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## Harmonization or Homogenization? The Globalization of Law and Legal Ethics--An Australian Viewpoint

Steven Mark

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# Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint

*Steven Mark\**

## ABSTRACT

*This Article examines the pressures of globalization on the practice of law and legal ethics from an Australian perspective. The Article first examines the positive aspects of globalization and then turns to the potentially disruptive and homogenizing aspects of globalization upon indigenous and non-Western societies. Next, the Article considers how globalization threatens to disrupt tradition and culture in Western societies, specifically focusing on the tradition of the law and legal practice. Finally, the Author discusses the response of the Australian legal profession to the demands of globalization. The Author examines changes that have been implemented to the legal practice and the structure of the legal services market, particularly in the state of New South Wales. The Article concludes by predicting that globalization has the potential for undermining legal ethics.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1174
	A. <i>The Impact of Globalization</i> .....	1174
II.	GLOBALIZATION OF THE LAW AND ITS EFFECTS IN NON-WESTERN CULTURES .....	1178
III.	LEGAL PRACTICE AND GLOBALIZATION .....	1182
IV.	THE AUSTRALIAN LEGAL SERVICE SECTOR AND ITS RESPONSE TO MARKET DEMANDS .....	1186
	A. <i>Australian Legal Market</i> .....	1186
	B. <i>Foreign Lawyer Amendments</i> .....	1187
	C. <i>Towards a National Legal Services Market</i> .....	1189

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D.	<i>Multi-disciplinary Practices and Incorporation</i>	1195
E.	<i>The New South Wales Position</i> .....	1200
F.	<i>Problems with the New Structures</i> .....	1203
V.	BUSINESS OR PROFESSION? THE FUTURE OF LEGAL PRACTICE .....	1208
VI.	CONCLUSION .....	1209

## I. INTRODUCTION

As the twenty-first century surges ahead with its rapacious spread of English language, English law, and the mighty U.S. dollar under the banner of globalization, one must remember there is an inextricable bond in society between ethics, culture, and identity. This Article will examine the pressures of globalization on the practice of law and legal ethics from an Australian perspective.

This Article begins with a general consideration of globalization, assessing its positive aspects. The Article then turns to the homogenizing effects globalization can have, particularly upon indigenous and non-Western societies, with its potential for causing social and economic disruption, and more importantly, the rupture of culture and identity.

The Article then considers how globalization, with its supremacy of market forces, also threatens to disrupt tradition and culture in western societies, focusing on the tradition of the law and legal practice. Will pressures to harmonize national and transnational legal and ethical systems and pressures to push legal practice from the realm of a profession into that of a business result in a homogenization of culture?

Finally, the Article turns to the Australian experience where the legal profession—like many of its counterparts worldwide—is grappling with how to respond to the demands of globalization. Here, major changes to the structure of the legal services market and legal practice have been implemented, particularly in the State of New South Wales (NSW). As a regulator of the legal profession, the Author foresees many potential problems, including the undermining of legal ethics, which shape the law as a profession and form the backbone of the rule of law.

### A. *The Impact of Globalization*

Over the past twenty years or so, one economic philosophy has held predominance throughout the western world. This is, of course, the philosophy of economic rationalism, which holds that market forces above all else should shape our economic and political decision

making. It is core to free market capitalism and the driving force behind globalization.

As globalization commentator Thomas Friedman explains, “[T]he more you let market forces rule . . . the more efficient and flourishing your economy will be . . . [G]lobalization . . . has its own set of economic rules . . . that revolve around opening, deregulating and privatizing your economy . . . .”<sup>1</sup>

In Australia, this philosophy has been embraced with zeal.<sup>2</sup> As a result, the notion of living in a society with all its attendant cultural mores and habits is being supplanted by that of living in an economy. Everything—from healthcare to correctional services, to education and the arts, to the professions, including legal services—is being reconsidered in light of market forces in which profit appears to be the fundamental goal.<sup>3</sup>

As such, there is increasing pressure on lawyers in Australia to treat legal practice only as a business, perhaps heralding the erosion of its traditional paradigm as a profession. In the State of New South Wales, significant changes to the structure and practice of the profession have been implemented to this effect. Multi-disciplinary practices (MDPs) with the ability to share receipts with nonlawyers, have been introduced,<sup>4</sup> and from July 1, 2001, legal practices—including MDPs—are able to incorporate as businesses.<sup>5</sup> It is the first jurisdiction in the world to enact such legislation.

