alien agency to pursue speculative gains at undue expense'.

242 Nick Smedley, 'Review of the Regulation of Corporate Legal Work' (Report, CI Group, 31 March 2009) 14.

243 Evans et al, Submission to the National Legal Profession Reform Taskforce, above n 192, 8–10.

place appropriate management systems to do so.²⁴⁴ To address concerns about intrusiveness and regulatory burden, they proposed that

where a principal (or supervising legal practitioner) has taken all reasonable steps to implement appropriate management systems, they should receive a safe harbour from liability ... This is not only fair and reasonable but also encourages the implementation of appropriate management systems.²⁴⁵

In this way, they argued for a concession for having an AMS in the form of more accessible defences than was found in the earlier 2004 legislation and the draft National Law: reasonable steps instead of due diligence and to be liable only with actual, as distinct from actual, imputed or constructive, knowledge of the contravening circumstances. However, the AMS and reporting requirements were not included in the *Uniform Law*. Yet the ‘concessions’ or more accessible defences were included, despite their initial justification for existing to make mandatory AMSs more reasonable or voluntary AMSs more attractive. We assume, but do not know, that the easing of defences was an idea drawn from the academics’ submission.

In the end, the Taskforce accepted that the Commissioner’s power as proposed was ‘unnecessarily broad’ and that instead there should be ‘a more clearly defined power’ which required ‘reasonable grounds’ before the Commissioner could conduct a compliance audit and potentially make a management systems direction.²⁴⁶ The *Uniform Law* ultimately enacted this more limited Commissioner discretion,²⁴⁷ which in many ways represents a return to the traditional, complaints-based or reactive approach. Interestingly, since this interception by the LFA would have been regarded as a win, Flood frames its then possible *adoption* in the UK for all firms as a victory²⁴⁸ since the outcome for the firms would be that the regulation is subcontracted to them. For the large firm in particular, he argued, it would simply vindicate what they do already. This would give them an additional way of legitimating their practices and cementing them as models for the rest of the profession, since they receive so few complaints.²⁴⁹

244 Ibid 9.

245 Ibid.

246 National Legal Profession Reform Taskforce, ‘Interim Report on Key Issues and Funding’ (2010) 5.

247 *Legal Profession Uniform Law 2014* (NSW) s 257.

248 The Solicitors’ Regulation Authority (‘SRA’) *Authorisation Rules 2011* (at 17 June 2011) r 8.2 require all authorised bodies to have in place ‘[s]uitable arrangements for compliance’ to ensure that they and their personnel comply with applicable regulatory requirements, and that professional principles are maintained by those to whom they apply. Rule 8.2(b) additionally requires that licensed bodies also have arrangements in place to prevent breaches caused or substantially contributed to by non-legal staff and interest holders. All authorised bodies must have compliance officers, who must take all reasonable steps to ensure the body’s compliance with its authorisation and statutory obligations and provide records of any failures to the SRA. A separate role exists to ensure compliance with financial obligations in the same way. All authorised bodies must provide annual ‘information reports’ to the SRA and must notify it as soon as it becomes aware of non-compliance.

249 Indeed, Flood observes that by becoming part of this process, they have used it to in effect virtually free themselves from external regulatory control: Flood, ‘The Re-landscaping of the Legal Profession’, above n 5, 517–18.

It is worth further contemplating the influence and control of the large firms. The nine LFA firms make up less than 0.1 per cent of all firms in Australia,²⁵⁰ and together their staff represent around only 9 per cent of all solicitors in Australia. For such a body to have the autonomy to ‘interpret laws, modify rules, and alter public responsibilities in ways that protect their interests’,²⁵¹ it must be an elite group. While social groups are becoming more differentiated and diffuse, and recognising the outmoded nature of the term ‘elite’,²⁵² the LFA has certain, classical markers of a powerful group. It is small and cohesive, very well-resourced and in a position to articulate, agree on, and enact collective goals.²⁵³ Its ability to mobilise on behalf of the nine largest organisations stands in contrast to traditional sole practitioners, of which there are some 10 700 (representing 16 per cent of the profession), spread across some 9500 practices. As signalled in Part III, sole practice remains the dominant private practice arrangement, constituting 76 per cent of all firms.²⁵⁴ In addition, to be effective, such a group needs to have access to the power network, here the network in which the regulatory negotiation takes place.

