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9. Barristers beyond the law: state and non-state actors work in partnership to enforce legal and moral norms

Jenny Job

1. INTRODUCTION

It can come as something of a surprise when so-called pillars of society break the rules and choose non compliance. This was the situation in the Australian state of New South Wales (NSW) in the late 1990s and early 2000s when many barristers chose to ignore their obligations to comply with taxation law by using bankruptcy law to nullify their debts to the Australian Taxation Office (ATO). In doing so, they also chose to ignore the rules of their profession about behaving ethically. Even more surprising, the Bar Association chose not to enact the sanctions in its rules and, initially, did not deal with the non compliance of its members. The tax office, its peers and the community trusted and expected the Bar Association to self regulate. The actions of the barristers concerned broke state and non-state laws, denied the community the use of millions of dollars in taxes, exposed their culture to public scrutiny and tarnished the reputation of the profession. The challenge for the tax office was in securing compliance in such a situation. Prosecution was an option, one typically used by taxation administrations, but this problem was not confined to just a few individuals. As well, bankruptcy law is not administered by the tax office. Other options for ensuring compliance were needed.

Despite the supposed clarity that has been given to the definition of law through distinguishing legal and moral norms (Tamanaha 1995), it has by no means provided clarity in the workings of state and non-state law in practice. The focus of this chapter is on the weaknesses of Field C in the map of non-state law as indicated in Chapter 2 – the inability of non-state actors to enforce their norms of decision in the world of business. This is where state law should take over, as it has the socially recognized role of enforcing legal norms. It would be nice if it was as simple as that, but the case study used in this chapter shows that just as the weakness for non-state

law in Field C, state law also has an inability to enforce legal norms in circumstances where people play the rules for their own gain. This chapter will consider whether, in a situation of blatant non-compliance, state and non-state actors can work together to enforce compliance, and the consequences of this for compliance and for the role of state actors. Rather than the role of state law declining, the case study used in this chapter illustrates that state and non-state law can work together as partners to enforce moral and legal norms. Close and ongoing cooperation between state and non-state actors resulted in a resolve by the legal profession to improve its self-regulation, the emergence of several new state laws and the refinement of the non-state law governing the legal profession.

In this chapter I examine the change which has occurred in regulatory style, both generally and within taxation administration. I explore the idea of regulation by governance (Burris et al. 2005; Hutter and Jones 2007; Parker and Braithwaite 2003). Rather than regulation being the role of government, the notion of governance assumes that many actors play a part in ensuring compliance. My aim is to show how weaknesses in the ability to enforce state and non-state law are being alleviated by a shift in regulatory approach. Rather than the role of the state in the enforcing of legal norms being overtaken by non-state actors, the ideas of decentred regulation using a nodal governance approach show how both state and non-state law and actors can work together to overcome their weaknesses in a complex situation of non compliance.

2. BEYOND STATE AND NON-STATE LAW

During the 1990s, the ATO noticed a growing trend among NSW barristers of large taxation debts and non-lodgement of taxation returns. Some of the debts amounted to several million dollars. In fact, 'the rate of debt default by NSW barristers was ten times higher than that of the rest of the Australian population' (Braithwaite 2005, p. 178). However, recovery was not possible as some barristers had bankrupted themselves, effectively negating their debts to the tax office.

The 2000–2001 ATO Annual Report shows the extent of the problem. In 2000, 590 barristers owed \$AU52 million in income tax. Sixty-two practising barristers were bankrupt, or had entered into bankruptcy arrangements during the 1990s. The ATO was the only creditor in 90 per cent of these cases, with 56 individuals owing \$AU20 million in tax. Not only did barristers have unusually large debts to the tax office, in mid-1999 nearly half of the NSW Bar had not lodged their tax returns on time. By January 2001, 38 more barristers were approaching bankruptcy, and there was a growing

tendency towards serial bankruptcies. Despite earning six figure incomes, the barristers had no assets, but their families did. Yet bankruptcy did not stop barristers from practising in their profession.

