REMARKS OF THE HON. MARILYN WARREN AC
CHIEF JUSTICE OF VICTORIA
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'Legal ethics in the era of big business, globalisation and consumerism'

The modern lawyer faces ethical challenges in light of the ever increasing commercialisation of legal practice. More particularly, lawyers face difficulties in discharging both the duty to the court and the duty to the client in this context.

There is a potential future consequence of the commercialisation of professional conduct, specifically with regard to the manner in which law firms in recent times have adopted a variety of business models and corporate structures in which to conduct their affairs. There is the modern scenario of litigation being conducted by the litigation funder. The funder is effectively the real client giving

instructions to a law firm, possibly floated on the Australian Stock Exchange. The litigation funder has duties to its shareholders and doubtless sees itself as owing no duty to the court while the law firm has a duty to the court, a duty to the client and also a duty to its shareholders. Counsel instructed by these parties may be in the situation of facing complex conflicting interests and duties. Thus, Judges need to make complicated assessments of what duty is owed and by whom. Indeed, the commercialisation of the legal profession brings to bear situations for lawyers in which multiple duties need to be deciphered and weighed against each other.

I am chiefly concerned with the impact of commercialisation on the exercise by lawyers of their duty to the court. Today, I would like to expand on this to consider the broader ethical obligations imposed on lawyers in a changing legal landscape. Lawyers and the public are facing developments that raise profound questions about the identity and obligations of the

profession. I would like to explore some of the reasons why this is so.

A NEW ETHICAL PARADIGM: HAS THE LEGAL PROFESSION BECOME A BUSINESS?

The legal profession is traditionally characterised by two unique attributes. First, it is ethically self-regulating. Secondly, legal practice is a profession and this sets it apart from other commercial enterprises. These attributes define the lawyer's professional status.

The broad ethical aims towards which lawyers' actions are directed are generally incorporated in a code or rules of professional conduct that apply in the jurisdiction in which he or she practises. The rules or code of conduct provide a clear understanding of what is required of a member of the profession. They serve to identify to a practitioner features of the profession which are essential to proper and ethical behaviour. Ethical behaviour is short hand in this instance for

the special relationship between lawyer and client, and the higher, paramount, duty owed to the court. Importantly, legal professional ethics serve the purpose of maintaining the standing of the profession in the eyes of the community, essential if a lawyer's unique role in the system of justice is to be maintained.

The foundation of a lawyer's ethical obligation is the paramount duty owed to the court. The reasons for this are long-standing. It is the courts who enforce rights and protect the citizen against the state, who enforce the law on behalf of the state and who resolve disputes between citizens, and between citizens and the state. It is the lawyers, through the duty owed to the court, who form the legal profession, and along with the judiciary, who underpin the third arm of government. Without the lawyers to bring the cases before the courts, who would protect the citizen? Who would enforce the law? It is this inherent characteristic of the duty

to the court that distinguishes the legal profession from all other professions and trades.

The practice of law nowadays is very much a commercial operation. The 'move towards the incorporation of legal practices, the commercial alliance between legal practices and other commercial entities and, more recently, the public listing of law firms on the stock exchange' have all contributed to the 'commercialisation' of the profession.[1] With economic considerations increasingly gaining ascendance over older notions of professionalism, legal practice is now viewed as a commercial activity, and the law as an industry. It is hardly surprising that clients of law firms are increasingly being viewed as consumers. This works both ways; users of legal services also view themselves as consumers.

[1] Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008),154.

In the commercial and profit driven space in which lawyers operate, it is common for lawyers to feel obliged to effect the every will and instruction of their client. This may have something to do with the market for legal services being so competitive. Law firms now must compete more fiercely than ever before for both clients and for staff. As a result, firms increasingly have taken on the characteristics of more conventional business enterprises. Most employ a cadre of non-lawyer professionals in executive and managerial positions, and vigorously market their services.