There are reasons why the LFA was able to engage in direct, collective action to represent its agenda in the regulatory arena, and specifically why it had a strong foothold in the professional associations at a time in which the associations must represent multiple and often conflicting fragments of the profession. Of most consequence, the large firms’ collective status and particular value to the professional societies are most clearly indicated by their constitutional membership and voting rights in the LCA since 2007. It meant the LFA is in a powerful position to turn down or to promote proposals. The LCA Constitution provides that, at General Meetings of the Council, the LFA has three votes,²⁵⁵ the same as the largest category of state law societies or bar associations.²⁵⁶ The constitution further provides that each constituent member may appoint a constituent director,²⁵⁷ and one role of the constituent directors is to appoint the executive of the Law Council.²⁵⁸ As in the general meeting, through its constituent director, the LFA enjoys the same voting rights on the

250 There are 12 483 private firms in Australia: Law Society of New South Wales, ‘2014 Law Society National Profile’, above n 81, 18.

251 John Higley and Jan Pakulski, ‘Elites, Elitism and Elite Theory: Unending Confusion?’ (Paper presented at the World Congress of the International Political Science Association, Madrid, 10 July 2012) 1.

252 Shore and Nugent point out that the term ‘elite’ is ‘so protean and porous that it is almost devoid of meaning’, but as a working definition, they posit that elites ‘can be characterised as those who occupy the most influential positions or roles in important spheres of social life ... whose decisions crucially shape what happens in the wider society’: Cris Shore and Stephen Nugent (eds), *Elite Cultures: Anthropological Perspectives* (Routledge, 2002) 3–4.

253 Drawing on Meisel’s three C’s for effective elites: cohesion, conspiracy and consciousness: James H Meisel, *The Myth of the Ruling Class: Gaetano Mosca and the ‘Elite’* (University of Michigan Press, 1962).

254 A sole practitioner firm has one principal: Law Society of New South Wales, ‘2014 Law Society National Profile’, above n 81, 18.

255 Law Council of Australia, above n 32, cl 21.2(a).

256 Ibid, that is, Law Societies or Bar Associations that have more than 1000 members.

257 Ibid cl 29.1.

258 Ibid cls 30.4, 38.1.

Board of the Council as any of the law societies and bar councils²⁵⁹ that represent entire states. Its equal footing here is something no other law firm group possesses.²⁶⁰

Moreover, in return for membership in the LCA, the LFA agreed to provide ongoing support for the associations of NSW and Victoria through significant membership and subscription revenue.²⁶¹ Membership and revenue were no longer guaranteed once compulsory membership was prohibited in the competition changes for the legal profession. The LFA has the collective action advantages capable of delivering an ultimate blow: leaving the professional association and taking with it a large proportion of its membership and annual revenue. Again, by contrast, the sole practitioners cannot threaten collective action in the same way, even though they represent around double the percentage of the profession. The potential of a member-group breakaway looms. For instance, in England and Wales, while the Bar Council represents barristers, there are also some 24 Specialist Bar Associations,²⁶² which fulfil similar purposes as the traditional associations, but are more tailored to their members' practices and business operations.²⁶³ The consequences of leaving for the associations are both threatening and real. As such, the LCA's Constitution states:

LFA shall ... encourage and recommend to the [nine LFA firms] that they ... pay to ... [the] Law Societies or Law Institutes, on behalf of the [firms'] ... partners, legal practitioner directors and employees ..., the relevant Law Society or Law Institute annual membership or subscription fee ...²⁶⁴

In a wider context in which large firm groups here and overseas have threatened to withdraw, or have in fact withdrawn, from professional associations, it is plausible that the large organisations' formal voting power in the LCA has influenced LCA policy and that of the professional associations in their state roles. From the perspective of the associations, this 'deal' represents a defensive professional mechanism to secure ongoing traditional authority.²⁶⁵ It is not a conventional part of 'individual within a community' professionalism for members of the representative (and co-regulatory) bodies to be an interest or specialty group.