One commentator suggests: “Escalating levels of activity in the corporate world—mergers, downsizing, takeovers, expansions and diversifications—have diluted geographical borders and increased client mobility. The market response has been to demand the provision of transnational legal services.”<sup>6</sup>

A number of State jurisdictions in Australia, most notably New South Wales, have responded to this demand by enacting the Model Practice of Foreign Law Bill, the principal purpose of which is to “encourage and facilitate the internationalization of legal services and the legal services sector by providing a framework for the regulation

1. THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 8-9 (Revised ed., 2000).

2. *See id.*

3. *See id.* at xi-xxi.

4. NSW first allowed the formation of multi-disciplinary partnerships by solicitors and barristers with non-legal practitioners, subject to solicitors rules in 1983. Limited sharing of receipts was allowed. Since then, the structures for MDPs have become more liberal. *See generally* Legal Profession (Incorporated Legal Practices) Act 1987.

5. *Id.* § 47(c).

6. Christopher Pyne, *Legal Practice in a Global Jurisdiction*, 22 *LAW SOC'Y OF S. AUSTRALIA* 28, 28 (2000).

of the practice of foreign law in [Australia] by foreign-registered lawyers as a recognized aspect of legal practice in [Australia]."<sup>7</sup>

Alongside the move to support the internationalization of legal services, a considered effort to create a national legal services market in Australia has developed over the last decade. Australia is a federation made up of seven States or Territories, each with its own system of laws and regulatory regimes concerning the legal profession. This system would allow practitioners, be they solicitors or barristers licensed to practice in one State, to be equally entitled to practice in any other State that had joined the National Market.<sup>8</sup> The method of joining the market would be for each State or Territory to pass mutual recognition legislation that would allow practitioners licensed in one State to practice in any other State that had passed similar legislation.<sup>9</sup> As of 1995, all Australian jurisdictions have joined the market allowing for freedom to practice by any practitioner licensed in any one of those jurisdictions.<sup>10</sup> This will be discussed in more detail later on.

As the Legal Services Commissioner in New South Wales,<sup>11</sup> in effect, an independent ombudsman for the legal profession, I must ask myself what is the role of a regulator within this new market driven paradigm? Are the terms of the new structures realistic? Do they threaten the ethical basis upon which the legal profession in Australia is founded? If so, will the professional tradition survive at all? And indeed, what would be the best outcome for clients, or the consumers of legal services?

In the light of these questions, this Article will examine the recent changes to the structure of legal practice in New South Wales and Australia. Before such examination occurs, however, I want to consider the ethical implications, both positive and negative, of globalization from a legal perspective.

7. Legal Profession (Practice of Foreign Law) Act 1987 § 48ZF.

8. Mutual Recognition (Commonwealth) Act 1992 §§ 16-17.

9. *Id.* § 5.

10. Mutual Recognition Act 1993 § 4 (SA); Mutual Recognition Act 1993 § 4 (Tas); Mutual Recognition Act 1993 Part 2 § 4 (Vic); Mutual Recognition Act 1992 § 1 (NSW); Mutual Recognition Act 1992 § 16 (Qld); Mutual Recognition Act 1992 pt. 3 § 16 (Austl. Capitol Territory); Mutual Recognition Act 1995 § 4 (WA); Mutual Recognition Act § 4 (NT).

11. The Office of the Legal Services Commissioner for New South Wales was established in 1994 as an independent statutory authority. The Legal Services Commissioner is the first port of call for all complaints against lawyers and oversees the regulatory and disciplinary work of the professional regulatory bodies, the Law Society of NSW and the NSW Bar Association. The OLSA investigates complaints or refers and oversees investigations by the Law Society and the Bar Association. It reviews decisions by the professional associations and can overturn their decisions, and it mediates consumer disputes. It also has a role in prosecuting, reprimanding and compensation. It plays an education role for both the profession and community and participates in establishing solicitors and barristers rules. Legal Profession (Incorporated Legal Practices) Act 1987 §§ 59B, 59D.

