

Occupational Licensing in Tasmania: New Competition Policy and Administrative Law

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Introduction

Administrative law has become a vital component of democratic government in Australia, its philosophy being that 'citizens are entitled to protection from arbitrary or unlawful exercises of power' and that 'they can expect openness and accountability in their dealings with government'.¹ Thus, it is essentially concerned with:

- Protecting the rights of individual citizens affected by administrative decisions;
- Ensuring openness and accountability of the Government; and
- Improving the standard of decision-making.²

This is necessary as the legislation and the implementing administrative state have grown to such an extent that it is impossible for Parliament, and traditional methods of accountability, to keep pace.³ This, coupled with the decline in notions of ministerial responsibility, and the inadequacies of the court system,⁴ has seen an increased need for control over primary decision-makers. Administrative law has

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1 Justice Jane Mathews, 'Future Directions in Administrative Review', in K Cole (ed) *Administrative Law and Public Administration, Form vs Substance* (Administrative Law Forum: Australian Institute of Administrative Law Inc, 1996) at p 322.

2 Ibid.

3 L Maher, 'The Australian Experiment in Merits Review Tribunals', *Courts, Tribunals and New Approaches to Justice* 74; A Mason 'Twelve Years of Administrative Review in Australia', (1990) *Commonwealth Law Bulletin* 77-78.

4 Courts are limited in their ability to provide redress for individual citizens as they are prohibitive in terms of cost, time and money. See Mason, 'Twelve Years of Administrative Review in Australia', note 3 above, pp 1019-1020; R Douglas and M Jones, *Administrative Law: Commentary and Materials*, (2nd ed, Federated Press, 1996) pp 11-12, 24. In addition, access is limited due to stringent standing rules (Mason, above, pp 1019-1020) whilst powers of review are limited to the law, not the merits of a case (Douglas and Jones, *Administrative Law: Commentary and Materials*, p 24).

provided both a means of control, and an instrument for implementing policy.⁵ However, the checks and balances established by statute are in danger of becoming paper swords as economic rationalism manifests itself in the doctrines of small government, and also managerialism in the public service context.⁶ A study of three occupational licensing boards in Tasmania reveals the tension between competing government policies.

Methodology

Goldring and the Missing Link

This article does not aim to provide a comprehensive coverage of every aspect of the operations of the three boards in an evaluative exercise into what constitutes an ideal tribunal. Rather it seeks to highlight the detrimental effect of economic rationalism in the guise of New Competition Policy upon administrative law, as demonstrated through occupational licensing boards in Tasmania. Thus, Goldring *et al*⁷ is used as a mere guide in identifying areas in which difficulties have arisen as a result of these tensions, creating repercussions for efficiency, efficacy, and procedural fairness in the boards' operations.

Significance of this Study

A central concern throughout this article is the effect of anti competitive policy on occupational licensing. Linkage between funding, efficiency and efficacy is largely ignored by authors such as Goldring, and others interested in tribunal operation, and occupational licensing in general. Australia's New Competition Policy (NCP) places a greater importance on the cost factor,⁸ and thus studies into administrative law in the future should both explore the linkages between cost and operation more fully, and place more emphasis on the cost

5 Ibid.

6 Justice Mathews 'Future Directions in Administrative Review', note 1 above, at p 323, alludes to this fact through reference to the changes since the 1970s which have seen the nature and practice of government and the public service influenced by 'financial imperatives'.

7 J Goldring, R Handley, R Mohr and I Thynne, 'Evaluating Administrative Tribunals', in S Argument (ed) *Administrative Law and Public Administration; Happily Married or Living Apart Under the Same Roof?* (Australian Institute of Administrative Law Inc, Canberra, 1994) pp 160-190.

8 *Independent Committee of Inquiry into Competition Policy in Australia. National Competition Policy: The Hihner Report*, (AGPS, Canberra, 1993).

factor when seeking explanation for administrative failure. The analysis incorporates cost in recommendations and discussion.

Of the three boards studied, there are strong arguments in favour of the retention of the Veterinary Board of Tasmania⁹ (Veterinary Board) and the Psychologists Registration Board¹⁰ (Psychologists Board). But the Travel Agents Licensing Board¹¹ (Travel Agents Board) does not operate as intended, and was arguably the incorrect form of government intervention at its birth. Essentially, all three boards could be improved in terms of their adherence to principles of procedural fairness, but most of these problems stem from lack of resources, not a climate of secrecy.

First, it is necessary to examine New Competition Policy, and determine if it is rhetoric or a real governmental direction.

New Competition Policy

Small government policy as a national direction will impact upon the operation of occupational licensing boards in Tasmania. This paper draws on NCP as one aspect of small government.¹² These impacts are inevitable, as economic rationalism, under the guise of NCP is perceived by government as a necessary evil.

Rhetoric or Reality?

New Competition Policy has been described as a 'prescription for microeconomic reform through competition policy'.¹³ It forms the ideological backbone for an economic reform agenda which rests upon the notion that to compete globally, there is a need to be competitive.¹⁴ The Independent Committee of Inquiry into Competition Policy (the Committee) defined NCP as including six main elements,

9 *Veterinary Surgeons Act* 1987.

10 *Psychologists Registration Board Act* 1976.

11 *Travel Agents Licensing Act* 1987.

12 Other aspects relating to small government, beyond the scope of this article, include contracting out and privatisation of government services. For further research see for example A Stuhmcke 'Administrative Law and the Privatisation of Government Business Enterprises: A Case Study of the Victorian Electricity Industry', (1997) 4 *Australian Journal of Administrative Law*; Administrative Review Council, *The Contracting Out of Government Services*, Issues Paper (February 1997).

13 L Carver, 'Consumers, Citizens and the National Competition Policy' (1996) 55 *Australian Journal of Public Administration* 88.