3. REGULATING THE PRACTICE OF LAW IN NSW

Professional organizations are not newcomers to regulation. They are part of the civil sector which comprises many sources of regulation and includes organizations which are neither government nor business (Hutter 2006). For decades professional organizations have regulated the conditions of entry to the profession and stipulated standards of conduct which members of the profession are expected to honour (Hutter 2006; Hutter and Jones 2007).

The practice of law in the Australian state of NSW is regulated by both state and non-state law. The NSW Bar Association is a professional organization. It is a public company limited by guarantee, does not have a share capital and is registered as a club under the *New South Wales Registered Clubs Act 1976*. The NSW Bar Association states that it is a 'voluntary association of practising barristers'. It has its own Constitution, or in other words, its own rules. Part 3 of its Constitution sets out the objects or aims of the NSW Bar Association. Of particular relevance is Part 3.1.6:

to promote fair and honourable practice amongst barristers; to suppress, discourage and prevent malpractice and professional misconduct; to inquire into so far as the law permits and decide questions as to professional conduct and etiquette of barristers; to make rules (including rules for the imposition on members of penalties, including expulsion, suspension or fines; with regard to the foregoing to the extent the law permits and in the absence of other rules and regulations made under the Act for breach of such rules; and if deemed necessary, to report any of such rules or decisions to the Supreme Court of New South Wales and to the Members of the Bar Association and to the public as the Bar Council sees fit.

This part of the Constitution sets out the expected requirement of ethical and professional behaviour or conduct by barristers. It makes clear that the rules include penalties and that the Bar Association will self-regulate by imposing penalties on members who behave inappropriately. There are two issues to note: that reporting of misconduct will only happen if the Bar Council *sees fit*; and it is not clear how far the expectation of ethical behaviour applies. Does it only apply when a barrister is practising the law, or does it apply to all aspects of their lives? Prominent Australian judge, Sir Anthony Mason, has been cited as saying: 'professional codes of conduct prescribe pursuit of high standards of both professional conduct and ethical conduct without drawing a distinction between the two' (D'Ascenzo

2007). This would seem to indicate that barristers themselves expect that their fellow members should behave appropriately in all aspects of their lives; ethical conduct seeming to apply beyond their workplace. The normative dimension of modifying behaviour is regarded as one of the main advantages of non-state regulation (Hutter 2006, p. 13).

These informal rules or non-state laws are reflected in state law. The current NSW Bar Association web page also states that: 'All barristers in New South Wales are bound by the Legal Profession Act 2004, the Legal Profession Regulation 2004 and the New South Wales Barristers' Rules.' Bedrossian (2004, p. 2) noted that to be admitted to the legal profession in NSW: 'Section 11 of the *Legal Profession Act 1987 (NSW)* ("the Act") provides: A candidate, however qualified in other respects, must not be admitted as a legal practitioner unless the Admission Board is satisfied that the candidate is of good fame and character and is otherwise suitable for admission.' The Act also deals with professional misconduct, referring to failure to reach reasonable standards of competence and diligence or conduct which justifies a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll (Bedrossian 2004). The 1987 Act was in place when the NSW barristers chose to disregard their taxation obligations. The problem with this piece of state law was its lack of precision or specific criteria by which to judge fitness and rightness, and the lack of explicit sanctions.

Under the system of self-regulation . . . the core tests of 'good fame and character' and 'fit and proper person' are open to wide interpretation. The history of the regulatory system entitles the public to think that the interpretations of these terms overwhelmingly influenced by the lawyers in the system have been absurdly stretched, such as, for example, excusing a barrister's failure to file tax returns as a result of 'involuntary inertia'. (Sydney Morning Herald 2001a)

Interestingly, court cases dealing with drug smuggling and sexual assaults by legal practitioners illustrate that the definition of professional misconduct was not clear in this Act which made it difficult to determine if a practitioner was fit to practise (Bedrossian 2004).