Globalization is not a new phenomenon. It has occurred over thousands of years through the movement of people and cultures, the expansion of religions, and the development of land and sea trading routes. The present cycle of globalization, however, is focusing the world primarily on economic issues.

Early last century, globalization, with its spread of free market capitalism, was well underway. A pause occurred with the advent of the Depression and two World Wars and during the subsequent Cold War, with the tension between communism, socialism, and free market capitalism, globalization was kept in check.

The failure of those alternative systems, ironically marked by events such as the fall of the Berlin Wall and the crumbling of the Soviet Union, signaled a wholesale opening of international markets.

According to Friedman, three fundamental changes or democratizations enabled the dismantling of the cold war system and the subsequent flourishing of the free market economy: (1) the democratization of technology; (2) the democratization of finance and the resultant deregulation of the markets; and (3) the democratization of information.<sup>12</sup>

The dynamic ongoing process of globalization involves:

[T]he inexorable integration of markets, nation states and technologies to a degree never witnessed before—in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, [and in a way that is] . . . producing a powerful backlash from those brutalized or left behind by this new system.<sup>13</sup>

This brutalization is both economic and cultural. Perhaps the main thesis of this Article, the intertwined nature of culture, identity, and ethics, plays a larger role than is often acknowledged or understood in the resistance we see to the most obvious excesses of globalization. We need to explore the role that law and legal ethics play in both enhancing and constructing unseen barriers to the benefits of globalization.

While globalization has the potential to deliver higher living standards around the world, that potential can only be achieved or experienced by societies with a significant level of social stability. The growing gap between rich and poor vitiates against such stability.

Globalisation is like a river. It can bring substantial economic, social and environmental nourishment to those who are in a position to benefit from it. However it can erode, devastate and overwhelm if it rushes too fast or spreads too far. Globalisation can be so ruthlessly exploited by narrow interests that even its economic utility is

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12. FRIEDMAN, *supra* note 1, at 313-48.

13. *Id.* at 8.

destroyed. Restraint and guidance are often necessary to maximise its benefits and minimise its dangers.<sup>14</sup>

## II. GLOBALIZATION OF THE LAW AND ITS EFFECTS IN NON-WESTERN CULTURES

From an economic standpoint, if countries are to attract capital and flourish in a globalized world, they must display political stability, efficiency, and transparency of operations. These attributes are to be gained through a legal system

that guarantees freedom of contract, protects property and proprietary rights, provides for an adequate regulation of secured transactions, and is further seen to give practical protection and remedies in the case of nonpayment of a debt, a jurisdiction where the judicial system is fast and efficient, and where security is guaranteed is attractive both to local and international investors. If the investor is not persuaded that the law gives real protection and remedies, then it becomes irrelevant and he will not invest. The establishment of a modern legal framework for regulation of commercial and economic activity is not only fundamental for the construction of a market economy but is also a precondition for a sustainable flow of foreign capital in the region.<sup>15</sup>

As such, there has been legalization, as well as globalization, of the world. While the positives include the development and strengthening of democratic ideology, the reinforcement of the ideas of fairness and equity in business and commerce, and a host of controls over administrative and discretionary excess, there are negatives: "fears of a legal explosion, of excessive litigation and other general disadvantages ranging from fragmentation of community to loss of spontaneity and dignity."<sup>16</sup>

Perhaps the most virulent consequence of globalization and the spread of free market capitalism is the tension created between cultural identity issues and economic rationalist imperatives. While pro-globalists believe globalization leads to a harmonization of transnational systems, detractors point to the danger of homogenization of culture and identity.<sup>17</sup>

The factors driving globalization most likely to encourage homogenization are the U.S. dollar and the English language, which

14. Julian Disney, *Globalisation is Like a River*, LIVING ETHICS (Newsletter of the St James Ethics Centre, Sydney, Austl.), Summer 2001, at 4.

15. Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations*, 34 INT'L LAW. 1055, 1056-57 (2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/mistelil.html>.