14 *Ibid.*

one of which is 'reforming regulation which unjustifiably restricts competition'.¹⁵

The effects of economic rationalism are such that occupational licensing and administrative law will be affected regardless of whether NCP is an economic ideology, or a real direction. There are indications that public servants do not view NCP as a serious policy imperative.¹⁶ However, this is more likely to be a sign of public service reluctance than government initiation.¹⁷

New Competition Policy has been enshrined in legislation at both the federal and state level,¹⁸ indicating a shift towards making rhetoric reality. Despite the demise of the Federal Labor Government, who first instigated NCP, the Coalition Government's focus on economic efficiency means costs and spending will be prime factors of concern, regardless of whether this is in the form of NCP, or a public service rationalisation drive.

Occupational licensing is related to this element, as its effect is to limit suppliers entering the market-place of a particular occupation. Although the Committee has excluded anti-competitive restrictions on professional practice imposed by state law from proposed market conduct rules,¹⁹ reviews of all state registration laws are mandatory. It is with this in mind that all three boards have been examined.

Limitations

It is necessary to turn to the specific difficulties facing the three boards studied. Factors discussed include the limitations imposed by fiscal restraint, procedural limitations, and the unique problems associated with an unbalanced board composition for the ability of a board to meet its functions. Other areas for analysis include the need for a broad geographical dispersion of board members, and the particular impediments to enhanced achievement of objectives, notably the barriers to complaints. It is recommended that the dual problems of such barriers, and limited intellectual access, be countered by increased advertising. It is noted that the unique problem confronting

15 F Hilmer, 'Forum: The Bases of Competition Policy' (1995) 80 *Trade Practices Commission Report Bulletin* 1.

16 Personal communication with the Registrar of the Veterinary Board of Tasmania, 27 September 1996.

17 Smaller government means a smaller public service, and jobs at stake. It is perhaps easier for a public servant to move slowly in implementation.

18 *Competitive Policy Reform Act* 1995 (Cth).

19 *The Hilmer Report*, note 8 above, at p 136.

the Psychologists Board in relation to protection from unqualified persons exist, but are unlikely to be resolved. Finally, the issue of qualifications versus competency as criteria for the granting of licences is examined. Similar cost barriers to ideal solutions are discussed in relation to the provision of alternate avenues of appeal for all three boards.

Funding

There is evidence to suggest funding limitations have a number of negative effects on the operation of Boards, which could lead to mutations of procedural fairness in decision-making. These are:

- Inhibition of investigation;
- Fear of appeals;
- Dependence on the government for what funding there is; and
- Reliance on the government for staff, leading to vulnerability to governmental policy influence.

Whether limitations on funding are a deliberate attempt to limit and guide the power of occupational licensing boards for political reasons, or a mere side effect of a climate of economic restraint, the effect is 'non-legislative' limitations of powers conferred by Parliament upon boards. This effect is likely to increase as the Tasmanian Government is forced to cut spending and address the State's economic woes. These 'non-legislative' limitations stem from government insistence that boards be self-funding.²⁰

The shift to self-reliance and self-funding operation will result in the need for increased fees to cope with additional costs. In the case of the Veterinary Board, Mike Heynes envisaged a rise in the licence fees to almost \$400.²¹ Such costs may prevent some veterinarians registering in Tasmania. A decrease in membership would result in less choice for consumers. A similar scenario would operate in the case of all three boards. This restriction of supply is opposed to market principles, and in particular the NCP. Thus, in the process of making boards more independent in response to market driven reforms, the market is disturbed.

20 Personal communications with the Chairman of the Psychologists Licensing Board, 27 September 1996; the Chairman of the Veterinary Board, 27 September 1996; and the Secretary of the Travel Agents Board, 30 September 1996.

21 Personal communication with the Chairman of the Veterinary Board, 27 September 1996.

Secondly, such a shift would result in all boards facing the problem experienced by the Psychologists Board. Concern exists about the costs associated with an appeal, the only avenue being the Supreme Court.²² Whilst this may create incentives to make a correct decision, it may jeopardise impartiality if a board is aware it will have difficulty meeting the costs of an appeal. This is more likely to result in a more lenient approach with psychologists than a 'hard line'. As Mike Heynes noted,²³ once a user pays system is introduced for Crown law services, boards will need additional funding to cover the cost of legal advice to the board, which is currently hidden. Whilst this may grant freedom to the boards to hire who they wish for advice, the costs may be prohibitive.

In addition, the cost factor can be seen to impact on the effectiveness of the board as the part-time nature of membership, and low rates of pay serve as a disincentive for members to become heavily involved in the board's work. Tasmania's jurisdiction is too small, the number of complaints are too low, and the entire State is too insufficiently funded to justify full-time members. Thus, the balancing act of economic rationalism and effective checks on occupations results in a trade-off of cost for effectiveness.

Investigative Powers

Thirdly, self-funding will exacerbate the boards' inhibition in their investigative roles, due to cost concerns. In order for boards to determine if disciplinary action is required as a result of a complaint, it is necessary to conduct investigations to gather evidence so as to inform board members. All three boards are empowered to perform such investigations under their relevant acts,²⁴ and to appoint people to carry out these tasks.²⁵ There appears to be a strong relationship between the provision of financial and departmental support, and the ability of a board to carry out investigations. The Veterinary Board has guaranteed financial support by virtue of government recognition of the social value that the Board possesses.²⁶ This is demonstrated by

22 Personal communication with the Chairman of the Psychologists Board, 27 September 1996.

23 Personal communication with the Chairman of the Veterinary Board, 27 September 1996.

24 *Psychologists Registration Act* 1976 (Tas) s 7(3) and s 7(4); *Travel Agents Act* 1987 (Tas) s 8(c), s 20(1), and s 20(2); *Veterinary Surgeons Act* 1987 (Tas) ss 44(1) and 48(1).

25 Ibid.

26 Personal communication with the Registrar of the Veterinary Board, 29 September 1996.

the fact that the Board appoints two investigators from the Department of Primary Industry and Fisheries, both qualified veterinarians, to perform investigations independent of the Board.²⁷

This contrasts with the Psychologists Board, which selects two members to perform investigations.²⁸ The effect of this approach is that the Board members must serve as investigators, judge and jury where a formal hearing is required. This interferes with the impartiality of the Board members when seeking to determine the appropriate course of action. This approach is defended by members of the Psychologists Board on grounds of cost effectiveness, and problems in access to investigative officers with the necessary technical knowledge.²⁹ At this stage, the Department of Health and Community Services does have investigative officers, but not with sufficient expertise in psychology to be of use to the Board. The technical nature of the profession, and the limitations of funding operate to force the board to jeopardise procedural fairness by using two of five Board members to investigate matters. This contrasts vividly with the Veterinary Board who have two independent investigators, who can collaborate evidence at formal hearings,³⁰ and are each highly skilled and experienced in veterinary science.

