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<b>Title</b>	Licensing as a Tool of Regulation and Governance
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<b>Publication date</b>	2014
<b>Publication information</b>	CASS Journal of Law, 36 (2): 35-45
<b>Publisher</b>	Law Institute of CASS
<b>Link to online version</b>	<a href="http://caod.oriprobe.com/articles/43375955/Licensing_as_a_Tool_of_Regulation_and_Governance">http://caod.oriprobe.com/articles/43375955/Licensing_as_a_Tool_of_Regulation_and_Governance</a> <a href="https://www.iolaw.org.cn/global/en/news7.asp">https://www.iolaw.org.cn/global/en/news7.asp</a>
<b>Item record/more information</b>	<a href="http://hdl.handle.net/10197/7018">http://hdl.handle.net/10197/7018</a>

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# Licensing as a Tool of Regulation and Governance<sup>1</sup>

Colin Scott

## 1. Introduction

Licensing originates from more general practices of those with property rights carving out part of their interest to give limited rights to others in respect of their property, for example having rights to visit or stay on land, or to use copyrighted material by performing a play or a song. In the armoury of tools and techniques for regulation licensing has a central place as the exercise of state control seeking to secure particular social and economic outcomes. The state's capacity to license is special, as it is linked to the state monopoly over legitimate coercive power.

Two preliminary remarks about the position of licensing as a regulatory instrument are warranted. First, though licensing is clearly an instrument of great significance across many if not all jurisdictions, remarkably little general analysis of the tool has been undertaken. Second, notwithstanding the obvious attractions and advantages of licensing as a mechanism of regulation, the costs and intrusiveness of the method have encouraged governments to consider alternative mechanisms to secure particular outcomes. This short paper considers the concept of licensing, the rationales for its deployment, risks and costs associated with the mechanism and alternatives. The paper draws largely on the experience of licensing within common law jurisdictions.

## 2. Regulation and Licensing

### 2.1 Regulation

Regulation is conventionally understood as the deployment of governmental authority to establish systematic oversight by reference to rules over some activities valued by society, frequently involving a dedicated public agency concerned with both monitoring and

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enforcement.<sup>2</sup> Regulatory scholarship has increasingly sought to incorporate both non-state actors as regulators and mechanisms of control other than rules as part of conceptual apparatus of regulation, equating regulation with a wider range of mechanisms that involve the setting of norms, feedback on deviations from the norms and the mechanisms for correcting behaviour. This expansion in the concept of regulation is linked to the understanding of governance as comprising control over behaviour whether exerted by public or private actors and whether using public or private mechanisms.<sup>3</sup>

Addressing actors first, while governments remain important, through their use of legislation to set down rules, the establishment of monitoring through departments or specialised agencies, and through enforcement with application of penalties either directly or through litigation for breaches of regulatory rules, it is increasingly acknowledged that these functions can be undertaken by non-state actors.<sup>4</sup> For example rules and standards are set by standards bodies, such as the International Organisation for Standards (ISO), by trade associations (such as the International Swaps and Derivatives Association (ISDA), and by non-governmental organisations (NGOs) such as the Forest Stewardship Council (FSC). Monitoring is undertaken both within self-regulatory regimes (often at national level), but also by NGOs (for example by Amnesty International in respect of human rights standards). A focus for enforcement is increasingly on the contractual provisions made by firms between themselves, so that failure to comply with a privately set standard can be punished by contractual penalties, but also within self-regulatory regimes where penalties may range between warnings and fines at one end of the spectrum and expulsion from the relevant association for the most serious breaches.

Addressing mechanisms, the classic regulatory mode involves statutory rules, combined with formal monitoring and enforcement powers which may be characterised as hierarchical. Alternative mechanisms invoke the potential for participation in competitive and community

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<sup>2</sup> Selznick, Philip, 'Focusing Organizational Research on Regulation' in Roger Noll (ed), *Regulatory Policy and the Social Sciences* (1985); Black, Julia, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1-35.