16. Richard Haigh, *Of Law, Lawyers, Globalization and Millenia*, 4 DEAKIN L. REV. 93, 93 (1999-2000).

17. FRIEDMAN, *supra* note 1, at 331.

have become the dominant vehicles for commerce in the world.<sup>18</sup> Less frequently discussed or understood is the role English law now plays as a vehicle to define the relationships between the players in the expanded market and in the resolution of any resultant disputes.

Because English law is based on the law of property, its main concern is with the identification of ownership of property and its exploitation.<sup>19</sup> Even when law attempts to regulate the exploitation of property, it is almost exclusively directed at individually owned property.<sup>20</sup> This includes property owned by corporations, which are regarded as legal persons that live forever without the requirement of morality.

For those of us who have been born and raised within this legal paradigm, it may be difficult to understand the clash it presents with other cultures based more on behaviorist codes or legal systems that recognize collective responsibility rather than individual rights.

In fact, I posit that, in many instances, the globalization of English property law fails the ideals of collective ownership or responsibility in many cultures. For example, "the norms of individual property rights associated with Western liberal capitalism often stand in contrast to norms of collective and state mandated property interests associated with East Asia, and in particularly with the People's Republic of China."<sup>21</sup>

The indigenous populations of Australia, Canada, and the United States, for example, have long struggled for the recognition of their connection with the land, which has both spiritual and—within their culture—legal significance. In Australia, despite numerous studies and reports by bodies, including the Australian Law Reform Commission, there has been little success in "harmonizing" Aboriginal law with the common law inherited from England.<sup>22</sup> Nowhere is this failure more stark than in dealing with rights to land or intellectual property. Simply stated, Aboriginal law does not recognize individual

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18. *Id.* at xviii.

19. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: Book 2, Chapter 1 472-81 (Rees Welsh & Co. 1902) (1765); SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW: Volume 2 347-57 (Methuen Co. Ltd. & Sweet & Maxwell 1936) (1903).

20. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: Book 3, Chapter 1 1-4 (Callaghan & Company 1884) (1765).

21. Pitman B. Potter, *Globalization and Local Legal Culture, Dilemmas of China's Use of Liberal Ideals of Private Property Rights*, 2 ASIAN L. J. 1, 2, 1-33 (2000).

22. See generally Aboriginal Land Rights Act 1983 (regulating Aboriginal land use); Native Title Act 1994 § 3 (NSW) (validating the existence of native title to land); *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (recognizing Aboriginal claims to land rights).

ownership to land.<sup>23</sup> It does, however, have an extremely sophisticated and complex system of recognizing individual and collective responsibilities to land, including its maintenance.<sup>24</sup> This creates significant difficulties when attempts are made to transfer title from the Crown to Aboriginal communities as an outcome of a successful land rights claim.

The spread of intellectual property law and environmental law on a global scale via international trade mechanisms is having a deep impact on cultures not based on the English property law model.<sup>25</sup>

Current intellectual property laws—and the mechanisms and institutions associated with their implementation and enforcement—pose a real and significant threat not only to the cultural integrity rights of indigenous peoples, but also to their territorial and resource rights.<sup>26</sup>

Many Asian cultures have similar problems when grappling with a culture based on an English legal tradition focused on individual rights rather than collective responsibility. This presents huge cultural challenges for Western countries, particularly Australia with its geographic location in the Asia-Pacific region.

How will these cultures survive in a world that increasingly does not even have the legal language to incorporate them, let alone the moral commitment to their survival?

Let us turn to India for a poignant example of how intellectual property law can conflict not only socially but morally with traditional ideas of ownership and, as a result, disrupt social and cultural relationships. In the early 1990s, the U.S. company WR Grace patented an extract of the Neem Tree in India as an antifungal pesticide. Grace took out patents in the United States and in Europe—where it held a joint patent with the U.S. Department of

23. THE LAW REFORM COMM'N, THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS 1986 Law Reform Comm'n Rep. 31, 327, available at [www.austlii.edu.au/au/other/IndigLRes/1986/1/index.html](http://www.austlii.edu.au/au/other/IndigLRes/1986/1/index.html).

