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**The Social Responsibilities of Lawyers**

**The Future of Regulation**

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My paper examines the social rights and responsibilities of lawyers in the contemporary Australian context. That context is the relationships between lawyers, the state, commerce and the public.

The content of the regulation of legal practice is drawn from several sources. Much is determined on the State level and I shall work with the example of my State, Victoria. The sources of regulation include State legislation, the common law of the courts, and the practice rules of the state registered lawyers associations, the Law Institute of Victoria and the Victorian Bar.<sup>1</sup>

The sources establish rights of practice for qualified lawyers. In return for these rights, it identifies standards of professional conduct, so we may say that the individual practitioner assumes duties to his client, the courts and tribunals, other practitioners, and members of the community. Those duties encompass honesty, candour, diligence, courtesy and fairness. The practitioner must also maintain the client's confidences and avoid conflicts of interest, either between the practitioner and the client or between two or more clients.

In this paper on social responsibility, I look not so much at the particular duties of the lawyer in everyday practice, as they are being discussed in my colleagues' papers. Instead, my focus is on the broad changes in the structure and style of legal practice. My argument is that regulation must adapt if it is to remain effective and responsive.

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<sup>1</sup> The principal legislation is the Legal Practice Act 1996 (Vic). For standard textbooks on lawyers practice and ethics, see Y. Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (Sydney: Butterworths); G. Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (Sydney: Law Book).

## **The Lawyer's Position in Society**

According to western liberal theory, there is a contract between the legal profession and the state. While the profession operates largely in the private sector, it receives protection and status from the state. Strict entry requirements, reserved areas of practice and a great deal of autonomy in determining ethical standards and professional conduct, do not just survive on the strength of innate expertise or client preferences. They have the authority of the state.

Yet the legal professionals do not owe their primary duty to the government, but rather to the client, the profession, and the law, the courts and the administration of justice. We do not say either that the profession is the creation of the state. In the west, the liberal professions largely preceded the strong centralised state. Lawyers have contributed to state formation, just as today they play a role enhancing the governability of society.<sup>2</sup>

So too, lawyers constitute a voluntary professional association that, as part of civil society, is interposed between the powerless individual and the state itself or a variety of powerful private organisations. Yet, while lawyers have an important role to play, defending essential civil rights, they also help bind local communities in suburban, rural and regional areas. Now additionally they fashion commercial and humanitarian links between different countries and cultures.

If lawyers have an organic professional identity, the practice of law is now undergoing changes that are breaking apart the cohesion and homogeneity of the local profession. The most common form of practice has been the sole practice or small group of practitioners (the partnership). Now, Australia follows the UK and US development of the large law firm that, while still nominally a partnership, is run on corporate lines. As a consequence, many lawyers are working as employees. The profession breaks into two contrasting hemispheres.<sup>3</sup>

The sophisticated large firms combine lawyers, para-legals and a range of other occupations, such as systems analysts, information technology, translators and cultural intermediaries,

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<sup>2</sup> For a useful summary, see T. Halliday, 'Lawyers As Institution Builders: Constructing Markets, States, Civil Society and Communities' in A. Sarat, M. Constable, D. Engel, V. Hans and S. Lawrence (eds), *Crossing Boundaries: Traditions and Transformations in Law and Society Research* (Chicago: Northwestern University Press, 1998).

<sup>3</sup> H. Kritzer, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World' (1999) 33 *Law and Society Review* 713.

lobbyists, and publicists. They are able to take advantage of economies of scale and scope to offer clients a full service.<sup>4</sup>

We should note that lawyers are practising their skills in a host of other organisations. They include business corporations, government instrumentalities, accounting firms, insurance companies, philanthropic foundations, insurance companies, advocacy groups and trade unions.

Some legal work is still very localised. But other legal services are increasingly multi-jurisdictional, if they are referable to a territorial jurisdiction at all. Some services seem to be constructed above the conventional state jurisdictions in a floating realm of trans-national private law.<sup>5</sup> There is a public international law dimension to this realm, sourced for example in the WTO and UNCITRAL, but its role largely is to open the way for private transactions.