<sup>3</sup> Scott, Colin, 'Regulation in Age of Governance: The Rise of the Post-Regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation* (2004) 145-174.

<sup>4</sup> Scott, Colin, Cafaggi, Fabrizio and Senden, Linda, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law & Society* 1-19.

settings to change behaviour.<sup>5</sup> Addressing competitive environments first, businesses may respond to market incentives to change behaviour and these can be actively deployed, for example by publishing comparative details of performance for example in respect of price and quality in provision of telephone services, enabling consumers to transfer their loyalty to better performers. Such league table rankings can also be used to encourage better performance from public bodies, whether service providers or regulators. An example in respect of regulators involves the publication of an annual international league table of performance by competition agencies by the private journal *Global Competition Review*.<sup>6</sup> With communities it is increasingly recognised that there is both there is capacity to set and secure compliance with social norms both formally (for example through self-regulation) and informally (through social interaction which both defines the norms and punishes non-compliance). Well developed examples of the latter phenomenon, where local communities implicitly set standards for companies involved in mining of minerals concerned with such issues as pollution, environmental standards and labour standards, are even referred to as constituting a 'social licence to operate'.<sup>7</sup>

This shift in thinking, to acknowledge a wider range of actors and mechanisms for regulation, recognised to some extent in public policy, for example in the recognition given to transnational private regulation in the OECD programme on international regulatory cooperation,<sup>8</sup> does not reduce the significance of state regulation, but rather emphasises the potential for complementary public and private regulatory governance.<sup>9</sup>

## 2.2 Licensing

Licensing as an instrument of regulation is generally thought of as a core form through which states exercise regulatory authority sometimes referred to as 'command and control'.<sup>10</sup> It is

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<sup>5</sup> [Murray, Andrew and Scott, Colin, 'Controlling the New Media: Hybrid Responses to New Forms of Power' \(2002\) 65 \*Modern Law Review\* 491-516.](#)

<sup>6</sup> <http://globalcompetitionreview.com/rating-enforcement/> (last visited 3<sup>rd</sup> January 2014).

<sup>7</sup> Gunningham, Neil, Kagan, Robert and Thornton, Dorothy, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law and Social Inquiry* 307-342.

<sup>8</sup> OECD, *International Regulatory Cooperation: Addressing Global Challenges* (2013).

<sup>9</sup> Black, Julia, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) [2001] *Current Legal Problems* 103-146; Cafaggi, Fabrizio, 'Private Regulation and European Legal Integration' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (2010).

<sup>10</sup> Baldwin, Robert, 'Regulation: After 'Command and Control'' in Keith Hawkins (ed), *The Human Face of Law* (1997); Parker, Christine and Braithwaite, John, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003).

striking that, notwithstanding its importance, remarkably little general analysis of the tool has been undertaken.

Typically licensing requires legislation under which government departments or agencies are empowered to grant licenses. It offers a more specific form of regulation than just general regulatory rules because it typically establishes a bilateral relationship akin to contract. A typical licensing regime involves:

- (i) an application process which permits government to choose who may enter the market (for a particular activity, occupation or product) and
- (ii) the issuance of a licence with terms and conditions which permit ongoing oversight of an identified group of licensees using rules set down in the license,
- (iii) monitoring powers which may be provided for in the license (for example duties to report to government periodically) and
- (iv) sanctions which may be more specific than those provided for in generally regulatory legislation and which may include the most severe sanction of license revocation which, in a sector where licenses are mandatory, will put the licensee out of business.