However, in a more positive sense, the LCA appears to have simply seen the value in joining with the LFA. For groups to be powerful, they need to be seen as having special, desirable qualities that contribute to effective exercises of power and 'are contingent on circumstances'.²⁶⁶ At least for the relevant period and for

259 Ibid cls 38.1, 38.3.

260 'Bar Councils, Committees of Counsel, Law Institutes and Law Societies in Australia ... and LFA are eligible to apply for recognition as a Constituent Body of the [LCA]': *ibid* cl 6.1.

261 Geoff Dunlevy, President, Law Society of New South Wales, 'The Law Council's Coming of Age' (President's Message, March 2007). <<https://www.lawsociety.com.au/about/news/presidents-messages/009240>>.

262 We would suggest that this nomenclature is itself an attempt by the Bar Council to keep them together under their ambit.

263 The Bar Council, *Specialist Bar Associations* (2017) <<http://www.barcouncil.org.uk/about-the-bar/what-is-the-bar/specialist-bar-associations/>>.

264 Law Council of Australia, above n 31, cl 1.7.

265 Muzio and Ackroyd, above n 98.

266 Higley and Pakulski, above n 251, 5–6, citing Pareto, above n 222.

certain audiences, the LCA perceived the LFA as possessing the nous and legitimacy it sees itself as needing in the current political and business contexts to help drive the necessary transformation from a group of local associations primarily serving small practices and provincial interests to being a national representative body that is influential in national regulatory debates especially in relation to extending markets for legal services. The exchange, which is part of the background of the regulative bargain, is represented in the following comments made by the Law Society of NSW. It framed the LFA's admission to the LCA as:

marking a very significant milestone in the evolution of the Law Council in its coming of age as a national representative association. It will result in a reformed Law Council where the state-based law societies and bar associations continue to be the portal for membership ... [The LFA firms have] committed to taking out three-year membership of the state-based law societies. For the Law Society of New South Wales this will be a very positive outcome, as not all of the nine firms who make up the [LFA] take out membership of the Law Society for those of their solicitors practising in NSW. We expect this will result in a significant boost to membership of the Society.²⁶⁷

As with other situations in which industry operates as a political actor and not simply a subject, we can observe, then, a situation in which the directions and original sources of the terms of the exchange are conflating and start to intermesh.²⁶⁸ The Law Society further described the LFA's joining as:

an extremely important day for the legal profession ... [that] will reinvigorate the Law Council and ultimately result in the development of a high quality national reform agenda. The focus of the Law Society will now turn to ensuring the Law Council of Australia is adequately resourced to develop and implement a business plan with priorities focused on an enhanced national profession and increased harmonisation across a number of crucial policy areas at a national level.²⁶⁹

The LFA was able to exert direct pressure on all of the professional associations and the peak national professional association to give them a special position in the reform process. In turn, their involvement was seen by the LCA as crucial to the design and execution of the national reform.

Once brought in by the LCA as a member, the LFA was able to gain a pivotal vantage point to promote its agenda in the National Reform process. As with other powerful groups, their membership is overlapping, horizontally integrated, and circulating.²⁷⁰ The National Reform Taskforce,²⁷¹ the body established by COAG to design the law, was made up of government (the Commonwealth,

267 Dunlevy, 'The Law Council's Coming of Age', above n 261.

268 John Murray, Daniel Nyberg and Justine Rogers, 'Corporate Political Activity through Constituency Stitching: Intertextually Aligning a Phantom Community' (2016) 23 *Organization* 908.