In the regulation of lawyers, such trends surface in the push to liberalise business structures. Liberalisation will enable lawyers to organise and combine with others on a much more functional global basis – in multi-disciplinary, corporate and trans-national practices.

Paradoxically, any move to professionalise legal services along traditional lines tends to inhibit this development. While furthering public control, professionalisation may prove economically inefficient. Nevertheless, the liberalisation of business structures will necessitate experimentation with new kinds of social regulation.

If independence from the state remains vital to political liberalism, another issue is the possibility of capture by economic imperatives, where public professional duties are subordinated to the requirements of commercial sponsors and employers. Here, the state itself appears not so much in a political role but as another economic force. Through the satisfaction of its own legal needs and the provision of legal aid, the state becomes a major paymaster of legal services.

Efforts are made to carve out spaces within these organisations for the individual lawyers so they can remain true to their professional standards. This approach does not seem wholly

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<sup>4</sup> W. Becker, M. Herman. P. Samuelson and A. Webb, 'Lawyers get down to business' (2001)(2) *The McKinsey Quarterly* 45; H. McVee, 'Predators and the Public Interest – the 'Big Four' and Multi-Disciplinary Practices' (2002) 65 *Modern Law Review* 811. Cf. A. Subrahmanyam, 'Growth and Change: The Diverse Challenges Facing Chinese Law Firms' (2004) 18(5) *China Law and Practice* 17.

<sup>5</sup> Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1997).

realistic. Regulation might be more effective if it also forms part of the social responsibility of the surrounding organisation, just like any business corporation or government agency.

### **Services to Households and Individuals**

The rights of lawyers can be traced back to the civil rights of citizens in a liberal democracy. These days, the right to legal representation is linked with the principle of natural justice. This principle extends well beyond criminal law and the right to a fair trial. Of course, there are matters of degree and Australia does not display the same degree of legalisation of executive and administrative policy making as the United States. Nevertheless, natural justice applies to a range of decisions that affect the interests of the individual, such as housing, employment and social security decisions.

Even in an affluent country like Australia, the principle of natural justice is frequently enough endangered on account of the fact that the litigant cannot afford to meet the cost of a lawyer. If government cannot or will not guarantee the cost of private legal representation through the legal aid system, it has to find other ways of putting legal services within reach of ordinary citizens. In Australia, those means include:

- \* cheaper market rates, increasing the supply of lawyers and removing restrictions on competition, both among lawyers and with other occupations
- \* contingent fee services, so fees do not have to be paid upfront and the lawyer runs the risk of a failure to recover damages
- \* salaried legal aid and community legal service lawyers
- \* pro bono legal services

These options are very much in issue in Australia, when government legal aid is increasingly confined to criminal and family law cases and strict means and merits tests applied for eligibility. Legal aid is almost entirely unavailable now for civil cases, such as debt, housing and employment, apart from the assistance rendered through funding of the community legal services.

Assistance for civil cases lacks support because of a concern it will encourage more people to take to the courts. Recently, there has been a tendency to blame lawyers for litigiousness and

rises in the cost of liability insurance cover.<sup>6</sup> In Australia, the extent of litigiousness has been exaggerated. But, in any case, the correction lies with the law itself such as the principles of liability and compensation.

Recently, legislation has placed thresholds on the recovery of damages for personal injury and provided simpler no-fault alternatives. We have also seen procedural reforms, including much more active management of cases that enter litigation. Case management uses directions, alternative dispute resolution (such as mediation) and costs penalties to drive early resolution. Protocols are being written to encourage more bench-bar cooperation and sharpen the lawyer's duties to the court.<sup>7</sup>

A popular butt of criticism is the conditional fee service. Some state governments have legislated to restrict plaintiff lawyers from advertising such service. Litigation lawyers have also been exposed to personal liability for legal costs.<sup>8</sup> But the conditional fee has been important to consumer and worker claims going forward, when legal aid has withdrawn from civil justice and other third party underwriters such as trade unions are in decline.