I am not suggesting that the right of law firms to be competitive should be stigmatised. Competition can create incentives for innovation, efficiency and good practice in the provision of services. But whilst competition itself might not impact on a lawyers' ethical obligations owed to a client, it may compromise the duty to the court because to be

competitive may imply the subordination of the interests of justice to the consumer.[2]

Consumers generally are becoming increasingly aware of the market power they wield and the market for legal services is no different. The shift toward commercialism in the legal industry has, in part, been a response to the needs and demands of clients and the changing business environment in which law firms operate. In most commercial circumstances, the paying client's interests trump all others. That is not the case when it comes to the legal profession and their clients. this is difficult for some clients to accept. Whilst it is partly resolved by in-house counsel even then the lawyer will have ethical duties that cannot be waived or compromised by the fact that the employing corporation pays the lawyer's salary.

[2] Posner, "Overcoming Law", in Rhode and Luban, Legal Ethics, 5th ed (2009) at 43, 45.

One significant side effect of increased competition is that the market for legal services is subjected to new external threats and internal conflicts of interest. Consumers question the role of the lawyer and appear to no longer automatically accept the cost, language, or accuracy of legal advice. Other professions, notably accountants, compete openly for traditional legal work, the boundaries of which are contested and continually changing. Some in the profession are keen for profit to be placed before principle and may welcome business oriented lawyering, while others express fears that genuine professional values are under siege.

The issue may, however, be far wider. The risk is that the scope and nature of legal professional ethics will be displaced, and it would then be appropriate to talk of 'corporate and business ethics' rather than legal professional ethics. The question I pose is, what moves and motivates lawyers to carry out their work ethically and pursue justice as

opposed to solely profit? The legal profession is challenged to define its mission and understand its place in a changing society. We must always remind ourselves that 'business ethics' consist of applying ethical principles to an area of human activity not always known for its ethical nature. On appearances alone, business is about making money, turning a profit, buying for the least and selling for the most, being competitive, enticement, promises and psychological techniques of suggestion.

But 'business' is not a 'profession' in the way the 'legal profession' has traditionally existed. It does not owe duties to the court or to the administration of justice. It is not subject to strict self-regulating ethical standards. The world of commerce has different imperatives. As Sir Anthony Mason expressed extra-curially, '[t]he professional ideal is not the

pursuit of wealth but public service. That is the vital difference between professionalism and commercialism.'[3]

Justice Kiefel made similar remarks in an address to the Queensland Law Society earlier this year where her Honour highlighted the need for the profession to hold the confidence and trust of the public for the legal system to be effective, and warned against losing sight of professional standards:

> *'It would not serve lawyers well to equate themselves with their clients, nor should they conduct all aspects of their practice as their clients might run a corporation.'*

I am concerned that this fundamental distinguishing feature, the standard of conduct required of legal professionals, is losing its force.

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[3] See the Hon. Sir Anthony Mason AC 'The Independence of the Bench' (1993) 10 *Australian Bar Review* 1, 9.

With the defence of professional values becoming increasingly difficult in the face of commercial values, competition, and the pressure to make profit, how is a lawyer then to reconcile the ascendance of commercial considerations over older notions of professionalism? No-one can question the need for law firms to make a profit but it appears that regulators believe that professional self-regulation is no longer effective and that broad and overarching external regulation is necessary.

Simply because a lawyer's job is difficult on occasion from an ethical point of view does not mean that the profession is not up to the task of performing its functions ethically in the traditional sense. External regulation may be welcome but it must not come at the expense of the traditional role of the profession. External regulation must allow continued education and training for lawyers to understand their duties in a changing society. It must continue to allow the inherent features of the profession to which I have referred.

The proposed national reforms, for which a three month consultation period commenced last week, do not, unfortunately, rise to the occasion. The executive branch of government appears to be capitalising on what it perceives as the community having lost faith in the professional standards of lawyers. What is troubling is the emergence of what appears to be a new customary duty: the 'duty to the consumer'. It would seem that this duty will, from now on, define a lawyers ethical duty as a matter of external regulation. Let me explain.