While there was non-state law in place, and it was supported by state law, it appeared that the non-state actors would not self-regulate for a number of possible reasons: they were protective of their own and did not 'see fit' to report improper behaviour so that it could be dealt with by state law; if improper behaviour did result in state enforcement in the courts they chose to apply leniency towards their own; they had no mechanism or criteria in place to know that members were behaving improperly; their rules were not clear about the type of behaviour which was improper; and state law was similarly unclear about what was improper or what behaviour might render

members unfit to practise. Given the lack of clarity, how could state and non-state laws be used to regulate problem behaviour like that displayed by the bankrupt barristers?

4. A CHANGING STYLE OF REGULATION

Regulation is generally understood to mean the enforcement of both legal and moral rules declared by supranational (for example, the European Union) and subnational (for example, professional associations) bodies (Parker and Braithwaite 2003, p. 119). Nevertheless, self-regulation by professional bodies is an important aspect of the market (Ayres and Braithwaite 1992; Hutter 2006). Many industry associations and professional bodies self-regulate by developing agreements, accreditation schemes, codes of conduct, codes of practice and standards (Hutter 2006; OECD Working Party on Regulatory Management and Reform 2006). These rules guide the behaviour of those who belong to these industry or professional groups and make it clear to outsiders what is expected of members. The groups monitor the compliance of members and enforce compliance with the rules (OECD Working Party on Regulatory Management and Reform 2006). Thus:

[i]n the present context the term 'regulation' may be taken to refer to the control of corporate and commercial activities through a system of norms and rules which may be promulgated either by government agencies (including legislatures and courts) or by private actors, or by a combination of the two. The direct involvement of the state is not a necessary condition for the existence of regulation in this sense, since rules may be derived from the activities of industry associations, professional bodies or similarly independent entities. (du Plessis et al. 2005, pp. 108–9).

Regulation is increasingly carried out by different 'classes' of private regulator. Scott (2002) has highlighted the growing role of private regulators where statutory powers are contracted out to non-state organizations. Nevertheless, not all private regulators have a legal mandate, meaning they lack that feature of the law that separates state and non-state law – the ability to impose sanctions (Scott 2002). However, '[a] regulator with no formal power to apply sanctions can nevertheless invoke competitive pressures and community disapproval, for example, by publishing information' (Scott 2002, p. 61). Scott (2002, p. 66) has classified a group of 'mandatory regulators' who hold 'governance power' through their ability to oversee other bodies, and possess and release information in the public interest. One such regulator is the media: 'Where the media maintains

effective systematic oversight (as with some investigative journalism . . .) then it may come within this third class of mandateless regulators' (Scott 2002, p. 68). Scott (2005) has argued that the changing understanding of the regulatory state conceives of a 'loosening' of the divide between the state and the market and the public and the private. This changed understanding of the role of the state and state law has been described as 'decentred regulation' (Black 2002; Kingsford Smith 2004), where the act of regulating is 'diffused throughout society' (Black 2002, p. 2). Thinking more broadly about regulation has occurred along with the view that state law has its limitations (Black 2002; Scott 2005; Hutter 2006; Hutter and Jones 2007). There were demands by the community for the state to be more responsive in its approach to regulation, with non-state actors increasingly becoming involved in regulation (Osborne and Gaebler 1992; Hughes 1994; Sparrow 2000; Black 2002; Scott 2005; Hutter and Jones 2007). Hutter and Jones (2007, p. 27) argue that because state law is insufficient in regulating business, 'regulatory space is occupied by the state and a variety of non-state players'. The different classes of regulation described by Scott (2002) reinforce the notion of decentred regulation and the changed expectation of more dynamic and effective regulation (Kingsford Smith 2004).