Thus, on one view licensing is a rather heavy handed and intrusive form of regulation. An alternative perspective notes that much of the recent emphasis on licensing has been as a mechanism to enable the state to withdraw from public ownership whilst retaining some control through the issue of licenses. Thus in many European countries the transfer of ownership to the private sector of many providers of public utilities such as electricity, gas and telecommunications has been accompanied by the issue of licenses through which rules may be applied and monitored in respect of the privatized suppliers. Seen in this context licensing can be seen, simultaneously as a form of deregulation (removing an activity from public ownership) and reregulation (applying new rules to operators in the sector) .<sup>11</sup> Contemporary China also provides an example where licensing is a mechanism used to retain elements of state control in conditions where ownership is transferred to the private sector. Thus there is a seeming paradox in the position that licensing can be seen simultaneously as deregulatory and re-regulatory. Similarly, in respect of matters for which policing is an alternative, such as controlling undesirable activities associated with consumption of alcohol, licensing can be presented as a

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<sup>11</sup> Armstrong, Kenneth, *Regulation, Deregulation, Reregulation* (2000).

less intrusive or more liberal mechanism.<sup>12</sup> More generally, in China, as in many countries, tendencies to proliferate requirements for businesses to have licenses have been reviewed in order to support a more attractive environment for businesses to develop.<sup>13</sup>

### 2.3 Negative Licensing and Class Licences

Whilst the typical licensing arrangement comprises a bilateral relationship between licensor and licensee, it is possible for governments to use licenses in different forms. Two examples of alternatives are negative licensing and class licenses. A regime of negative licensing deems everyone to be able to engage in the licensed activity without application for or issuance of a license. This mechanism permits government to remove actors from a market through 'license revocation.' A key example in the UK, under the Estate Agents Act 1979, permitted any person to establish themselves as a real estate agent, facilitating property transactions, but empowered a state agency, the Office of Fair Trading, to engage in monitoring of the sector and to receive complaints about the conduct of estate agents. Where the Office of Fair Trading became aware of factors making a person unfit to act as an estate agent, for example a criminal conviction, it was empowered to make statutory orders, including a prohibition on any specified person continuing to practice as an estate agent. Whilst this mechanism has not been much developed, a leading regulatory scholar, John Braithwaite, has argued that it might be developed to address misconduct of banking practitioners, who might be disciplined and even removed from practice as bankers where evidence emerges that they are unfit to practice.<sup>14</sup>

A class licence is a license deemed to be issued to all actors pursuing a defined set of activities and for which no application is necessary. This mechanism has the advantage that it can apply license conditions to the affected group without the cost on both sides associated with application processes. A key advantage of both these mechanisms is that they are less costly on both sides. A regime of class licences is used in wildlife management in the United Kingdom with two forms of class licence deployed. A *general licence* sets down conditions for certain kinds of regulated activity, such as selling of particular species of wild bird and amphibian, but may be used by anyone without application or notification. The only requirement on those using the

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<sup>12</sup> Valverde, Mariana, 'Police science, British style: pub licensing and knowledges of urban disorder' (2003) 32 *Economy & Society* 234-252.

<sup>13</sup> Peerenboom, Randall and He, Xin, 'Dispute Resolution in China: Patterns, Causes and Prognosis' (2009) 4 *East Asia Law Review* 1-61.

<sup>14</sup> Braithwaite, John, 'Restorative Justice for Banks Through Negative Licensing' (2009) 49 *British Journal of Criminology* 439-50.

licence is that they comply with the conditions, which may include restrictive eligibility criteria (such as membership of a particular association). The second form, described as a *class licence*, does not require application, but does require users to register. Class licences may have particular qualifying pre-requisites for use (such as particular skills or training) and may have a reporting requirement to enable the regulator to monitor how they are used.<sup>15</sup>

#### 2.4 Licensing as a Tool of Governance

The deployment of licensing as a tool of governance and regulation is an adaptation of the capacity of any actor with property rights to grant a licence to others to use their property without interfering with the property claims of the owner. Thus the owner of land may issue a licence to others to enter or use the land. The owner of intellectual property rights such as a patent or a trade mark may license others to use the intellectual property in a prescribed way. Following this analogy the establishment of licensing regimes by government has been said to establish a form of 'new property' since the right to engage in some activity can be of great value, the loss of a license can be very costly, and in some cases the rights associated with a license may be assigned or sold on to others (as with taxi and alcohol licenses in some regimes). This recognition has led to the attachment of significant rights around applications, renewals and revocations of licenses in many jurisdictions.<sup>16</sup>