Often the injured are up against a large and well-resourced defendant such an insurance fund, business corporation or government agency. A dedicated and specialist cadre of plaintiff lawyers is needed to match the strength of the defendant lawyers. To maintain sufficient resources to be able to take risks, these firms must attract a high volume of work and implement process efficiencies – sometimes called standardisation or commodisation of legal practice.<sup>9</sup>

Recently, governments have been encouraging lawyers to make more of their services available *pro bono*, that is for no fee or a reduced fee. To decline a fee when the client cannot afford to pay is a tradition in the profession. But, under analysis, *pro bono* law is not a systematic means of meeting caseloads in high volume areas of the law.<sup>10</sup>

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<sup>6</sup> See Forum, Reform of the Law of Negligence: Balancing Costs and Community Expectations, University of New South Wales Law Journal, Volume 25(3), 2002.

<sup>7</sup> J. Spigelman, 'Citizens, Consumers and the Courts (2001) 60(4) Australian Journal of Public Administration 5.

<sup>8</sup> B. Walker, 'Expanded Duties of Barristers in Damages Cases', Bar Brief Special Edition, New South Wales Bar Association, Sydney, September 2002.

<sup>9</sup> H. Kritzer, 'The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers' (2001) 8 International Journal of the Legal Profession 225.

<sup>10</sup> C. Arup, 'Pro Bono in the Post-Professional Spectrum of Legal Services' in C. Arup and K. Laster (eds), For the Public Good: Pro Bono and the Legal Profession in Australia (Sydney: Federation Press, 2001).

The focus of our *pro bono* revival has been the large commercial law firms. These firms are contributing their resources to partnerships with charitable foundations and community services. The small-scale practitioners in the suburbs and the country have rendered *pro bono* assistance for a long time; it would seem they are too hard pressed economically to do more now.

The concern with litigiousness or adversarialism has led to lawyers being barred from certain jurisdictions. This approach has found some favour in the primary decision making forums for family breakdown, injury compensation, employment dismissals, and land use planning. But it has considerable dangers.

Banning lawyers should not be confused with the introduction of greater informality into proceedings. Empirical research suggests the advice of lawyers can assist with alternative dispute resolution.<sup>11</sup> Unrepresented parties are making heavy demands on the courts. Civil rights are at stake too. For example, the weaker party in a nasty domestic violence case should not be expected to confront the defendant directly.

At the same time, we are learning that it is productive for lawyers to work in combination with a range of other professionals, government agencies, community groups and business enterprises. As the welfare state retracts, and fewer services are provided directly by government employees, there is interest in 'third way' formations between the command and market economies. These forms combine public responsibilities with private agencies. In the legal field, they are represented in the concepts of the community legal service partnership<sup>12</sup> and the problem solving community court.<sup>13</sup>

### **Services to Business and Commerce**

Business services are an increasing proportion of the legal services provided overall and often the most lucrative for lawyers. When the major sources of production and investment operate in the private sector, these legal services have a significant impact on governability and social welfare. Even in a capitalist economy such as Australia, privatisation of public instrumentalities (such as communications, energy) and the proliferation of financial markets (such as derivatives) are enlarging this sphere of operation.

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<sup>11</sup> R. Hunter, 'Adversarial Myths: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156.

<sup>12</sup> R. Moorhead, 'Third Way Regulation: Community Legal Service Partnerships' (2001) 64 *Modern Law Review* 543.

<sup>13</sup> M. Dorf and J. Fagan, 'Problem Solving Courts: From Innovation to Institutionalization' (2003) 40 *American Criminal Law Review* 1501.

Such services deploy the private law forms of property, contract, the corporation and the trust to make resource allocation decisions. Practising regulatory arbitrage, they are able to construct packages and manipulate forms to choose the most advantageous law and jurisdiction to apply.<sup>14</sup> In Australia, the private sector has access to high quality commercial law services. Legal fees are deductible from taxable income as a legitimate business expense.