24. *Id.* §§ 882-85.

25. The WTO Administered Trade-Related Intellectual Property Agreement (TRIPS) signed as part of the Uruguay Round Final Act (1994) and the proposed Multi-lateral Agreement on Investment (MAI) developed by the OECD have been severely criticized by anti-globalization movements. One such criticism suggests that “national laws which protect domestic innovation and manufacture will have to be altered to conform with the more stringent patent laws of developed countries, where the maximization of profits is the cornerstone of culture” laying open the floodgates for indigenous knowledge to be exploited by multinationals. Vandana & Radha Holla-Bhar, *Intellectual Piracy and the Neem Tree*, 23 THE ECOLOGIST 223, 226 (1993). See also Potter, *supra* note 21, at 2-5 (discussing the dilemmas of globalization with regard to private property rights).

26. See Tony Simpson & Vanessa Jackson, *Effective Protection for Indigenous Cultural Knowledge: A Challenge for the Next Millenium*, INDIGENOUS AFFAIRS, No. 3/1998 for a concise discussion on the need to protect indigenous cultural heritage and the problems arising from the application of intellectual property law.

Agriculture.<sup>27</sup> These patents were granted despite the fact that Neem is a culturally significant resource in India. In Sanskrit, Neem is called the *Sarva Roga Nivarini*—"the curer of all ailments"—or in the Muslim tradition, *Shajar-e-Mubarak*—"the blessed tree."<sup>28</sup>

This has stimulated a bitter transcontinental debate about the ethics of intellectual property and patent rights. "Grace's . . . interest in Indian neem production has provoked a chorus of objections from Indian scientists, farmers and political activists, who assert that multinational companies have no right to expropriate the fruit of centuries of indigenous experimentation and several decades of Indian scientific research."<sup>29</sup>

Access to Neem's various products have traditionally been free or cheap and its uses are many and varied—ranging from treatments for leprosy and dabeles, to use in toothpaste and soap, as a spermicide, and as lamp oil. Neem's properties are recognized in the ancient Sanskrit treatise, the *Upavanavinod*, which cites Neem as a cure for ailing soils, plants and livestock.<sup>30</sup> For centuries Indian farmers have known about the pesticidal properties of Neem.<sup>31</sup>

The patenting of Neem has had a direct economic impact upon Indian society. The once free resource is now an exorbitantly priced commodity for which the traditional local user now competes for the seed with an industry supplying western consumers.<sup>32</sup>

This new economic value placed on Neem has had a profound effect culturally, particularly in smaller villages where traditionally Neem trees were not "owned" but utilized as a communal resource in the community. Neem's increased economic value not only potentially removes it as a resource to the community, but changes the very power structure and nature of the community with the flow of profits to individuals where previously the resource was a communal one. In addition, it must have been particularly irksome to the Indian identity that the multinational corporation that had secured the patent for Neem did so on the argument that their extraction methods, and more particularly their uses for Neem, were novel and therefore could subject Neem to patent.

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27. See generally Emily Marden, *The Neem Tree Patent: Intentional Conflict over the Commodification of Life*, 22 B.C. INT'L & COMP. L. REV. 279, 279-95 (1999) (providing background to the patenting issue and subsequent dispute).

28. Holla-Bhar, *supra* note 25, at 224 (discussing the Indian perspective on the patenting of Neem and the deleterious effects on traditional society).

29. *Id.*

30. *Id.* at 223-24.

31. *Id.*

32. *Id.* at 225.

This year the European patent was revoked as Grace's claims were declared not original in view of public prior use that had taken place in India.<sup>33</sup>

The case was resolved under the tenets of intellectual property law.<sup>34</sup> One, however, must question the morality of applying intellectual property law in the first place to allowing the patenting of the age-old Indian resource. "Lurking behind the Neem dispute is a sense of anger and fear at the power of multinational corporations to transform India."<sup>35</sup>

The Neem dispute prompted a campaign of massive protest by Indian farmers and scientists who believe that knowledge is:

[A] social product, subject to local common rights, rather than drifting in a limbo of free global access until the first commercial venture snatches it up. Any company purloining local knowledge and local resources is engaging in intellectual piracy, and the farmer's organizations see it as their right to punish such violators.<sup>36</sup>

So we see that the fundamental problem emerging in this clash of culture and its various legal institutions is the anger that flows when people consider that others are trying to strip them of their culture, or their very identity. The Indian Neem dispute triggered massive protesting by farmers in India as well as radical activist action, including the destruction of seed stocks and the burning of company records in an effort to stop corporate manipulation of India into further agricultural independence.<sup>37</sup> As I have stated earlier, identity is central to culture and culture is central to law.