As noted above, the concept of license is also used metaphorically to describe social relationships in which businesses have an implicit permission to undertake certain activities which may be withdrawn by society if implicit expectations are breached. The idea of the 'social license to operate' originated in extractive industries with capacity to damage the interests of communities with which they are in proximity, but has been extended to a wider range of relationships where the proximity is not geographical but is rather supplied by the market. The existence of a social license to operate is said to explain why some business go beyond minimum legal requirements in seeking to meet regulatory and social responsibilities.<sup>17</sup>

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<sup>15</sup> See the website of Natural England  
<http://www.naturalengland.org.uk/ourwork/regulation/wildlife/licences/default.aspx> (last visited 3rd January 2014).

<sup>16</sup> Reich, Charles, 'The New Property' (1964) 73 *Yale Law Journal* 733.

<sup>17</sup> Gunningham, Neil, Kagan, Robert and Thornton, Dorothy, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law and Social Inquiry* 307-342.

However defined, licenses as a tool of government can be deployed for a number of distinct purposes of which regulation is only sometimes the primary purpose.<sup>18</sup> Other key rationales for the deployment of licensing include the promotion of development of resources (which is liable to have a regulatory element), and, related to this, the allocation of scarce resources, and the extraction of payments from licensees. Thus on narrower definitions of regulation, licensing can be conceived of as having wider functions of managing scarce resources and securing payments. Whilst it is conventional to make such distinctions, where a wider conception of regulation is used then each of these functions could be seen as aspects of regulation.

Where governments are keen to see the development natural resources such as coal, petroleum and gas licenses are often deployed not only to permit exploitation and extraction, but also to require it to ensure that appropriate development is undertaken by the licensee. Whilst there is liable to be a regulatory element to such natural resources licenses, key rationales for such licensing regimes are more typically to promote development and to extract payments out of the licensees.<sup>19</sup>

In a second class of licensing regime associated with scarce resources such as radio spectrum and aircraft landing slots, the primary purposes of licences is to allocate and promote the best use of the scarce resources involved.<sup>20</sup> This may involve a regulatory element, but regulation is typically not the primary purpose.

A third non-regulatory class of licenses is deployed to collect revenue for government. In these cases government has no particular interest in regulating behaviour to licensees. Examples include the licensing of televisions and also licenses for provision of gambling services. Television licenses are in effect a form of tax. Licenses to offer gambling serve a dual purpose of collecting revenue and also identifying where gambling is going on as it sometimes attracts forms of unlawful activity which may require policing. In other cases the raising of revenue may be a subsidiary aim, as where licensee payments are required to cover the costs of a regime.

The focus of this short article is licensing as a tool of regulation or governance. Accordingly I shall not address directly the use of licensing to manage natural and scarce resources nor as a means

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<sup>18</sup> Scott, Colin and Black, Julia, *Cranston's Consumers and the Law* (2000), Chapter 12.

<sup>19</sup> Schlager, Edella and Ostrom, Elinor, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68 *Land Economics* 249-262.

<sup>20</sup> Borenstein, Severin, 'On the Efficiency of Competitive Markets for Operating Licenses' (1988) 103 *Quarterly Journal of Economics* 357-385.

to raise government revenue, even though these government objectives could be brought within a discussion of regulation

### **3. Rationales for Licensing as Regulation**

Even limiting discussion to licensing as an instrument of regulation, there are myriad examples of deployment of the tool. Where licensing is regulatory, we may assume that the key rationale for the regime is to exert control.