269 Geoff Dunlevy, Law Society of New South Wales, 'President's Message: Law Society Influences Parties – More Constructive Justice Policies' (President's Message, April 2007) <<https://www.law.society.com.au/about/news/presidentsmessages/009236>>.

270 For a discussion of the interlocking nature of elites, see Huibert Schijf, 'Researching Elites: Old and New Perspectives' in Abbink and Salverda (eds), *The Anthropology of Elites: Power, Culture, and the Complexities of Distinction* (Palgrave Macmillan, 2013) 29, 32–33.

271 See National Legal Profession Reform Consultative Group, above n 214, 1.

NSW, Victoria and the Australian Capital Territory)²⁷² and the LCA, which already included the LFA as a member. A second formal body, the Consultative Group, was established to provide ongoing advice to the Taskforce and was made up of representatives from a range of stakeholders including the academy, various government departments, government regulators and the LCA, along with the LFA, legal, consumer, and business groups.²⁷³ Emblematic of how close these relationships are among leaders of these groups and the sufficient leverage of the LFA as the professional organisational elite, in 2016, after the reform process ended, the chair of the LFA became President of the LCA.²⁷⁴

But as with the other professional bodies, and as an under-documented reason for institutional stability, even stagnation, these are rotating roles, and therefore levels of enthusiasm and expertise vary and there is limited time for change.

VI CONCLUSION

The negotiation of the regulatory bargain between the state and the profession has a fundamental impact on the future direction of the professions. Whether made explicit or not, the issues for ongoing negotiation include: the continual evaluation and articulation of the profession's essential justification and especially its public service function; its structure and restructure; its social standing and development, including those of the bodies and segments within it; and in what locations, by what means, and ultimately for whom the values of professionalism are enforced. It is striking the extent to which the large law firms are driving this renegotiation process.

Large firms have reached a commanding position by way of their effective break from the traditional model of self-regulation, which is based on individualistic and community values, and associational controls. They have become their own locations of professional regulation and meaning, deploying hybrid forms of professionalism for their own purposes, including defensive ones. To a large degree, this influence has been indirect and incidental, as these organisations get on with their varied business activities within their own, increasingly international, business environments. Employee professionals are most powerfully managed in these contexts by the partner elite and the demands of largely corporate clients rather than the traditional, wider professional hierarchy or the community. Here, traditional mechanisms of collegiality and peer and court supervision have become far less relevant and often impractical.

However, in making this break, the large firms have also considerably benefitted from, and in the process advanced, the government's twin agendas of competition and consumer protection, while one of the 'losers' in the allocation

272 New South Wales Government, Department of Justice, *National Legal Profession Reform – Background Information* (7 October 2014) <<http://www.justice.nsw.gov.au/for-students-legal-profession/national-legal-profession-reform/background-information>>.

273 It is also publicly listed; *ibid*.

274 Law Council of Australia, *Our Presidents* <<http://www.lawcouncil.asn.au/lawcouncil/about-the-law-council-of-australia?id=10>>.

of benefits is the Legal Aid branch of the profession.²⁷⁵ Of the two agendas, the big firms have helped government elevate national and international competition as the driving dilemma of contemporary professionalism, and national uniformity, its central solution. However, having coordinated the plan with the government, the large firms have paradoxically also come back into the heartland of the traditional profession through the professional associations. They have done this by forming an elite interest group, LFA, and then gained a unique insider position as a member of the LCA with the same voting rights as a state professional association. This has allowed them into the centre of the national law reform arena as a main consultant group, as one of the architects, and as a primary beneficiary.