The Travel Agents Board benefits from investigation of complaints by Office of Consumer Affairs (OCA) investigators. This conflicts with parliament's intentions that the Board be self-sufficient,³¹ relying only on licence fees for funding. As investigations are carried out at a cost to the OCA, this disguises the real running costs of this Board. However, it does ensure the independence of Board members from investigations should a formal inquiry ever be held. What is recommended is that boards maintain close links with departments, so as to allow adequate and independent investigation to take place. Boards cannot make fair decisions without unbiased evidence. But this must be balanced against the economic cost of such investigations. It is argued that reducing bias in board decision-making requires guarantees of financial support for independent investigation,

27 Ibid.

28 Personal communication with the Chairman of the Psychologists Board, 29 September 1996.

29 Ibid.

30 Personal communication with the Registrar of the Veterinary Board, 29 September 1996.

31 Tasmania, *Parliamentary Debates*, Legislative Council, Vol IX No 4, p 4344.

but that economics can be taken into account by using departmental resources rather than private investigators.³²

Having noted some of the negative effects that funding restraints have on a board's operation, a factor largely excluded by Goldring, it is necessary to turn to an analysis of the boards' functions. Analysis will be based on Goldring's criteria, but modified to highlight particular problems confronting the boards studied.

Procedural

Rules of procedural fairness apply to all three boards.³³ Since *Kioa v West*, a common law duty exists to accord procedural fairness unless a clear statutory exemption exists. As Mason J stated in *Kioa v West*:

The critical question in most cases [in the context of procedural fairness] is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?³⁴

The level of content is therefore flexible, and:

judges have shown a growing sensitivity to the need to place practical limits upon the demands of procedural fairness lest they become too onerous.³⁵

Thus, in analysing the boards, what is necessary for procedural fairness will be tempered by the costs involved. This is recognised in the *Veterinary Surgeons Act 1987*³⁶ where it is noted that the Board will observe the rules of natural justice with as little formality, technicality and as much expedition as proper consideration permits.

32 For example, in Western Australia, the Psychologists Board hires a firm of solicitors to perform investigative work. Given Tasmania's low number of complaints, this cost may not be justified. Furthermore, lawyers would not possess the necessary technical expertise desired in an investigator by current Board members: personal communication with Iain Montgomery, 27 September 1996.

33 Even before the decision in *Kioa v West* (1985) 159 CLR 550, occupational licensing boards were bound by rules of procedural fairness. This is because rules of natural justice applied where an individual's property was affected by an administrator's decision. Licenses have monetary value and are of the proprietary type (*Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; *Ridge v Baldwin* [1964] AC 40, at 68-71). *Kioa v West* requires that an individual citizen's interests must be affected in a direct and immediate way. Procedural fairness is excluded where there is a legislative intention to the contrary.

34 *Kioa v West*, at 585.

35 M Allars, *An Introduction to Australian Administrative Law* (Butterworths, 1990) p 262.

36 Section 45(9), subsections (b) and (c).

Hearing Rule

One of the principles of natural justice is that no one shall be condemned unheard.³⁷ Provision is made for compliance with the need to give notice, and grant opportunity to be heard in the establishing Acts of all three boards.³⁸ In reality all three boards comply with this rule at an informal level prior to the formal inquiry stage. For example, the Travel Agents Licensing Board sends a departmental representative out to discuss non-compliance matters with an offending travel agent before any action is taken.³⁹ The Veterinary Board relies on written correspondence to determine whether a complaint requires further investigation.⁴⁰ The Psychologists Board requires the accused to come in for an informal discussion.⁴¹ In all three cases, the accused is made aware of the nature and particulars of the charge and is thus given the opportunity to defend himself in relation to the pending charge. Thus, notice and a chance to be heard are given in all three cases.

In addition, the chance to be represented at a formal inquiry is also granted under all three Acts. And whilst it is stipulated that reasons must be provided for a determination under the *Veterinary Surgeons Act* and the *Travel Agents Act*, the Psychologists Board has adopted the practice of providing reasons. As there is no rule at common law or in natural justice that requires reasons be given for administrative decisions,⁴² it is recommended that when the *Psychologists Board Act* is reviewed, a requirement for reasons be included in the Act to ensure that the common law hearing rule principles are enshrined in legislation.⁴³

37 R Bird (ed) *Audi Alteram Partem; Osbourne's Concise Law Dictionary* (8th ed, Sweet and Maxwell, 1983) p 39.

38 *Veterinary Surgeons Act* 1987 (Tas) s 44(2); *Psychologists Registration Act* 1976 (Tas) s 20; *Travel Agents Licensing Board* 1987 (Tas) s 32.

39 Personal communication with the Registrar of the Travel Agents Licensing Board, 30 September 1996.

40 Personal communication with the Chairman of the Veterinary Board, 27 September 1996.

41 Personal Communication with the Registrar of the Psychologists Board, 30 September 1996.

42 *New South Wales v Osmond* (1985) 159 CLR 656 at 662. It is however noted that the courts appear to be heading toward an acceptance of a principle whereby reasons be provided for administrative decisions. See *Croatia S Sydney Soccer Football Club Ltd v Soccer Australia Ltd* SCNSW Unreported Judgement, 23 Sept 1997. In this case, Einstein J notes that depending on the particular circumstances of a case, fairness may require a board to provide reasons for its decisions.