5. REGULATION BY GOVERNANCE

The 'dispersal of capacities and resources relevant to the exercise of power among a wide range of state, non-state and supranational actors' has been defined by Scott (2005, p. 45) as governance. Governance is regarded as the management of the course or flow of events in a social system (Parker and Braithwaite 2003; Burris et al. 2005). Regulating the social system requires a focus on and understanding of the complexities of the actors and the mechanisms of that system (Burris et al. 2005). However, 'the complexity of governance in practice has evaded capture in the models that are commonly deployed in legal and regulatory theory' (Burris et al. 2005, p. 31). To understand how complex systems work in practice, Burris et al. (2005, p. 33) have proposed the theory of nodal governance: 'an elaboration of contemporary network theory that explains how a variety of actors operating within social systems interact along networks to govern the systems they inhabit'. Governance is an 'adaptive response' to complexity (Burris et al. 2005, p. 34). This implies that a social system includes many and different actors who interact as institutions in the governance of a system (Burris et al. 2005).

This framework is useful in understanding how the bankrupt barristers were successfully regulated. The situation being examined here is complex.

It crosses two tiers of government (Commonwealth and State levels of government); it includes state and non-state actors; it overlaps business and private worlds; it includes legal and moral norms; and the professional culture of the legal profession appeared to be having an influence. Each part of this complex system had a role to play in regulating the barristers.

On its own, the tax office could not have achieved compliance because the barristers had creatively used bankruptcy laws to put themselves beyond its reach. The Bar Association had moral rules which it was expected to monitor and regulate but this had not happened. The barristers could not be sanctioned for breach of the state-level Legal Practitioners' Act unless the Bar Association saw fit to abide by the rules of their profession and report their non-compliant behaviour to the courts, to the other members of the Association and/or to the public. It appears that it was the networks operating within the smaller social system of NSW barristers which realized the spread of the non-compliance rather than being a monitoring system to ensure compliance. It seems that the moral suasion aspect of non-state regulation had fallen down here – the rules of the legal profession which highlighted ethical behaviour were not enough to persuade members to comply.

6. A MORE RESPONSIVE STYLE OF TAXATION REGULATION

The role of state organizations is norm enforcement: 'the test for law is based upon the severity (coercion/force) and nature (publically approved and executed) of the sanction imposed upon infraction' (Tamanaha 1995, p. 507). As well, state organizations have clearly defined boundaries around their areas of responsibility which prevent them from regulating law beyond their own jurisdiction. While this is a strength, it can also act as a weakness, as in the case being explored in this chapter.

Until recently, taxation administrations have operated in the manner expected of state organizations. They have kept the door firmly shut when designing new law and administered the law with a command-and-control approach to regulation – a very resource intensive and demanding style of regulation. Since the late 1990s, an alternative approach to taxation compliance has increasingly been used in taxation administration: responsive regulation (Braithwaite 2003, 2007; Job and Honaker 2003; Braithwaite 2005; Job et al. 2007). A responsive regulatory approach shows an attitude by the regulator that is open to the use of a varied range of regulatory responses to gain compliance depending on the situation at hand (Ayres and Braithwaite 1992). The ATO adopted a responsive regulatory

approach to taxation compliance in 1998. The aim was to: understand taxpayer behaviour; build a cooperative relationship with the community; encourage and support compliance; introduce a range of sanctions escalating in severity and known to taxpayers; and reduce complaints about procedural justice (ATO 1998; Job et al. 2007). The goal was to work cooperatively with taxpayers to build community ownership of the system and encourage taxpayers to take responsibility for their own actions.

But what happens when the ethical appeal in self-regulatory codes of conduct fails, or when a professional body fails to either monitor compliance or to enforce compliance? This appeared to be the situation with the bankrupt barristers in NSW who were ignoring their own professional rules. Moral suasion did not seem to work. Their ethical obligations to their fellow barristers and their profession were forgotten, as were their legal obligations to the tax office and the Australian community. However, there was no specific mention within their professional rules about any requirement to meet one's personal taxation obligations.