#### **3.1 Information Gathering**

Within regulatory regimes a core rationale for licensing is frequently to discover who is engaging in certain kinds of activity in which locations. Licensing of food premises, for example, permits government to know who is operating food premises so that they can be visited periodically to ensure compliance with hygiene and other food safety legislation. There may be no particular interest in controlling entry, but rather a concern to ensure that whoever enters the market shall comply with certain rules. A less stringent and less costly alternative to licensing in circumstances where neither entry nor conditions of entry are to be controlled is the introduction of a scheme of registration which simply requires businesses to submit their names and contact details for inclusion in a register.<sup>21</sup> However, it is possible to attach conditions to registrations which make them operate *de facto* as licensing regimes (for example for example to notify changes in activities) but perhaps without normal procedural rules which attach to licensing.

A distinct but related rationale for licensing is to impose mandatory reporting requirements on licensees. Gathering of information about compliance is a core function within regulatory regimes, and frequently the subject of general legislative powers such as the power to inspect premises or require supply of documents. The issue of licenses permits the imposition of more specific reporting duties by known actors.

#### **3.2 Controlling Entry**

In other instances the rationale for licensing may be to control entry, to ensure that only persons with certain qualifications and experience are able to engage in certain activities. Such regimes powerfully regulate potential market entrants, persuading some that they should not seek entry, and persuading others to follow the appropriate steps to qualify for a license. Key examples are

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<sup>21</sup> Scott, Colin and Black, Julia, *Cranston's Consumers and the Law* (2000).

found in the occupational licensing of professionals such as lawyers, who generally have imposed on them stringent educational and other requirements before they are permitted to practice (in many cases with the licensing power delegated by government to the profession itself, with attendant risks of anti-competitive conduct) and special forms of liability.<sup>22</sup> In other instances it may be the character rather than the qualifications which are of interest. UK licensing of consumer credit providers, for example, includes a check on fitness which precludes those with convictions for violent crime from offering credit (for fear that they might use violent methods to target those who do not pay their debts).<sup>23</sup> In the case of professional and other forms of occupational licensing the license constitutes a form of government badge of recognition, indicating that the licensee meets minimum requirements necessary to operate in the market, in addition to being subject to continuing regulation. Where regulation is undertaken well such government reassurances may be positive in addressing the asymmetric information of consumers and others and promoting confidence in the market place. Where regulation is poor such reassurance may be misplaced and may constitute a source of regulatory failure. A further concern about occupational licensing is that its effects may be anti-competitive if it controls entry in such a way as to protect existing licensees by preventing new entrants from practising.<sup>24</sup>

### 3.3 Controlling Conduct

Distinct from the control of entry is the rationale for licensing based on the control of conduct of businesses during the period they hold the license. A key example of this rationale for licensing is provided by the utilities networks in cases where governments have decided for sound economic reasons to restrict entry and/or permit economic dominance of the sector by one or more operators, but subject to conditions and regulatory oversight intended to substitute for the effects of competition and/or require meeting public service obligations.<sup>25</sup> Key example of license conditions imposed on utilities service providers include controls on price, requirements to permit others to use their networks to provide competing services (third party access and

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<sup>22</sup> McGuire, Paul Fenn; Neil Rickman; Alistair, 'Professional Liability and the Licensed Profession' (1992) 12 *International Review of Law and Economics* 479-496.

<sup>23</sup> Borrie, Gordon, 'Licensing Practice Under The Consumer Credit Act.' (1981) 91-103; Scott, Colin and Black, Julia, *Cranston's Consumers and the Law* (2000).

<sup>24</sup> Gellhorn, Walter, 'The Abuse of Occupational Licensing' (1976) 44 *University of Chicago Law Review* 6-27.

<sup>25</sup> Armstrong, Kenneth, *Regulation, Deregulation, Reregulation* (2000).

interconnection) and obligations to provide universal service (service at reasonable cost to all who demand it, frequently at uniform cost regardless of actual cost of supply, for example to remote areas) .<sup>26</sup> Such conditions typically carry with them reporting requirements on licensees and monitoring and enforcement powers for regulators.