43 The Board intends to have the Act reviewed by the year 2000.

Evidence Rule

'A duty to afford procedural fairness need not imply that the administrator must comply with the technical rules of evidence'.⁴⁴ Boards are basically 'masters of their own procedures' at common law,⁴⁵ thus they are entitled to use any evidence which is logically probative.⁴⁶ All three boards have the freedom to use any evidence relevant to the case, including hearsay. This flexibility allows procedures to be modified to suit the level of formality of discussion, which is important as it allows time to be spent resolving the issue at a lower level rather than entangling discussion in admissibility of evidence and other legalistic sidetracks. Evidence of such flexibility is visible in the operation of the Veterinary Board. As the level of formality of a hearing increases so too does the stringency of the rules of evidence. The formal hearing stage utilises quasi-court evidence admissibility requirements so as to afford maximum protection of the accused person's rights.⁴⁷ A similar approach is adopted by the Psychologists Board.⁴⁸ The Travel Agents Board has not had cause to hold a formal inquiry as yet, and thus procedure in regard to evidence has not been established.

Rule Against Bias

A case of non-pecuniary bias could conceivably arise where board members serve dual roles of investigator and judge, as occurs with the Psychologists Board.⁴⁹ The fact that a majority of the Board is left independent may save the Board from challenges on the grounds that a reasonable person may apprehend bias.⁵⁰ It is recommended that the Board use independent investigators so as to ensure that no bias ex-

44 M Allars, *An Introduction to Australian Administrative Law* (Butterworths, 1990) p 269.

45 *R v War Pensioners Entitlement Appeal Tribunal; Ex Parte Bolt* (1933) 50 CLR 228.

46 *R v Deputy Industrial Industries Commissioner; Ex Parte Moore* [1965] 1 QB 465, per Diplock LJ at 488; *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666; *Mahon v Air New Zealand* [1984] AC 808.

47 Personal communication with the Registrar of the Veterinary Board, 27 September 1996.

48 Personal communication with the Registrar of the Psychologists Board, 30 September 1996.

49 Personal communication with the Chairman of the Psychologists Board, 27 September 1996.

50 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70; *Bond v Australian Broadcasting Tribunal* (1989) 89 ALR 185; *R v Sussex Justice's, Ex Parte McCarthy* (1924) 1 KB 256; *R v Watson, Ex Parte Armstrong* (1976) 136 CLR 248; *R v Commonwealth Conciliation and Arbitration Commission, Ex Parte Angliss Group* (1969) 122 CLR 546.

ists. This is in the Board's interest as it would limit the opportunity for appeal on the grounds of a failure to accord procedural fairness. Bias of a non-legal nature may arise where a board is dominated by the profession which it seeks to regulate.

Jurisdiction and Functions: Boards Acting Under Another's Policy?

Theoretically, all three boards are intended to control registration or licensing, as well as discipline practitioners where required,⁵¹ so as to monitor and regulate standards of competency in Tasmania. There has been a shift towards allowing national professional associations to set minimum qualification standards.⁵² This is essentially a delegation of the board's power to determine minimum levels of competency. The advantage of this approach is that national uniformity in acceptable qualification standards is ensured. The disadvantage of this is that it can lead to capture of the boards by the relevant industries, and thus jeopardise independence. This risk is accentuated where the majority of representation of the board consists of members nominated by the associations themselves, or are members of the association in their occupational capacity. The following table demonstrates that this is the case for all three boards.

Table 1: Board Composition

BOARD	MEMBERS	% INDUSTRY REPS	% GOVT REPS
Veterinary Board	5	60	40
Travel Agents Board	4	50	50
Psychologists Board	5	100	0

Capture of the process of granting licences opens the chance of occupational industries protecting their own existing members. This tyranny of the status quo⁵³ means a profession may impose more

51 *Psychologists Registration Act* 1976 (Tas), Divisions I, II and III; *Travel Agents Act* 1987 (Tas) s 8; *Veterinary Surgeons Act* 1987 (Tas) s 5.

52 The Psychologists Board adopts the national stance of the Australian Psychological Society with regard to qualification requirements, whilst the Veterinary Board adopts the position of the Australian Veterinary Association formulated at the Annual Veterinary Boards Conference (personal communication with Mike Heynes, 27 September 1996).

53 Refer to discussion on limitations of the current system for further analysis of this concept under the section headed 'Rule Against Bias'.

stringent requirements on new competitors so as to limit competition and protect their own place in the market. In addition, the input of such associations could lead to further compromises in autonomy. This could impinge on the boards' independence and allow national considerations of the professions to override the independent nature of the boards, replacing independent inquiry into a matter with professional policy.

Evidence of deference to the national opinion was evident in interviews with board members, particularly members of the Psychologists and Veterinary Boards.⁵⁴ Whilst national uniformity is an admirable goal, consistent with integration into global markets through mutual recognition of qualifications, the purpose of the boards must be remembered. The State Government chose to intervene to protect consumers by compensating for information failures. Control is to protect the individual, and the community, as well as the profession. This must be given primacy by board members, as complete dominance by professional associations lessens the role of the boards, and casts doubt on the need for their existence if they are not meeting their objectives in an unbiased manner.

The policy of government may impinge on boards' decisions where large costs are involved. The 1996 Chairman of the Veterinary Board points to current reliance upon Crown legal advice. This could be overcome by using private legal advice, as the Western Australian Psychologists Board does.⁵⁵

In addition, members of a board who are nominees of the Minister may feel pressured to bow to the prevailing atmosphere of financial restraint in government. The risk to consumer protection is acute as these boards all lack consumer representation. Fear of costs may result in the use of power to charge an investigated practitioner for costs where it would otherwise not have occurred. This has not happened yet in any of the boards, as none have used the power to charge costs. To do so would involve the use of an irrelevant consideration in decision making, and could lead to a challenge in court, a more expensive result. It is recommended that the composition of the boards be adjusted so as to balance professional, government and consumer

54 Personal communication with the Chairman of the Veterinary Board, 27 September 1996; personal communication with the Chairman of the Psychologists Board, 27 September 1996.

55 Personal communication with the Chairman of the Psychologists Board, 27 September 1996.

interests to avoid the domination of a board's process by a prevailing policy drawn from outside the Act itself.

Board Composition

Despite strong arguments in favour of community, or non-professional representation on boards, this proves to be problematic. This is due to difficulties in ascertaining which community should be represented, and ensuring an independent role is maintained by this member.