There were a number of ways to remedy the barristers' non compliance. Legal obligations are enforceable through the judicial system. The ATO could pursue that option and seek to punish the particular individuals. In this situation, faced with a less than enthusiastic response from the NSW Bar Association about self-regulation, the tax office took several of the worst offenders to court. However, resorting to this approach for all offending barristers would have been expensive and unlikely to achieve the desired result in most cases, as the past lenient treatment of barristers by the courts and tribunals had demonstrated. This was a rapidly growing problem spreading not only through the NSW legal profession but across the legal profession in Australia.

Something more was needed – a system of governance where each part in the system forms a node (Burris et al. 2005). Rather than being a network, where decision making is shared, nodal governance emphasizes the steering of the situation. In this case the steering was done by the media and by the tax office, which worked in cooperation with other members of the social system to regulate barristers through enforcing self-regulation, and strengthening state and non-state law.

7. ENFORCING COMPLIANCE THROUGH A SYSTEM OF NODAL GOVERNANCE

The challenge for the tax office was to achieve a change in this non-compliant behaviour and to encourage the Bar Association to be more active in self regulating its members. In this case the idea of fair and ethical

behaviour which had appeared in the NSW barristers' Constitution had been left open. It could apply to everything a barrister did, or it might have been interpreted to mean only in relation to their work as a barrister and have no reference to their personal life. There were no criteria by which to judge the behaviour of members.

Initially, the ATO approached the NSW Bar Council about the problem of barristers bankrupting themselves to avoid paying their debts to the tax office, expecting it to deal with these barristers through a self regulatory process. However, its response was not quite what the tax office wanted to hear:

The Bar Council took the view that making practising certificates conditional on tax compliance was not a matter of self-regulation, but a matter of regulation by the NSW Legal Services Tribunal. The Bar Council had taken a tax complaint to the Tribunal just once before, in 1997: Mr Tom Harrison had been convicted of 30 offences of failing to lodge a tax return over 14 years. The three senior lawyers on the Tribunal found Harrison not guilty of professional misconduct on the basis that 'his omissions were the result of an involuntary inertia rather than an attempt to avoid his responsibilities'. They were caused by 'a psychological block' which he had tried but failed to overcome (*Sydney Morning Herald*, 27 February, 2001, p. 4). (Braithwaite 2005, p. 179)

The Bar Association and the Law Council believed that the tax office should have come to them with details of the barristers involved (Haslem 2001; D'Ascenzo 2007). However, secrecy and privacy laws prevent the tax office from revealing an individual's taxation details to another person.

As a next step, the taxation commissioner highlighted the problem of the bankrupt barristers in speeches and in his annual reports. Doing so attracted the interest of journalists who began to investigate the problem and print detailed reports on the bankrupt barristers, their families, their assets and their extravagant lifestyles. It became even clearer that the NSW Bar Association appeared to be less than enthusiastic in its use of self-regulation:

This newspaper revealed that some barristers had become bankrupt on more than one occasion as a way of 'managing' their tax liabilities. . . . In relation to bankrupt member Robert Somosi, the Bar had apparently been 'investigating' for five years his conviction for tax offences. 'You can't assume we're doing nothing', Ruth McColl, the president of the Bar, reassured the Herald. (Auckland 2001)

Newspaper stories about the bankrupt barristers attracted the attention of Australian Attorneys-General at both Commonwealth and state levels who began to examine bankruptcy law (Braithwaite 2005). The Attorneys-General took the problem seriously and decided to introduce a suite of

measures so that barristers could not declare bankruptcy to avoid paying tax. Rules across the country would be tightened up, including 'changes to the Bankruptcy Act aimed at stopping unscrupulous debtors using bankruptcy to defeat the legitimate claims of their creditors (such as the tax office)' (The Australian 2001), there would be tests to determine fitness to continue practising the law and the onus was put on barristers to notify their association of their tax or other serious offences (Farrant 2001).