### 3.4 Enforcement

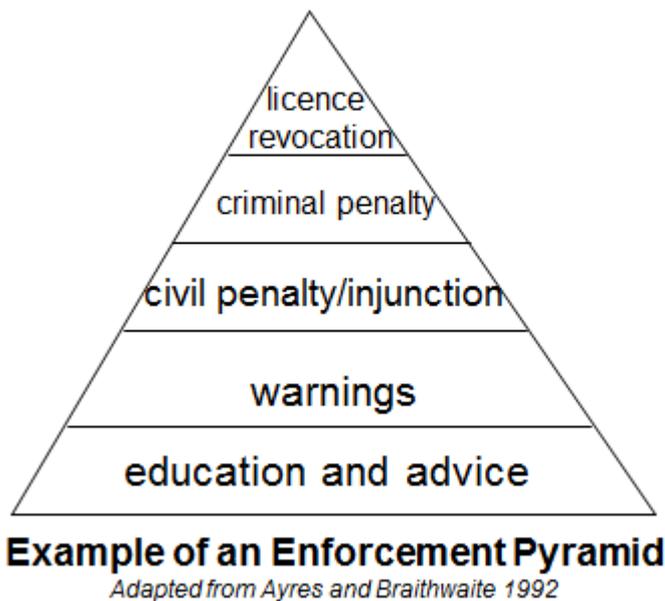
A core enforcement rationale for licensing is that the requirement of a license permits businesses in breach of the rules to be threatened with license revocation. Within many regulatory regimes where enforcement activity has been researched, researchers found that a form of 'enforcement pyramid' was deployed under which lower level engagements and sanctions frequently secured compliance, but under which higher level sanctions can be threatened to promote compliance with requests, warning and low level sanctions .<sup>27</sup> The possibility of license revocation creates a very severe top level sanction which, if accompanied by lower level and intermediate sanctions, can constitute an effective threat to secure lower level compliance .<sup>28</sup> Licence revocation is described as a more severe sanction than criminal prosecution because licence revocation removes the licensee from the market completely, whereas prosecution permits a business to continue trading, even though it may have been penalised and may have suffered reputational damage. This applies in particular with routine, low-level prosecutions and sanctions. But even where a firm is prosecuted for very serious crimes, such as corporate manslaughter, it can typically continue trading.

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<sup>26</sup> Prosser, Tony, 'Public Service Law: Privatization's Unexpected Offspring' (2001) 63 *Law and Contemporary Problems* 63-82.

<sup>27</sup> Grabosky, Peter and Braithwaite, John, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

<sup>28</sup> Ayres, Ian and Braithwaite, John, *Responsive Regulation: Transcending the Deregulation Debate* (1992).



The discussion of enforcement should make it clear that a central condition for effectiveness of licensing as an instrument of government is that there should be assigned to a department or agency powers to monitor and enforce licence requirements and also sufficient resources to be able to undertake the necessary tasks. A central rationale for the adoption of pyramidal approaches to enforcement is concerned not only with effectiveness but also making the best use of limited resources. If agencies can secure compliance in most cases through education, advice and warnings, then they can conserve resources for more costly processes of prosecution reserved for the most persistent or egregious breaches.<sup>29</sup>

One way to address limited enforcement capacity of the state is to use licenses to require licensees to sign up to private redress schemes which empower customers (whether businesses or consumers) to enforce license or other rules without the intervention of public agencies or the courts. Thus licensees might be required to finance and operate an arbitration scheme which offers a relatively quick and cheap and alternative to litigation for those who are disappointed with products and services.

#### **4. Evaluation of Licensing**

##### 4.1 Competition Concerns

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<sup>29</sup> Cranston, Ross, *Regulating Business: Law and Consumer Agencies* (1979).