The elite firms' direct participation in the regulatory process entailed subtle, 'insider' elements, as well as explicit campaign activity. Rather than images of conflict, we see coordination and solidarity, at least on the surface. The LFA appears to have successfully persuaded the associations, or some of them, that their future security lies in implementing a national regime and aligning associational and large firm strategies. The associations' requirement in pursuing this representative work has been to retain their autonomy and co-regulatory roles with the local, State regulators, such that the new national regulators have ended up with largely only formal, oversight roles. With the government, the associations recognised the LFA as leaders and experts, and the LFA responded accordingly. While representing only around 9 per cent of all Australian solicitors, it produced over 30 per cent more submission material for the National Reform process than did all of Australia's law societies combined.²⁷⁶

The elite firms pursued their collective advantage by using the professional associations' pressing need for membership legitimacy and revenue. The large firms gained their formal voting power position on the Law Council, at least in part, through agreeing to arrange for their staff to become professional association members, which then gave them direct influence over the policy agenda of the Law Council and its member professional associations. Such organisational activities would usually be seen as undercutting associational authority. However, as this case study has shown, professional associations will adopt organisational strategies for their own projects and, as such, they will also accept alliances with professional organisations to manage the threat to their existence from increased external regulation. Indeed, through the National Reform process, the associations appear to have clawed back some power lost in recent decades. By contrast, the local, NSW regulator, the OLSC, appears to have had its position somewhat weakened, certainly since its high-level, proactive role in regulating ILPs under the AMS regime in the previous decade.

On that issue, the OLSC's approach to promoting greater management regulation through the AMS regime, which might then have extended to all firms, was by no means perfect. However, it was recognised internationally as a bold

275 See Hanlon, *Lawyers, the State and the Market*, above n 121, 32, for a list and analysis of the winners and losers of the liberalisation program.

276 See above nn 223–4.

first effort to institutionalise self-regulatory structures within a firm with a 'laudable' emphasis on collaboration between 'regulators, researchers, and firms'.²⁷⁷ Nonetheless, the LFA and others were able to stop the regulator retaining or widening its proactive role, notwithstanding that the Law Society of NSW was a co-regulator of the AMS program and now, under the *Uniform Law*, continues to be an advocate.²⁷⁸

In addition, and to signal another area of further research, the scale and sophistication of the LFA firms suggest they have the ability to implement mature practice management systems and ethics training and support. While the extent of their ethical infrastructures is unclear, since the spike in local ethics scandals a decade or so ago, there is, at the very least, a greater awareness among the big firms of the risks of poor conduct. While traditional claims of independence were made by firms to resist reform, for the profession as a whole, it seems there is no going back to the traditional model now that organisations are the most strongly influential site of professional ethics and standards. If done properly, extending regulation to the organisation can support individuals to discharge their obligations in the face of the immense commercial pressures we detailed in this piece. Although a tentative conclusion pending more research, it is possible that opposition to proactive, capacity-building entity regulation has frustrated continuing improvement in performance and conduct across the profession, particularly in smaller practices. At the very least, it seems likely that the professional associations, and more than possibly also the local regulators saw consolidating their jurisdictions within the proposed new 'national' profession as their immediate interests. This seems to have been pursued at the expense of using the opportunity for an examination and re-articulation of professional values in the full exploration of what entity regulation might offer.

Another related question for further research is how the professional associations will maintain their role as independent advocates for the profession as a whole when the profession has distinct segments with differing interests and values, and such starkly varied degrees of influence. The threat of withdrawal of their financial support through employee membership fees is currently latent, but could be realised. From the perspective of the big firms, until the National Reform process, the associations had largely ignored their interests and practices. Thus, ultimately the process was a win for them in gaining influence, even if the LFA did not achieve all it wanted. Indeed, in light of our analytical theme of large professional service firm power, it was surprising how many things it wanted were not obtained and the extent to which its growing influence seems to have been constrained by the institutional interests and habits of the associations. Schneyer argues, in the US context, that the large firms will either leave the professional associations or else act as their own, independent lobby group as we have seen in Australia. They may even insist on a separate division within the

277 In reference to the Australian (NSW and QLD approach, see Elizabeth Chambliss, 'Queensland Law Firms Partner with Regulators and Researchers to Improve Firms' Ethical Culture' on *JOTWELL* (Article Review, 24 January 2011) <<http://legalpro.jotwell.com/queensland-law-firms-partner-with-regulators-and-researchers-to-improve-firms-ethical-culture/>>.