The regulations in force from today will require barristers and solicitors to notify the Bar Association or the Law Society if they become bankrupt or if they apply 'to take the benefit of any law for the relief of bankrupt or insolvent debtors'. Further changes to the Legal Profession Act will specify that bankruptcy falls within the definition of professional misconduct and so, possibly, lead to a practitioner being disciplined or struck off. A practitioner who is declared bankrupt will be suspended and will subsequently lose the right to practise unless she or he is able to show cause why she or he is still fit to practise. (Sydney Morning Herald 2001b)

It was then that the NSW Bar Association began to take more of an interest and take some action against its own. 'Facing the spectre of a law prohibiting any recent bankrupt from practicing law, the NSW Bar Association became interested in dealing with the problem' (Braithwaite 2005, p. 180). The NSW Bar Association took several of its legal practitioners to court. At least three were found unfit to practise law and their names were removed from the roll. Others were suspended from practising. As well, the Bar Association began to show a different public face, more in support of its own rules which were supposed to deal with improper behaviour. Ruth McColl, former president of the NSW Bar Association said: 'the Bar Association deplores persons who deliberately flout and avoid their legal and financial obligations. It strikes at the community and public interest. It undermines the reputation of the Bar and is a slur on the overwhelming majority of barristers who pay their taxes' (D'Ascenzo 2007). However, the lack of self-regulation on the part of the Bar Association resulted in the Attorneys-General taking changes to state law much further in an effort to ensure compliance in the future. The Legal Profession Act 2004 repealed the Legal Profession Act 1987, with its commencement being preceded by three new pieces of legislation. The Legal Profession Act 2004 adapted the National Legal Profession Model Provisions developed by the Attorneys-General which aimed to achieve improved national consistency and uniformity in the regulation of the legal profession (Webster 2006). Included in the Act was a chapter specifically dealing with the handling of complaints and conduct that may be the subject of complaint:

Chapter 4 expressly applies to conduct of a local legal practitioner where there is a 'conviction for a serious offence', a 'tax offence' or an offence involving dishonesty, conduct of the practitioner 'as or in becoming' an 'insolvent under administration' and 'in becoming' disqualified from managing or being involved in the management of a corporation. (Webster 2006, p. 66)

Specific definitions in the new Act included: serious offence; tax offence; insolvent under administration; unsatisfactory professional conduct; and professional misconduct; as well as suitability matters. Of most interest is the 'show cause event' definition which specifically includes 'being "convicted" of a "serious offence" or a "tax offence" whether or not in New South Wales' (Webster 2006, p. 70). These changes to state law dealt with the problem mentioned earlier of the lack of specificity and clarity in both the state and non-state laws about what type of behaviour was improper. If non-state law did not spell out specific criteria, the Attorneys-General decided that the new state law would do so. Another problem mentioned earlier which had to be dealt with by the Attorneys-General was the apparent reluctance of the NSW legal profession to self-regulate:

No matter how much the Bar Association may insist that the system of regulation and discipline is not one of self-regulation, but co-regulation, it is essentially still one aptly characterised by the expression 'Caesar judging Caesar'. As Mr Debus says, those who practise law have an obligation to uphold the highest standards of lawful conduct. Mr Debus's task remains formidable. He has to produce legislation tough enough not only to close every loophole against every clever tax-shy lawyer, but also tough enough to overcome the bias inherent in an essentially self-regulatory system of professional standards. (Sydney Morning Herald 2001b)

The 2002-2003 ATO Annual Report showed a marked improvement in the barristers' compliance with their taxation obligations. There was improvement in the lodgement on time of tax returns, with 81 per cent lodging on time. By 2003, debt levels for barristers had declined, with 116 barristers in debt, and NSW barristers were showing a greater willingness to enter into arrangements with the ATO to pay their debts. Bankruptcies had declined. Nationally, tax collections from barristers had increased from \$AU231.4 million in 2000-2001 to \$AU346.2 million in 2002-2003, partly attributed to improved compliance.