Recent research indicates that commercial lawyers do not simply respond to the demands of their corporate clients. They may be the inventors and architects of legal strategies. We see the legal entrepreneur in financial securitisation, tax minimisation, investment and take-over, debt restructuring and insolvency.<sup>15</sup> Much of this work never goes near a court. If it develops into a dispute, the lawyers shepherd their clients through private negotiations, mediation or arbitration.

Sometimes, the social implications of corporate activity come to public prominence. Australia too has experienced major corporate collapses, financial scandals, and mass torts. Again, when this happens, there is a tendency to blame the lawyers.

If they are complicit in the planning of offences, lawyers may be liable under the general law along with the officers of the corporation. Some lawyers do not merely act as legal advisors but step beyond their professional role and become business associates with their clients.

We should note also that, in Australia, lawyers may be sued in ordinary civil law for breach of contract, negligence, misleading or deceptive conduct, or breach of fiduciary duties.<sup>16</sup> In such suits, the client is likely to be the plaintiff. But increasingly lawyers are exposed to suit from the other parties to the failed venture or from third parties who suffer the fall-out. While the lawyer may be guilty of conventional neglect, liability expands with an expectation that lawyers are to provide proactive risk management services, acting almost as a guarantee against commercial failure.

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<sup>14</sup> Y. Dezalay and D. Sugarman (eds), *Professional Competition and Professional Power* (London and New York: Routledge, 1995).

<sup>15</sup> T. Halliday and B. Carruthers, 'Making the Courts Safe for the Powerful: the Commercial Stimulus for Judicial Autonomy in Reforms of United States Bankruptcy Law' in T. Halliday and L. Karpik (eds), *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997).

<sup>16</sup> S. Walmesley, A. Abadee and B. Zipser, *Professional Liability in Australia* (Sydney: LawBook, 2002); S. Christensen, W. Duncan and T. Walsh, *Professional Liability and Property Transactions* (Sydney: Federation Press, 2004).

Recently Australian governments have followed the lead of New South Wales in offering practitioners ceilings or caps on their professional liability. To be eligible for this legislative protection, the practitioners must hold insurance cover and submit to the risk management requirements, continuing legal education programs, and complaints and discipline procedures of a recognised professional association.<sup>17</sup>

What of the lawyer's ethical obligations in these commercial situations? The lawyer's responsibility for sensitive information provides a good test. Here, my concern is not so much the evidence that will assist the other party to a civil dispute to substantiate their claim. It is information that will assist government authorities with their investigations and proof of offences in the public interest.

The defence of privilege has meant that lawyers can withhold information that is communicated to them for the purpose of obtaining legal advice. The advice may be about whether the client has committed an offence or incurred liability. Privilege is said to encourage the client to seek legal advice freely. It is consistent with the right to legal representation.

The defence of privilege is subject to some exceptions. It does not apply if the client is seeking advice for the purpose of actually engaging in a criminal offence or undermining the administration of justice.

As a common law defence, it may also be overridden by a clear enough statutory requirement, as it has for certain purposes associated with tax and corporate law enforcement. Lawyers jealously guard privilege and the extent of the encroachment by legislation is currently under review.<sup>18</sup> At the same time, offshore developments, notably the United States Sarbanes-Oxley Act, has raised the issue whether lawyers should in some circumstances be under a duty to report the activities of their clients to the authorities. While the US Act will have some extra-territorial effect, it is unlikely that a local version will be enacted here.

There is a tendency to see the private lawyer as the opponent of the state and the public interest. In fact, broader social benefits flow from allowing lawyers to enjoy autonomy. In a liberal political economy, the private legal practitioner takes some of the regulatory load from the state. This regulatory role comes in various guises, most obviously legal advice about conformity with the law and the settlement of disputes, but we can see it in the construction,

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<sup>17</sup> New South Wales Professional Standards Council, see [www.lawlink.nsw.gov.au/psc](http://www.lawlink.nsw.gov.au/psc).

for example, of long-term contracts, corporate governance, schemes of arrangement, industry codes of conduct, or public interest test cases.