### III. LEGAL PRACTICE AND GLOBALIZATION

The expansion of multinationals globally and the increasing complexity of commerce and finance that comes with globalization have "provided new challenges and created new problems as legal issues transgress boundaries and become global issues and legal arguments from one jurisdiction are imported more quickly and effortlessly into another."<sup>38</sup>

With the globalization of law has come a concurrent push towards the globalization of legal practices. According to McKinsey's Quarterly, companies with global interests "increasingly seek out law firms that can provide consistent 'multilocal' support and integrated

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33. "Neem tree oil" case: *European patent No. 0436 257 revoked*, at [http://www.european-patent-office.org/news/pressrel2000\\_05\\_11\\_e.htm](http://www.european-patent-office.org/news/pressrel2000_05_11_e.htm).

34. *See id.*

35. Marden, *supra* note 27, at 286.

36. Holla-Bhar, *supra* note 25, at 227.

37. Marden, *supra* note 27, at 286 n.47.

38. Haigh, *supra* note 16, at 97.

cross-border assistance for significant global M&A and capital-markets transactions, as well as antitrust and tax matters.”<sup>39</sup>

As such, there has been an increasing number of lawyers engaged in transnational legal services. With greater liberalization of trade in services and the dismantling of anti-competitive barriers to legal practice, it is becoming easier for lawyers to practice law outside their home country.

Ryszard Piotrowicz suggests:

Given law’s role as a critical feature in the infrastructure in national and international economic programmes, the implications of globaliz[ation] for legal practitioners are even more far reaching, and demand coherent strategies if practitioners are to be able to compete more effectively in the next century. A global battle for the delivery of legal services appears to be emerging.<sup>40</sup>

The establishment of English law—with its basis in private property—as the law of commerce has allowed law firms from the United Kingdom and the United States to gain “a distinct advantage in cross-border legal transactions.”<sup>41</sup> As such, these law firms dominate the global landscape.

Australian legal practices, which operate on a transnational as well as national basis, are still relatively small compared to their U.K. or U.S. counterparts. The estimated revenue of Australia’s largest law firm, Mallesons Stephen Jaques, was only around \$AUS260 million (approximately \$US137-138 million) in the financial year ending June 2000, with a revenue per equity partner of more than \$AUS1.5 million (\$US795,000). Britain’s biggest firm, Clifford Chance, generated gross fees of 442.5 million pounds in 1998-99, more than one million pounds per partner, while top U.S. law firm Skadden, Arps, Slate, Meagher, & Flom pulled in revenue of \$US890 million.<sup>42</sup>

The legal services sector is still relatively fragmented, largely because of the “historical importance of local relationships and local laws,” whereas other service industries like banking and accounting have been more flexible in their structure and approach to the globalizing markets.<sup>43</sup>

Wendy M. Becker posits that grand-scale mergers creating global megafirms and some “notable failures” suggest that the legal business is:

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39. Wendy M. Becker, et al., *Lawyers get down to business*, THE MCKINSEY QUARTERLY 45, 46 (2001).

40. Ryszard Piotrowicz, *The Internationalisation of Legal Practice and Education*, 73 AUSTL. L. J. 791, 791 (1999).

41. Becker, *supra* note 39, at 46.

42. Lucinda Schmidt, *Law: Pecking Order of Legal Eagles*, BUS. REV. WEEKLY, Sept. 24, 1999, at 78-83, available at <http://www.brw.com/au/newsadmin/smio/brw/19990924/3615.htm>.