The ATO credited these improvements to several factors: expanding its focus on barristers from NSW to barristers nationally; working closely with relevant parties such as trustees to obtain access to assets; its referral of barristers for prosecution; the management of their relationships with legal professional bodies; and the information sessions the ATO held for members on compliance.

Through the cooperation of state and non-state actors (two levels of government – the Commonwealth of Australia and the State of NSW – the media and the NSW Bar Association), Commonwealth tax and bankruptcy laws were strengthened and non-state law regarding the ethical behaviour of barristers was reinforced.

In using a nodal governance approach to deal with this problem, the tax office demonstrated its ability to be responsive in achieving compliance rather than relying on commanding and coercing. However, it was the media which played a prominent role in the steering of this situation to generate action from the nodes in this system – both state and non-state actors. It has been argued that the media can encourage taxpayer compliance by appealing to civic virtue, although the success of such an appeal depends on an individual's attitude towards the duty of paying tax (Mason and Mason 1992). It is the idea of moral suasion, or ethical behaviour, that is implicit in the informal law of non-state actors in regulating behaviour. The strength of non-state law is often based on an appeal to the moral or ethical side of a person's character which is the basis of Part 3.1.6 of the NSW Bar Association's Constitution. However, that appeal does not appear to have achieved the compliance of the individual barristers. Rather, by putting pressure on the profession, the media brought into play the idea of the 'social licence to operate' (Gunningham et al. 2003; Hutter and Jones 2007). The stories in the media did not only threaten the reputation of the legal profession. These stories made the profession face up to the prospect that their reluctance to self-regulate would result in changes to state law which might prohibit barristers from practising. It was this that prompted action from the NSW Bar Association and encouraged it to become an active node in the governance system.

8. CONCLUSION

It has not been revealed why so many NSW barristers decided to use the law in such a creative way to remove their taxation obligations. It could be that they, like so many others, are increasingly being caught up in the changing times which emphasize the economic over the ethical.¹ Some thought the closed culture of the profession was the main reason for its inability to self-regulate:

As the tax debacle shows, the legal system's self-regulatory nature is largely to blame for such blatant abuses being allowed to continue for so long. The closed nature of the legal profession – the archaic airs and graces, the convoluted language, those pretentious wigs and gowns – lead to a mindset of indifference to the public interest and accountability. . . . unless and until a culture that turns a

blind eye to abuses is reformed, legislators will have a hard time keeping ahead of those determined to ignore their obligations, to their own advantage. (The Australian 2001)

These barristers not only flouted state law but they ignored the rules of their profession and their social responsibility to behave ethically and to be a fit and proper person. While the rules in their Constitution are voluntary, they are built on and embedded in established social norms about the right way to behave and the way in which professional persons such as barristers should behave. These social norms are further reflected in state law.

The state and non-state laws governing the behaviour of barristers combined to form a 'network' or 'web' where different actors each played a part in the governance of the system (Sahlin-Andersson 2004, p. 143; Burris et al. 2005). In this case, the network regulating the legal system included non-state actors (the Bar Association, the barristers and journalists) and state actors (several government organizations at different levels of government and legal tribunals). Systems of rules which are not backed by legal sanctions rely on voluntarism (Sahlin-Andersson 2004). The assumption of these systems is that members will voluntarily follow the rules and will self-regulate by monitoring behaviour and sanctioning those who ignore the rules. The problem comes when voluntarism and self-regulation do not occur. This has been noted as one of the main problems of self-regulation when clear, known sanctions are not in place (Hutter 2006). In the case of the bankrupt barristers, the Constitution of the Bar Association was backed up by legal sanctions. And yet, the courts often seemed to be reluctant to enforce sanctions on those who were non-compliant, preferring instead to make excuses for them, as demonstrated earlier in the Tom Harrison court case. A problem of organizational culture where members see fit to protect their own?