The professional associations of lawyers contribute to the quality of regulation too. They make informed recommendations for law reform. Appointments are made from their ranks to the judiciary and other public offices.

### **Preparation for Practice**

If the changes are creating dilemmas for the regulation of everyday professional conduct, what of the structural determinants of lawyers practices and ethics?

The Australian approach places considerable store by the preparation of lawyers prior to entering practice. In Australia, such education and training requirements are prescriptive. The entry route to practice is completion of a university law degree (of at least three years), together with a short but compulsory period of practical legal training.

While many Australian universities now provide legal education, competition for places remains high, and the some of the best students academically choose law. In some States, the practical legal training component may be undertaken in a solicitor's office (articles). But the trend is towards formal training either in a university or a specialist institute. In Australia there is no bar examination.

The judges insist that certain areas of knowledge be covered both in the university degree and in the practical legal training. In Victoria, the universities submit their subjects to the Council of Legal Education for approval. Attached to the Supreme Court of Victoria, the Council is dominated by judges, together with representatives of the university law schools. The Government is represented through the Attorney-General and the Solicitor-General.<sup>19</sup>

While these requirements are formulated and administered at a State level, all the States share a system of mutual recognition of qualifications. A National Law Admissions Consultative Committee recommends common standards for education and training to the States.

Such preparation is designed to ensure each practitioner acquires a basic understanding and competence in eleven areas of knowledge. The areas cover public and private law as well as

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<sup>18</sup> See now the Australian Law Reform Commission Law of Evidence Reference at [www.alrc.gov.au](http://www.alrc.gov.au).

<sup>19</sup> Legal Practice Act 1996 (Vic), Part 14.

procedure and evidence.<sup>20</sup> The preparation is a safeguard both for the lawyer's clients and for the administration of justice. The areas include professional conduct. The practical legal training must also have an ethics component too.

While important, these requirements are somewhat old-fashioned. The universities often add their own subjects, to ensure for instance that the graduates have knowledge of international law or skills in alternative dispute resolution.<sup>21</sup>

What of education and training after admission? While, increasingly, lawyers will specialise in a particular area of law, the specialities are not regulated. Instead, the law associations have voluntary schemes. A practitioner may prove experience and sit an examination, in order to be able to say that they are accredited by their state association as a specialist in an area of law, for instance in family law.

If lawyers wish to become members of the independent bar in their state, they commonly must undergo a specialist advocacy course and work as a pupil in the chambers of an experienced barrister. There are advantages to membership, though these barristers do not have exclusive rights of audience before the courts.

In addition, the larger firms are developing their own in-house training programs. In a number of states, including Victoria, practitioners must undertake a quota of continuing legal education each year in order to keep practising.

### **The Form of Association for Practice**

In this last section, I focus on the regulation of the structure and association through which lawyers may engage in legal practice.

Limited legal work can be done in other capacities such as in-house counsel to a corporation. A qualified practitioner must 'engage in legal practice' as a natural person. That may either be a sole practice or a partnership with other qualified practitioners. In Victoria, a qualified practitioner may not enter into an arrangement to share income with a person who is not also a qualified practitioner.<sup>22</sup>

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<sup>20</sup> Legal Practice (Admission) Rules 1999 (Vic).

<sup>21</sup> On these needs, see Australian Law Reform Commission, *Managing Justice, A Review of the Federal Justice System*, No 89, 1999, at [www.alrc.gov.au](http://www.alrc.gov.au). Further, *International Journal of the Legal Profession*, volume 8(1), 2001.

<sup>22</sup> Legal Practice Act 1996 (Vic), Part 12.

Recently, provision has been made for legal practices to assume the corporate form. But the corporation must have the sole object of engaging in legal practice. In keeping, only qualified practitioners may be directors and shareholders of that corporation.