The Need for Community Representation

The underlying purpose of the three boards was to protect the community from the repercussions of information failure in relation to the professional services available. Thus, community representation is desirable to ensure consumer interests are being adequately protected and represented, otherwise domination of a board's functioning by a professional association, or government direction, may jeopardise the ability of the board to operate effectively in terms of its objectives. A benefit of including community representation is an enhanced public perception of the board's underlying role as protector of community interests. This will encourage complaints to the boards, a particular problem with the Psychologists Board. It will also provide the board members with an insight into community preferences and viewpoints, which may not otherwise be considered.⁵⁶

Problematic Nature of Community Representation

In practice, however, a community representative may become a quasi-professional, as community representatives tend to adopt the viewpoint and stance of other board members over a period of time.⁵⁷ David Wills notes that it would require a very strong individual with a clearly defined role to prevent this occurring.⁵⁸ Alternatively, frequent rotation of the position of community representative may help overcome this problem of socialisation.

A second problem arises in determining which community the community representative should be drawn from. The representative may

56 As the Registrar of the Veterinary Board has noted, the lay member brings a different perspective to the deliberations of the Veterinary Board as a member independent of the AVA. Personal communication with the Registrar of the Veterinary Board, 27 September 1996.

57 Personal communication with the Registrar of the Psychologists Board, 30 September 1996.

58 Ibid.

represent the general community or the attentive community. It is argued that as only people with interests in the services offered by the professions are affected by a boards' decisions, only these communities should be represented. Members of voluntary community organisations with an interest in the operations of the boards could also form a pool of potential board members. The inclusion of such community organisation members may operate to mitigate some of the difficulties involved in lay persons understanding the technicalities associated with veterinary and psychological practice. Given that technical barrier may be still be too large, there is a strong argument for retaining majority membership of professionals on the boards. This is not necessary in the case of the Travel Agents Board, as this occupation does not involve the attentive public in the same sense as the other two boards do, and is not as technical in nature.

Geographical Dispersion of Board Members

The geographical dispersion of board members is as vital as the composition of the board. The Veterinary Board, with members dispersed across the state, in Smithton, Hobart and Devonport, has a wider, and arguably more effective network than the Travel Agents and Psychologists Boards. It is more effective as it ensures a wider proportion of the population is acquainted with, and has access to board members. This broad network established in numerous towns enables the Veterinary Board to have a greater 'intelligence capacity' than a board with all its members located in Hobart.

The importance of geographical dispersion is demonstrated by the case of the Travel Agents Board, who have experienced difficulties in ensuring that agents in remote areas are licensed.⁵⁹ This can be traced to the fact that the Travel Agents Board members rely upon a close, but narrow, personal network for information gathering.⁶⁰ To broaden the scope of the network would expand their base for information diffusion and collection. Costs associated with meetings could be overcome through the use of technology such as video or telephone conferencing, or computer based communications.

⁵⁹ Problems have been experienced in Penguin and Flinders Island: personal communication with the Registrar of the Travel Agents Board, 30 September 1996.

⁶⁰ Ibid.

Impediments to Enhanced Achievement of Objectives

This expanded network may partially overcome the barriers to people complaining, as personal recognition of a board member may alleviate concerns. This is particularly a problem for the Psychologists Board where the biggest barrier to action by the Board is the barriers to people complaining.

The Board is characterised by a low number of complaints. Whilst this may mean there is no problem in Tasmania, Iain Montgomery and David Wells suggest under-reporting is the reality. This problem exists for all boards, but is particularly acute in the case of clients of psychologists. A client may feel embarrassed, or fear public exposure of their problem. Whilst this is true of medical patients, the perceived stigma attached to users of psychological services may operate more to prevent a person complaining. A client may simply be unaware that the behaviour or treatment is wrong.⁶¹ In addition, the power imbalance between the psychologist and client is unequal to a degree where a client may doubt that his word is sufficient evidence against the word of the psychologist.⁶² Thus, a range of social and psychological factors may discourage a person from complaining. The nature of the service requires one of the persons present at the time to talk and to have evidence. This may be compounded by ignorance of the Board's existence, or ignorance of the operations of the Board.

Ways to encourage complaints could include public education through posters and stickers in the waiting rooms, stating the role, and methods used by the Board. This would enhance public awareness of the presence of the Board.

Intellectual Access

The incidence of low numbers of complaints for the Psychologists Board may be exacerbated by limitations on intellectual access resulting from lack of publicity of the Board's existence and its functions. Goldring's criteria detail a number of aspects relating to access. Intellectual access, or the ease with which a board's procedures and decisions may be understood, is just one of these.

This is a problem for the Travel Agents Board, where a lack of advertising meant the Board took six years to get all Travel Agents un-

61 Personal communication with the Chairman of the Psychologists Board, 27 September 1996.

62 Ibid.

der the Act and compensation scheme.⁶³ Advertising the presence of all three boards, and their basic functions would increase awareness, and enhance intellectual access.

Overcoming the power imbalance is not as simple. Procedural fairness dictates that a psychologist must be aware of the charge he faces, and the circumstances. Confidential complaints would not allow a psychologist to defend himself. Perhaps guarantees that the matter will not be made public would encourage clients to complain. Although secrecy would not remain long as the only avenue of appeal is the Supreme Court. What is recommended is the use of taped evidence or the use of video or phone conferencing for hearings so as to avoid the necessity for confrontation between psychologist and client. In addition, the provision of another avenue of appeal other than the Supreme Court would be preferable, not only for privacy reasons, but because of the prohibitive costs involved in such appeals, both for the individual and the board.

Protection from Unqualified People

Those who do not use the label of psychologist are still likely to remain outside the Board's reach. The only way to exercise control is to prove a person is carrying out psychological practices within the meaning of section 2 of the *Psychologists Registration Act* 1976. Thus, social workers, counsellors, and those who call themselves by names other than 'psychologist' can evade the Psychologists Board's scrutiny. This is because the Board will not be aware that such a person is carrying out psychological practices unless a complaint is made, or real evidence is available.⁶⁴ The Board, in compliance with the no evidence rule, cannot launch investigations on the basis of suspicion or rumour. Thus, not all people are protected from harmful practices, and not all the practice of psychology in the state is subject to the Board's scrutiny.