Whilst licensing may have positive effects in terms of capacity to pre-clear market actors and to identify and regulate them, there is significant potential for adverse effects. A key risk is that restrictions on entry to the market adversely affects competition. If too few lawyer licenses are issued then the availability of lawyers may be reduced and the costs may increase. This risk is particularly significant where the power to license is delegated to the profession itself. In the case of taxi licenses prices are typically regulated, recognising the situational monopoly of a taxi, and thus the issue of too few licenses may not increase price, but may mean there are insufficient taxi drivers.<sup>30</sup> Conversely the issue of too many licenses may make it difficult to make a living and may reduce supply of taxi drivers over time.

#### 4.2 Costs

Licensing clearly creates costs for both licensor and licensees. For licensors such as government the costs of the regime are dependent on numbers of applications, number and complexity of criteria for grant, stringency of application of those criteria, and mechanisms for application, review and notification. Numbers of applicants are likely to be known, at least approximately, before establishing a regime. Where numbers are relatively small and the policy reasons for licensing are strong then cost considerations may not discourage the establishment of a licensing regime. However, where likely applicant numbers are high there should be strong consideration of alternative ways of securing the objectives of the proposed regime. The setting and application of criteria for licensing should centrally consider congruence with the objectives of the regime. There is a significant quantity of scholarship concerned with setting of regulatory rules generally which considers the advantages of more simple and general rules as compared to more complex and specific rules against considerations of both ease of application and compliance and congruence with objectives.<sup>31</sup>

#### 4.3 Abuse of State Power

The establishment of licensing regimes also creates risks of arbitrary or unjustified use of authority by state actors, challenging to ideas about fairness, transparency and the rule of law, leading to the oversight of licensing authorities by both administrative and judicial mechanisms

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<sup>30</sup> Barrett, Sean, 'Regulatory Capture, Property Rights and Taxi Deregulation: a Case Study' (2003) 23 *Economic Affairs* 34-40.

<sup>31</sup> Baldwin, Robert, *Rules and Government* (1995); Black, J.M., "'Which Arrow?': Rule Type and Regulatory Policy' (1995) [1995] *Public Law* 94-117; Braithwaite, John, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47-82; Diver, Colin, 'The Optimal Precision of Administrative Rules' (1983) 93(1) *Yale Law Journal* 65-109.

in many jurisdictions. In the common law world the early licensing renewal case of *McGuinness v Onslow-Fane* [1978]1 WLR 1520 has generated a great deal of discussion about the treatment of applications for licenses and licensees in terms of both legal rights and legitimate expectations

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As I understand the position in China, a key mechanism for addressing potential costs and difficulties associated with licensing has been the establishment of a single model for licensing within the Administrative License Law adopted in 2004. The 2004 Law sets down the objectives for which a licensing regime may be established, which are very broad and include a catch-all provision (Article 12). Alternatives to licensing are specified to include market competition, self-regulation and state supervision without licensing (Article 13). This approach is consistent with the approach to better regulation and alternatives to regulation set down by the OECD.<sup>33</sup> The establishment of a licensing regime is said to require an articulated justification, the potential effects, and details of consultation (Article 19). Periodic review with a view to revising or abolishing licensing regimes is also required (Article 20). There is provision for testing and inspection to be carried out by 'professional technical organizations' (Article 28). Application procedures and appeals rights are set down in detail across a number of sections, including provision for electronic application and administration (Article 33). The text is of great interest in setting down principles for establishing and operating licensing regimes, though the effects of the law are likely to be best understood through looking at its application rather than simply its principles, something which is outside the scope of this short article.

#### 4.4 Alternatives to Licensing

If licensing is considered to be both costly and intrusive then governments should consider alternative ways of securing the same outcomes prior to introducing licensing regimes.<sup>34</sup> This is a basic principle of better regulation generally as advocated by the OECD and implemented across most OECD member states. There are at least two dimensions to developing the capacity to act on the principle. First, there is the development of institutional capacity for scrutiny of regulation, and second there is the development of ideas. The UK government has established a

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<sup>32</sup> Baldwin, Robert and Horne, David, 'Expectations in a Joyless Landscape' (1986) 49 *Modern Law Review* 685-711.