We should also note that members of the independent bar are further restricted. They must practise on their own; they may not be the partner or employee of another qualified practitioner.<sup>23</sup>

What is the rationale for limiting the form of the legal practice and those with whom the practitioner may associate? The main concern is the independence of the practitioner.<sup>24</sup>

The fear is these forms will subject the practitioner to direction from those who do not share the same professional ethics. An external allegiance will compromise the professional's freedom to act in the client's best interests or indeed to honour his duties to the courts and the administration of justice. A conflict of interest will arise when, for instance, the practitioner declines to act for a client because it does not suit the business interests of the firm to do so. A particular concern is the protection of client communications from disclosure and misuse.

Overall, the partnership form has proved quite flexible. Unlike the policy in some other countries, there are no limits on the size of these partnerships, for instance, or on the number of offices that they may maintain. Nonetheless, in recent years, the argument is made that this business structure stands in the way of more functional combinations for the provision of services. The professional associations and the government policy makers have been investigating forms that might attract necessary capital and expertise while safeguarding traditional professional standards.

The State of New South Wales has paved the way. Now the National Legal Profession Model Laws Project provides for multi-disciplinary partnerships (MDPs) and for corporations to engage in legal practice.<sup>25</sup>

The reforms come with conditions designed to preserve professional independence. Within the MDP or the corporation, only qualified practitioners will be able to engage in legal

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<sup>23</sup> Victorian Bar, Practice Rules, rr. 113-122, see [www.vicbar.com.au](http://www.vicbar.com.au).

<sup>24</sup> See discussion in Law Council of Australia, Issues Paper, Multidisciplinary Practices: Legal Professional Privilege and Conflict of Interest, September 2000, at the Council website: [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au).

practice. The partnership or corporation should have at least one qualified practitioner on its board and that practitioner should have carriage of the legal practice. The practitioner bears the onus of keeping the legal practice separate from the pressures brought to bear by his non-lawyer partners, directors or shareholders. He is responsible in particular for segregating the funds of the legal clients from the business overall.

Some remain sceptical that these exhortations will be enough to ensure the independence of the practitioner. Further emphasis should be placed on structural safeguards and the systems by which these firms operate. For example the firms should institute what in the west are called 'Chinese Walls', so that the confidential communications of the legal clients are insulated.

Likewise, the new regulation should charge the MDP or corporation not to exercise undue influence over the legal practitioner or interfere with his independent judgement.

It may be that such firms should be prohibited from engaging in certain activities that are inherently inconsistent with professional legal practice. Similarly, certain types of non-lawyers should be barred from directorships or shareholdings.<sup>26</sup> These approaches are reminiscent of the measures being considered, in light of the recent corporate frauds, to maintain the independence of the auditor.

For those many lawyers who are now working as employee solicitors, the conditions of practice are regulated immediately by the contract of employment and the policy and procedures of the firm in which they work. Employment legislation sets a few minimum terms, like base rate salaries, but it does not regulate working conditions.

Those advocating a change in regulation say that more attention should be given to the commercial pressures placed upon these employee lawyers by their own firms. On this argument, it is unrealistic to insist that these lawyers exercise wholly independent judgement, as if the primary reference point was their professional ideals.

Again, the regulation should embrace the practices of the firms themselves. For example, currently, there is an argument that the firms should do away with their system of billable

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<sup>25</sup> See [www.law.gov.au/ag](http://www.law.gov.au/ag). For discussion, B. Gottersen, 'Framework for a National Legal Services Market' (2004) 78(July) Law Institute Journal 38. The State of Victoria will soon be following suit when the Legal Profession Bill 2004 is passed through the Parliament and becomes law.

<sup>26</sup> See MDP issue of the International Journal of the Legal Profession, volume 8(2), 2001.

hours.<sup>27</sup> The firms are also being urged to adopt operating practices that support a healthier balance between work and family, especially as the majority of law graduates are now women.<sup>28</sup>

These approaches are consistent with the general movement towards corporate social responsibility. If they are to compete in the marketplace, firms need freedom to choose their strategies. However, through the media of 'enforced self-regulation', and 'co-regulation' with government and community, they can be encouraged to attune their systems to general social standards.