Qualification versus Competency

Another impediment to the achievement of objectives is the problematic question of licence qualifications. A common problem asso-

63 School clubs and social groups were identified as a particular problem: personal communication with the Registrar of the Travel Agents Board, 30 September 1996.

64 Personal communications with the Chairman of the Psychologists Board, 27 September 1996, and the Registrar of the Psychologists Board, 30 September 1996.

ciated with boards, such as the Veterinary Board and the Psychologists Board, is that qualifications form the basis of licensing requirements, not competency. Thus, as John Gillham pointed out,⁶⁵ although he hadn't practiced for twenty years, he was technically qualified to treat animals. Although in such cases it would appear logical for the board to use its discretionary power in granting registration, and demand that an examination be passed. Such examinations include competency components. An alternative would be the inclusion of competence requirements in licensing criteria.

Such a proposal is currently under consideration by the Australian Psychologists Society in relation to national standards for psychologists. Ideally, competence requirements should form part of the qualification criteria, and regular tests would ensure on-going training was undertaken, thereby ensuring the tyranny of the status quo did not occur, and higher standards were maintained in the state. A program similar to those required by the Nursing Board would be ideal. But the need for this must be weighed against the costs. John Gillham notes that the time and money involved in administering such a scheme would probably be prohibitive.⁶⁶ A solution to this cost for individual boards would be to have a central licensing authority which could administer competence tests in co-ordination with the boards. However, the social significance of the boards' roles must be considered in determining whether the additional resources are justified. In a climate of economic conservatism, such extensions of government intervention are unlikely to be approved.

Outcome

Avenues of Appeal

A similar cost barrier confronts an otherwise ideal solution to an additional problem. The only avenue of appeal for a decision made by all three boards in this study lies in the courts. As previously discussed, this is particularly a problem for the Psychologists Board, as the costs of appeal to the Supreme Court could be prohibitive. But the rights of an aggrieved psychologist, unhappy with a decision, are also limited to his ability to hire a suitably skilled lawyer. It is one of the basic aspects of natural justice that a person has an opportunity to appeal against a decision they believe to be unfair. It is argued that

⁶⁵ Ibid.

⁶⁶ Personal communication with the Registrar of the Veterinary Board, 27 September 1996.

the best opportunity is not given where the only avenue of appeal is too expensive, time consuming, and limited to appeals on issues of law.

What is desirable is a state version of the Administrative Appeals Tribunal (AAT), which could apply to all Tasmanian Government decisions, at the local and state level, with similar powers of review as those which the AAT possesses. This would form an intermediate step between the primary decision-maker and the courts. This would have the benefit of providing additional avenues of appeal, on the merits, for practitioners aggrieved by statutory decisions, whilst also serving to lighten the workload of the courts. However, the cost associated with such a scheme must be less than the benefits conferred. The growth of a legal lesion on the AAT, and the subsequent warping of its role and its operation, demonstrates that caution is required before committing resources to sustain such a tribunal. While this approach is recommended, it is unlikely to occur given the current direction of government policy which is in favour of small government. If this push continues, administrative law will have reached its high tide, and the creation of new tribunals is unlikely.

Given this push towards economic rationalist principles, inefficient and ineffectual boards are unlikely to survive. Thus, it is necessary to turn to the theoretical underpinnings of occupational licensing, and the justifications for the establishment of the three boards in question, to determine whether these instruments should be repaired or discarded.

System Improvements

Given the need to question the current system as it stands in the light of New Competition Policy, and to eliminate unnecessary costs, it is necessary to query the future existence of all three boards. Thus, the theoretical justifications for occupational licensing are examined, and applied to the boards in question. It is found that the Psychologists Board and the Veterinary Board are justified on grounds of health and safety, but that the Travel Agents Board cannot, and should not remain in existence. Its objectives lie unfulfilled and unfounded.

Justifications for Existing System

A theoretical justification for government intervention in the form of occupational licensing boards lies in the inherent failings of a free market economy. Where a Tasmanian consumer receives substandard veterinary services, or is a victim of fraud by a travel agent, it can be seen as the result of uninformed consumer choice of services. Such

information failures are typical in free markets.⁶⁷ Specialised services in particular have proved problematic. Such services are 'inherently difficult for users to evaluate'.⁶⁸ This is because consumers have difficulty in distinguishing the competent from the incompetent due to the specialised nature of the services provided.⁶⁹ The Government will typically intervene in response to community or professional pressures,⁷⁰ or simply to a national push for uniform protection of consumers.⁷¹ In Tasmania, the Government has chosen to delegate power to regulate various professions to a number of boards.

The assumption underpinning this article's argument is that occupational licensing in the cases of veterinary surgeons, psychologists and travel agents in Tasmania is a delegation of power to regulate by the Tasmanian Parliament in response to a breakdown in the market for information about these services. Essentially, it is the establishment of administrative organs to ensure that citizens are protected. This is necessary because not only has there been an information breakdown,⁷² but there is also a lack of inexpensive redress procedures, and the significant social costs involved in not intervening are too high.⁷³

Problems of Occupational Licensing: Market Costs

There are also costs associated with such intervention, and it is vital to balance the costs and benefits in order to determine if intervention is really required in the cases of veterinarians, psychologists and travel agents in Tasmania. As Goldring notes, there is a need to view occupational licensing in its broader context:

It directly affects the structure of particular industries by regulating the number of participants and hence the consumer's choice between participants.⁷⁴

67 H Colebatch and P Lamour, *Market, Bureaucracy and Community: a Student's Guide to Organisation* (Pluto Press, 1993).

68 B Baxt, 'Commission Study of the Professions', (1990) 56 *Trade Practises Commission Report Bulletin* 7.

69 Ibid.

70 As in the case of both the Veterinary Board and the Psychologists Board. See J Goldring, L Maher and J McKeough, *Consumer Protection Law*, (4th ed, Federated Press, Sydney, 1993).