INVALIDATING THE PROFESSION: REGULATORY NATIONALISATION OF LEGAL PROFESSIONAL ETHICS

The National Legal Profession Reform Bill provides for the National Legal Services Board's members to be appointed on the recommendation of the Standing Committee of Attorneys-General (SCAG). The Law Council of Australia and the Council of Chief Justices will each nominate a panel of three

candidates and one board member will be selected from each panel. The other board members are to be appointed by SCAG so as to represent 'a balance of skills in the practice of law' and 'the protection of consumers'.[4] The proposal also includes national conduct rules for barristers and solicitors (prepared by the Australian Bar Association and the Law Council of Australia).

A National Legal Services Ombudsman will be established as an independent entity to administer and oversee complaints against legal practitioners. The Ombudsman will have a range of functions including powers to make determinations and orders in relation to complaints made by 'consumers' and powers to prosecute matters involving professional misconduct. It will also have the power to conduct audits of law firms to ensure compliance with the law and rules of conduct.

[4] Report attached to draft Bill.

Decisions of the Ombudsman will be subject to internal review by the National Legal Services Board, such decisions then reviewable by a disciplinary tribunal, which in turn may be appealed to the Supreme Court of the State or Territory to which the order relates.

The proposed national legal profession reforms are troubling and should be a matter of concern for all lawyers. They will have the effect of undermining the independence of the legal profession and its role in our democratic system of governance. The proposal dramatically changes the ethical paradigm in which Australian lawyers practise. Bringing the legal profession under the control of the Executive arm of government as is proposed, through the governing vehicle of the Standing Committee of Attorneys-General, would compromise the independence of the legal profession and its role in implementing the rule of law. The question of national

legal profession reform is much more than a method of costs saving and efficiency.

Critically, the proposals appear to indoctrinate many of the difficulties the commercialisation of the profession is causing for legal practitioners to which I have referred. There appears to have been no regard for the acknowledgment of the legal profession as a 'profession', in the sense I have described, but instead, an attempt to recast the profession as a business whose ultimate goal is to tend to the interests of consumers and to be prepared for auditing by the National Legal Services Ombudsman. In short, the proposals will crystallise the external regulation of legal professional ethics to a standard based on either the expectations of the Executive arm of government through the National Legal Services Ombudsman rather than to the traditional standards required by the rule of law. There is a very real risk that lawyers will no longer be able to self-regulate in the face of

meeting these competing demands. There are foreseeable conflicts between these external standards and the duty to the court.

COAG is no doubt trying to respond to a perceived decline in confidence in the legal profession in the community at large, that lawyers are not meeting their professional and ethical obligations, and that in the interests of the protection of the community and 'the consumer', entrenched external regulation is necessary. The question must be asked – where is the evidence to justify the extent and nature of the reforms? What started out as supposedly an exercise to achieve greater efficiency and nationalisation of the legal profession has developed into an unexpected model: the Executive arm of government will effectively oversee and control the legal profession. But the reforms do not sufficiently take account of the traditional ethical obligations of the legal profession and its role in the context of the third

arm of government, and very real risks arise between a new conflict between the duty to the court and the duty to the consumer.

CONCLUSION

The modern reality is that the legal profession has changed dramatically. Firms market themselves aggressively; they are nationalised and globalised. Partners are encouraged to retire as young as 55 with a commensurate loss of wisdom and experience. At the other end, young lawyers are actively pursued and recruited – they are exploited as reflected in the high attrition rates, especially young women. The Victorian Supreme Court's admission gender demarcation is currently running at over 60 per cent in favour of women. In the middle are the associates, senior associates and prospective partners struggling to meet the profit demands of the modern practice. Their incentive for unfailing, relentless commitment

to the firm's profit is that they too may be made a partner, one day.

In the context of ethics the commitment to pro bono work by the profession is a noble but salutary phenomenon. It reminds firms that their duty is to assist in the administration of justice and they do to the extent of millions of dollars in legal work.

So ultimately two points resonate. The duty to the court is what distinguishes lawyers from all other professions and the trades. Secondly, the profit goal must be balanced and put into perspective. After all, lawyers are a critical part of the rule of law that underpins our democracy. Corporations and businesses are not part of the structure of government, whereas lawyers are.