Coercion alone could not have achieved the desired result in this situation. Possession of a legal mandate by the tax office was insufficient to gain compliance. Nor were the norms of decision which should have been enforced by the Bar Association sufficient. Hutter and Jones (2007) posed the question of whether the regulated recognize regulation beyond the state. This appeared to be the issue here. These barristers understood not only the moral rules and norms but also the legal rules and norms so well they were able to play on the weaknesses in both state and non-state law to put themselves beyond the law. They recognized neither non-state nor state regulation.

The weakness in Hertogh's Field C of non-state law as described in Chapter 2 – the norms of decision and the inability of non-state law to enforce – is mirrored in state law. Each state organization has responsibility

for different facets of the law and the power of state institutions is constrained so that they may only act within their own mandated area. A tax office can only enforce tax laws. Such constraints are a good thing; however, as this case study demonstrates, they can be a weakness by preventing state actors from crossing their own boundaries, even to the point of inability to share information about non-compliant individuals, as was the situation in this case. The narrow view of law and its enforcement is that it is the role of the state. This view has more recently been challenged by the notion of decentred regulation (Black 2002). However, even a decentred approach to regulation is insufficient in cases like this. More was required to enforce compliance – governance (Scott 2005; Hutter and Jones 2007) and a nodal governance regulatory approach (Burris et al. 2005) where state and non-state actors worked not alone but as a networked system.

These recent ideas about regulation are not challenging state law, or the role of the state in the making and enforcing of law. Rather, they are examining the role of both state and non-state law and actors, and the relationships between them. State and non-state actors can work together to make and enforce rules in a way that makes up for their respective weaknesses. Government organizations like a tax office must operate within state law. They can limit their role to seeing the role of state law as one of coercion. Or, they can broaden the role of state law and their ability to enforce it by allowing space for interaction with non-state actors to enable a more dynamic and effective system of enforcing the law.

This study illustrates the focus of this book on the interaction between the state legislature and non-state law. In this instance, non-state law did influence the state legislature at two levels of government to change several pieces of legislation, not necessarily because non-state law was inadequate but because the non-state actor would not, or could not, enforce its own rules. In the face of this action by the state, the non-state actor chose to strengthen its own rules and to finally self-regulate by investigating the behaviour of its members.

It would seem that non-state law works when things are going well but is not effective on its own in the business world when there is deliberate non-compliance. State law is needed in these situations to enforce where non-state actors cannot. Rather than seeing a declining role for the state, the issue is more one of state and non-state actors needing to work in cooperation to ensure compliance. Where there is 'genuine conflict' or widespread and deliberate non-compliance, as there was with the bankrupt barristers, non-state law has weaknesses which may prevent its ability to achieve compliance. This is where a nodal governance approach to compliance can bring state and non-state actors together in a web of influence to achieve what has been argued as the preferred regulatory mix of state and non-state

regulation (Hutter 2006). This change has occurred in the way state actors think about and conduct regulatory activity. What was once a state activity, with each government organization seeing its role as separate from other regulators, is changing to a governance system where several state and non-state actors may work together.

The consequences for the role of the state would appear to be twofold. First, as this case study has demonstrated, there is the need to ensure that explicit sanctions are reflected in state law to ensure compliance when the enforcement of moral norms in the business world fails to occur. Then, there is the realization that the state does not have to bear the sole brunt of enforcing the law. It increasingly works as an essential part of a larger system where state and non-state actors can work in an enforcement partnership when necessary to enforce state and non-state law.

NOTE

1. See the speech, 'Legal Professional Ethics in Times of Change', by The Hon. Justice Michael Kirby at The St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996 on The New South Wales Bar Association website.

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