71 As in the case of the Travel Agents Board.

72 C Aislabie and K Lindgren, 'Economic Analysis of Legal Restrictions on Entry into Business' (1975) 3 *ABLR* 38.

73 Ibid.

74 Goldring et al, *Consumer Protection Law*, note 70 above, at p 193.

From a libertarian perspective, this is seen negatively because it 'subverts preferences' and thus is an 'unjustified intrusion on individual freedom'.⁷⁵ Also, from an economic perspective, it threatens a misallocation of resources.⁷⁶

Reduction of Consumer Choice

The effect of restrictions is to reduce competition. Licensing requirements and regulation of professions prevents sellers from remaining in an industry, and prevents others from entering an industry.⁷⁷ This exclusion of potential providers of services inhibits a consumer's ability to choose a cheaper service and risk a lower standard.

Tyranny of the Status Quo

Controls on those attempting to enter the market-place has the effect of regulating new competitors, but protecting those already practising, and thus the status quo is preserved.⁷⁸ This will be seen in Tasmania once the Psychologists Board, in conjunction with the Australian Psychological Society (APS), increases the qualification requirements to a six year course before the granting of registration. Those already qualified under the Act⁷⁹ are not required to participate in on-going training, nor are they required to have a masters degree, nor comply with the future qualifications.

Direct Costs

In addition to these indirect market costs, there are direct costs associated with occupational licensing in Tasmania through boards. Firstly, the operation costs of the boards.

An application for a license must ... be processed, background information may need to be investigated and often a decision on the merits of the application must be made.⁸⁰

75 A Duggan, 'Some Reflections on Consumer Protection and the Law Reform Process' (1991) 17 *Monash University Law Review* 254.

76 Ibid.

77 Aislabie and Lindgren, 'Economic Analysis of Legal Restrictions on Entry into Business', note 72 above, at p 3; A Moore and A Tarr 'General Principles and Issues of Occupational Regulation', (1989) 1 *Bond LR* 119.

78 Ibid (Moore and Tarr); K Mackie 'Occupational Licensing in Tasmania' (1977) 5 *University of Tasmania Law Review* 290.

79 *Psychologists Registration Act 1976* (Tas).

80 Moore and Tarr 'General Principles and Issues of Occupational Regulation', note 77 above, at p 123.

With an ad hoc approach threatening a long term misallocation, and thus long term resource inefficiency,⁸¹ the three boards require careful scrutiny to determine if their existence is justified.

Was There a Need for Intervention at the Time of Enactment?

The three boards fall into two different categories, as distinguished by the motivation for their establishment. The Travel Agents Board falls into the category of fraud prevention, whilst the Psychologists Board and the Veterinary Board were designed to ensure minimum levels of competence,⁸² as health and safety factors, such as animal health and consumer mental health were, and remain at stake.⁸³

Travel Agents: Fraud Prevention and National Uniformity Desired

The travel industry is of a rather different nature, however, and alternative methods are available to achieve the same result in a cheaper and more efficient manner. This involves disbanding the Travel Agents Board and relying solely on the Travel Compensation Fund, supplemented by support from the Office of Consumer Affairs (OCA).

No real need

There are strong arguments against the need for a board to be established. The *Travel Agents Act* 1987 was enacted despite the lack of a problem in Tasmania. In the three years prior to the introduction of the *Travel Agents Act*, only one Travel Agency was placed in liquidation, and there were no complaints of loss of money by clients.⁸⁴ But the Government of the day claimed the Act removed the possibility of interstate licensed agents establishing base in Tasmania and creating problems.⁸⁵

81 Aislabie and Lindgren, 'Economic Analysis of Legal Restrictions on Entry into Business', note 72 above, at p 32.

82 Evidence of the objective of ensuring minimum standards of competence lies in the preamble to the *Psychologists Registration Act* 1976 (Tas): 'protection of the public from unqualified persons and certain harmful practices'. The Act is also to 'provide for the registration of psychologists and regulation of the practice of psychology'. Reference to the need to 'maintain and review standards for registered veterinary surgeons' in the long title of the *Veterinary Surgeons Act* 1987 (Tas) demonstrates a similar objective.

83 Moore and Tarr, 'General Principles and Issues of Occupational Regulation', note 77 above, at p 214; Duggan, 'Some Reflections on Consumer Protection and the Law Reform Process', note 75 above, at p 165.

84 Tasmania, *Parliamentary Debates*, Legislative Council, Vol IX No 4, p 3173 (Mr McKay).

85 Ibid.

The Deputy Leader's speech in the Legislative Council⁸⁶ reveals an admission of the limited scope for the Travel Agents Board in Tasmania. In addition, other speakers in Parliament, at the time of the Bill's passage, reveal that a desire for uniformity was foremost in the politicians' minds. George Shaw, in a modified version of the libertarian perspective, argued 'consumer protection is best left to the consumer himself in cases where health and safety are not involved'.⁸⁷ He argued that there was no demonstrated need in Tasmania, a fact supported by the Government itself.⁸⁸ The only need at the time of the passage of the bill was a need for national uniformity.⁸⁹

This lack of support for a need for the Board has led to a lack of support for the Board's role today. Roy Ormerod, Secretary of the Travel Agents Board, claims there is less need in Tasmania than elsewhere.⁹⁰ This is because the profit margins and the market are too small, and the lack of cruise ships and lucrative package deals renders Tasmania an unattractive market for a dishonest trader.⁹¹

Cost

In addition to questions about the need for the Board, there have always been queries as to the costs involved in administering the Act. As Shaw, a Member of the Legislative Council argued, 'will it establish a costly bureaucracy and can that be afforded by the industry'?⁹² This concern with direct costs has not proven to be correct. The board breaks-even with regard to licence fees and costs. However, this is only possible through heavy reliance on the Office of Consumer Affairs. The OCA provides investigators, performs any investigations, receives complaints, and the Secretary even writes the Board report, the Chairperson merely signing it. It would appear that the OCA does the work, and Board meetings are to merely inform members of what has been done.⁹³ This is partially explained by the fact

86 Ibid.

87 Id, at pp 3344-3345 (Mr Shaw). For a general discussion, see K Mackie, 'Occupational Licensing in Tasmania', note 78 above, at pp 288-290.