### **International Legal Practice**

Regulation also has to respond to the demand for practices that can supply multi-locational or trans-national services. Presently, Australia joins other countries in restricting the rights of lawyers who are qualified elsewhere to engage in legal practice.<sup>29</sup>

Australian States now permit non-nationals to qualify for admission to practise and therefore access to the full range of legal work, including practice in Australian law. A nationality requirement is not considered necessary to ensure the social responsibility of the practitioner. Instead, the expectation is that the education and training should engender a respect for local legal traditions and institutions.

Except in the case of practitioners from New Zealand, there is no mutual recognition of foreign qualifications. The foreigner must qualify locally. The credits given for education and training back home are limited even for those from 'common law' countries. We should note in passing that the recently concluded FTA commits the Australian government to establish a working party with the United States for mutually acceptable standards and criteria for licensing and certification of professional service suppliers.

Australia is a supporter of the limited licence approach. Foreign practitioners are permitted to engage in the practice of foreign law in two ways. They may do so on a temporary basis and not establish a practice in Victoria, or they may become a registered foreign practitioner.

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<sup>27</sup> American Bar Association, Ad Hoc Committee on Billable Hours, Report, 2002, at [www.abanet.org/careercounsel/billable.html](http://www.abanet.org/careercounsel/billable.html). See also University of New South Wales Law Journal, volume 27(1), 2004, Forum: Stopping the Clock? The Future of the Billable Hour.

<sup>28</sup> See Law Council of Australia, Discussion Paper, Challenges to the Legal Profession, September 2001, at the Council website.

<sup>29</sup> C. Arup, 'Law Without Borders?' (2003) 77(August) Law Institute Journal 48.

Registered foreign practitioners may provide legal services consisting of doing any work or transacting any business concerning the law of the place they are registered by their home authorities.<sup>30</sup> They may also provide legal services (including appearances) in relation to some arbitration proceedings, some proceedings before bodies other than courts, and some forms of consensual dispute resolution.

Registered practitioners may also provide legal services consisting of advice on the effects of the law of Victoria or another Australian jurisdiction if they meet two conditions. The giving of the advice must be necessarily incidental to the practice of foreign law and the advice must be expressly based on advice given by a current local practitioner, who is not an employee of the foreign practitioner.

The State law regulates the form of association for the practice of foreign law. The foreign practitioner may form a partnership with local practitioners or with other registered foreign practitioners. The foreign practitioner may be the employee of a local practitioner. But the foreign practitioner may only employ a local practitioner if the local refrains from providing advice on the law of Victoria or another Australian jurisdiction or otherwise engaging in the practice of law in Victoria.

There is no residency requirement for the practice of foreign law. Instead, those registering as a foreign practitioner must carry adequate professional indemnity insurance cover and make contributions to the client fidelity fund.

In the fresh round of negotiations under the GATS, currently underway, the Australian Government has made an offer to liberalise foreign practice further.<sup>31</sup> The Government is suggesting that foreign access will benefit Australian lawyers at home as well as in export markets. There will be flow-on benefits for the host country practitioners, for example from providing supporting or complementary services in Australian law and from international commercial arbitration being conducted in Australia. Access will also facilitate the transfer of professional skills and knowledge.

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<sup>30</sup> Legal Practice Act 1996 (Vic), Part 2B.

<sup>31</sup> See Communication from Australia, TN/S/O/AUS, 2 April 2003, at [www.wto.org](http://www.wto.org) under services negotiations.

Australian lawyers are seeking to export their legal services and form alliances with lawyers overseas. But such forms are dependent on the regulation that applies in other countries, including China, and on the development of trans-national codes of practice.<sup>32</sup>

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<sup>32</sup> C. Arup, *The New World Trade Organization Agreements* (Cambridge: Cambridge University Press, 2000), chapter 5; C. Arup, 'WTO membership and professional services regulation in China' in D. Cass, B. Williams and G. Barker (eds), *China and the World Trading System* (Cambridge University Press, 2003), chapter 13.