<sup>33</sup> OECD, *Regulatory Impact Analysis: Best Practices in OECD Countries* (1997); OECD, *Regulatory Reform* (1997) vol 1: Sectoral Studies.

<sup>34</sup> Dewees, D N., 'Policy Alternatives in Quality Regulation.' in Donald Dewees. (ed), *The Regulation of Quality*. (1983) Ch 2.

number of public bodies with responsibility for drawing on the views of businesses and others affected by regulation in order to develop capacity for both scrutiny and ideas. One of these bodies, the Better Regulation Task Force (established in 1997, and replaced by the standing Better Regulation Commission in 2006 and by the Regulatory Policy Committee in 2011) has investigated both alternatives to state regulation and, more generally, ways to make regulation both more effective and simultaneously less burdensome for businesses.<sup>35</sup> Alternatives to licensing include doing nothing (and thus leaving outcomes to market and or social processes), encouraging self-regulation, using market-like mechanisms to change behaviour (for example imposing taxes on undesirable activities or offering subsidies to desirable activities) and applying regulatory oversight without the burden of licensing (but possibly with registration requirements). A key example, found at both domestic and supranational level in the European Union, involves advertising regulation. Most member states delegate substantial aspects of standard setting and enforcement (through adjudication on complaints) to self-regulatory bodies, sometimes with periodic government threats to legislate to encourage tightening of regimes.<sup>36</sup> At the level of the EU, and notwithstanding the fact that the EU institutions generally have been sceptical about whether self-regulation could deliver on the EU's objectives, there is significant recognition of the importance of self regulation.<sup>37</sup> Discovering which mechanisms may be appropriate for securing outcomes may involve a degree of experimentation and learning, with the possibility of revising regimes following review.<sup>38</sup>

## 5. Conclusions

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<sup>35</sup> Better Regulation Task Force, *Alternatives to State Regulation* (2000); Better Regulation Task Force, *Less is More: Reducing Burdens, Improving Outcomes* (2005).

<sup>36</sup> Baggott, Rob and Harrison, Larry, 'The Politics of Self Regulation: The Case For Advertising Control' (1986) 14.(#2.) *Policy and Politics*. 145-159.

<sup>37</sup> European Commission, *Self-Regulation in the EU Advertising Sector: A Report of Some Discussion Among Interested Parties* (2006). Subsequent to this report, the EU has substantially delegated the development of new regulatory rules for online behavioural advertising to the European Advertising Standards Alliance, which comprises both national self-regulatory bodies and industry representatives.

<sup>38</sup> Scott, Colin, 'Reflexive Governance , Regulation and Meta-Regulation: Control or Learning?' in Olivier de Schutter and Jacques Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. (2010).

Licensing offers strong capacity for government to apply requirements to businesses, to monitor compliance and to enforce the rules. In this sense it offers a rather complete form of regulation, and for this reason is likely to be attractive as a means to assert control. Licensing does, however, increasingly, generate some anxiety for a number of related reasons. First, there is a growing questioning of the appropriate balance between state and non-state activity in driving forward economic and social progress and anxiety about potential adverse effects on competitive markets. Licensing is an application of the strong state and might create risks both of abuse of state power and also of crowding out social and economic innovation. Related to this is a good deal of scepticism about the capacity of states to exert control as a means to securing desired outcomes and a question as to the extent to which states might use their capacity to stimulate and observe market and social processes as means to secure acceptable outcomes, with licensing and other more stringent modes of regulation reserved to those actors and sectors where less interventionist modes are not likely to be successful. Sorting out the circumstances in which licensing may or may not be appropriate is likely to involve research, experimentation and learning.