278 Moffitt, above n 204.

professional association,²⁷⁹ as has started to occur in England and Wales. For now, the financial support of large law firms is important to the professional associations' viability, tethering the associations to large organisations and the competition program.

In the making of the *Uniform Law*, it appears that the LFA has inserted itself as a significant new actor in the regulative bargain and enjoys a unique and very powerful position for a relatively small group of practitioners. From this it has been able to successfully advocate for the further institutionalisation of arrangements that express values of efficiency and rationality. The fiduciary and humanistic values associated with the traditional view of legal practice are implied, then, much more opaquely through the systems and services large firms offer for their corporate clients where technical competence is at a premium. This group has been able to extend its arena of operation in the delivery of professional services to a national market, rather than a series of provincial markets. It has helped establish uniformity of conduct and practice rules in the two states where 70 per cent of all Australian solicitors practice. As a sign of its potential growing strength in the future, the LFA has been crucial in establishing a template for a fully national law, which could be extended to other states in future. In particular, that template provides for mobility of practice for individuals between states and a national regulator creating a fully national regime, and the LFA has stated its intention to continue with this national reform program.²⁸⁰ It is likely, though, that its fortunes here remain dependent on the right mixture of leaders among the main professional bodies with established interests in the national reform agenda and perhaps even additional support from the growing mid-sized firms.

It seems that, in the future, there may be increased support from the west coast to reduce or remove the east coast versus west coast divide. The Western Australian ('WA') Law Society's 2014 review of the national law scheme²⁸¹ was largely favourable and took pains to explain to the WA government that the scheme was not simply a Commonwealth takeover.²⁸² Further, the review incorporated many of the arguments raised by the LFA in support of national arrangements.²⁸³ As a final illustration of LFA influence, including in WA, the President and Senior Vice President of the WA Law Society at the time were both LFA member-firm lawyers,²⁸⁴ the Society consulted with the LFA for its review²⁸⁵ and five of the 14 submissions made to the review were from LFA member-firms.²⁸⁶

279 Schneyer, above n 195.

280 Garber, above n 216.

281 See summary of findings: Law Society of Western Australia, 'Review of the Legal Profession Uniform Law' (Report prepared for the Legal Profession Uniform Framework Ad Hoc Committee of The Law Society of Western Australia, 26 August 2014), 45–6.

282 Ibid 15–16.

283 Ibid 17.

284 Ibid 2.

285 Ibid 4.

286 Ibid 47.

The professions have been described as ‘lords of the dance’ that help choreograph some of our most important institutions and their restructuring.²⁸⁷ As illustrated in this article, the large professional organisations are becoming increasingly influential in deciding how this dance goes. Our article responded to calls for research to better understand the ways in which professional organisations gain authority, including by interacting with the wider profession.²⁸⁸ There is still a need for closer examination of the dynamics between these main players, who are reframing what professionalism means today, including what occurred during the National Reform process. The *Uniform Law* has helped institutionalise, more than any other single reform in Australia, the ‘hemispheres’ between those firms serving primarily corporate clients and those largely serving individuals, and between the east coast and west coast. However, these themes are less importantly about turf battles – though drawing and defending jurisdictions is a critical feature – as they are a part of the contest within the profession inherent in the project of liberalisation. It is a contest, which other professions will also recognise, to decide what the professional offering is.

287 Brock, Lelebici and Muzio, above n 85, 9.

288 Muzio and Kirkpatrick, above n 4, 390.