88 Tasmania, *Parliamentary Debates*, Legislative Council, Vol IX No 4, p 3173 (Mr McKay).

89 Ibid.

90 Personal communication with the Registrar of the Travel Agents Board, 30 September 1996.

91 Ibid.

92 Tasmania, *Parliamentary Debates*, Legislative Council, Vol IX No 4, p 3345.

93 Personal communication with the Registrar of the Travel Agents Board, 30 September 1996.

that the \$676 spent on Board member salaries last year was insufficient to make it worth their while to become heavily involved in the Board's work. Thus, Government concern that a costly bureaucracy not be established has led to a removal of financial incentives for board members to perform their roles with vigour. Instead, the workload, and costs associated with this, are dealt with by the OCA. This is also because the OCA is accustomed to performing a consumer protection role. The general expertise of the OCA is sufficient to deal with the travel industry in Tasmania.

It is highly questionable whether the Board is fulfilling its objectives as stated in the legislation. In theory, the Travel Agents Board has two functions. One is to ensure minimum standards are met and maintained.⁹⁴ The second is to participate in a co-regulatory compensation scheme.⁹⁵ As previously discussed however, the debates in Parliament indicate the focus was always firmly on ensuring compensation. In reality, it has taken over six years for the Travel Agents Board to get all agents licensed and under the compensation scheme.⁹⁶ Whilst the Board has developed procedures to ensure compliance,⁹⁷ these are largely ineffectual.

Firstly, the random checks duplicate the work of the Travel Compensation Fund (TCF), through requiring identical financial information be provided. Secondly, although licensing does take longer today than reported by Lucas,⁹⁸ this is not due to additional scrutiny. Information provided by applicants is not verified.⁹⁹ This raises the question of whether the Board is shirking its duty to ensure that travel agents are adequately qualified.

The Board does very little itself: it merely forms a personal contact network between the OCA and travel agents. On the positive side, the ineffectual nature of the Board ensures that its conduct is not anti-competitive and unduly restrictive on the supply side of the market. On the negative side, this means it is not performing its duties. This

94 *Travel Agents Act 1987* (Tas), Part IV Divisions 2 and 3.

95 *Ibid.*

96 *Travel Agents Licensing Board, Seventh Annual Report* (1994) 10.

97 Including random checks on Travel Agents, the release of information kits upon application for licensing, and a revamped image through glossy brochures and annual reports.

98 1996 Advanced Administrative Law Assignment, Ebony Lucas, University of Tasmania.

99 Personal communication with the Registrar of the Travel Agents Board, 30 September 1996.

prompts the question as to whether an alternative method of licensing and regulation would be better equipped for the task.

Alternatives

Bond system: magistrate administered

Shaw's suggestion of licensing by a magistrate under the *Commercial and Inquiry Act* 1974 (Cth)¹⁰⁰ is probably not the best solution. He proposed a bond system be established, with a banking system and audit provision akin to hotel licensing. But such a system faces the inherent limitations of registration through magistrates. Licensing through a magistrate means reliance on the police force for enforcement of regulations. As Duggan notes, 'it is notorious that tasks of this sort take low priority on already crowded police schedules'.¹⁰¹ This argument could be extended to the magistrates. The courts already face a heavy workload, and it is preferable to find solutions to professional regulation which do not unnecessarily clutter existing organs, such as courts or law enforcement agencies.

Certification

Another alternative is non-compulsory certification. Travel agents could apply to the OCA for certified status. They would be required to satisfy financial and qualification requirements in order to be granted status. This could be advertised to consumers, much like Royal Automobile Club of Tasmania approved motor mechanics. This is consistent with the main objectives of the *Travel Agents Act*, as it ensures that only those financially secure can operate. However, this still duplicates the work of the Travel Compensation Fund (TCF).

TCF only

A third alternative is to rely only upon the TCF for regulating travel agents. The TCF is a national scheme, set up under a deed of trust. It compensates consumers who have experienced financial loss resulting from the collapse of travel agencies.¹⁰² It also monitors the financial viability of travel agents, and maintains a national detailed register of participants. The operations of the TCF are administered under a deed of trust administered by trustees appointed by the Consumer Affairs Ministers in each state and territory.¹⁰³ As the Travel Agents

¹⁰⁰ Tasmania, *Parliamentary Debates*, Legislative Council, Vol IX No 4, p 3345.

¹⁰¹ Duggan, 'Some Reflections on Consumer Protection and the Law Reform Process', note 75 above, p 166.

¹⁰² *Travel Agents Licensing Board, Eighth Annual Report* (1995) p 5.

¹⁰³ The Northern Territory is not a participant in the scheme: *ibid*.

Board duplicates many of these functions, it may be preferable to use the national scheme only. The OCA could provide information about the TCF, and stickers and posters advertise the fact that without TCF participation, a travel agent is trading illegally. This will ensure consumers are protected from financial loss, and will not interfere in the market-place by restricting supply. Furthermore, the direct costs associated with the Travel Agents Board are eliminated. This approach accords with the economic argument against licensing limitations.

Conclusions

New Competition Policy represents a countering force to administrative law. These are two competing policies, one in favour of big government, the other small. The prevailing economic climate and governmental philosophy today means the high-tide of administrative law will recede unless a strong case of societal need can be made out. Occupational licensing is just one example of that need. Without government intervention to compensate for the failings of a free market economy, notably an information failure, the health and safety of users of services are exposed to risk. Thus, the Veterinary Board and the Psychologists Board should be exempt from NCP, and their procedural operation strengthened, not weakened. This strength can only be provided by a commitment to adequately fund the boards so that their roles of regulation and investigation can be fulfilled. However, the task of fraud prevention is best implemented by alternative means. The Travel Agents Board should be replaced by a Travel Compensation Fund based system of control only.

If government policy continues in its present direction, then not just occupational licensing will be affected. A scaling back of government means a scaling back of the methods of ensuring accountability, and citizen protection.¹⁰⁴ A reversion to times of old may eventuate if the red light is removed, or disabled, in anticipation of smaller government before the state is rationalised. To do so would jeopardise the progress made in the empowerment of citizens, and accountability of the state.

¹⁰⁴ For a detailed discussion see Stuhmcke, 'Administrative Law and the Privatisation of Government Business', note 12 above.