43. Becker, *supra* note 39, at 45.

losing its immunity to the macroeconomic forces that have propelled consolidation and stratification in other industries. Of the world's largest law firms (measured by revenue), all but the most profitable are in some peril, and even the profit leaders, historically viewed as untouchable, will find it harder to maintain their flow of first-rate clients and talent.<sup>44</sup>

This rather negative prognosis is worsened by the steady erosion of lawyers' franchise over the provision of legal services in the past two decades. In many jurisdictions, work that was once considered the exclusive province of lawyers is now being handled by accountants, migration agents, and a whole host of providers who do not have specific legal training and, more importantly, are not covered by the professional regulations that guide the conduct and behavior of lawyers.

And with the democratization of technology and the internet, some arguments contend that "the law itself has been democratized, as it is now available to anyone who can operate a computer and read, not just a select few who have specialized training."<sup>45</sup>

As such, there has been much debate within the international legal community as to how to redress such problems and allow for a more flexible practice of law both domestically and internationally. At the 1998 Paris Forum on Transnational Practice for the Legal Profession, a historic meeting of multiple bar associations, a variety of issues arising from transnational law practice were discussed including: ethical issues; consumer protection issues; social responsibility and independence; and the particular problems of multi-disciplinary practice.<sup>46</sup>

Donald H. Rivkin, chair of the American Bar Association's Transnational Law Practice committee, observes:

[E]thical codes and practices throughout the world cover largely the same ground and contain largely the same prescriptions for lawyer conduct; they should not serve as reason for excluding foreign lawyers, but lawyers engaged in transnational practice must be scrupulous in their observance of their own and the host country's ethical norms.<sup>47</sup>

Liberalization of transnational legal services also raises ethical questions in regard to how professional regulation of those services should operate. Will there be interjurisdictional conflicts of ethics between different regulatory codes and how should those conflicts be handled? How great are these differences in reality and do they

44. *Id.*

45. Haigh, *supra* note 16, at 97.

46. See Laurel S. Terry, Symposium, *An Introduction to the Paris Forum on Transnational Practice for the Legal Profession*, 18 DICK. J. INT'L L. 1, 1-31 (1999).

47. Donald Rivkin, *Discussion Papers: Presented by the American Bar Association Section for International Law and Practice*, 18 DICK. J. INT'L L. 55, 62 (1999).

disclose cultural or identity based distinctions or are they nothing more than different ways of approaching similar issues?

For example, variances do arise between the ethical norms of different jurisdictions in areas such as client conflicts, the issue of incompatible professions, and the scope of attorney-client privilege and contingency fees.

In Australia, contingency fees—defined as a percentage of the successful result of litigation—are unlawful while in the United States they form the backbone of the civil litigation system. Most observers, however, would probably agree that the similarities between Australian society and U.S. society far outweigh the differences. Indeed, other than a difference in accent, one would be hard pressed to find many distinctions between the two.

There have been important efforts to create an international code of ethics. These include the post-war code of ethics of the International Bar Association (IBA) and the recent Common Code of Conduct for lawyers in the European Community (CCBE).<sup>48</sup>

The Japanese Federation of Bar Associations states:

[T]hat sufficient consideration must be given to the fact that the legal profession, which comprises one part of a country's judicial system, has the special characteristics of serving the public interest, as well as to the fact that the legal system of each country is founded on the history, culture and economy of the country.<sup>49</sup>

As such, it believes "that the legal profession should be separately and independently considered from other professional services in the preparation of multilateral regulations and mutual recognition standards under WTO/GATS."<sup>50</sup>

While it may be possible to provide a universal code of ethics for legal practice, my belief is that such a code would suffer from two major, and perhaps fatal, difficulties. First, while it is my belief that the fundamentals of legal ethics would be almost universal, the inability to state them succinctly while allowing for a degree of tolerance to meet local criteria would result in sweepingly broad statements which would have little local utility. In addition, Arthurs points out:

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48. H. W. Arthurs, *A Global Code of Legal Ethics for the Transnational Legal Field*, 1 *LEGAL ETHICS* 59 (citing *KLUWER LAW INT'L & INT'L BAR ASSN, LAW WITHOUT FRONTIERS* n.3 (E. Godfrey, ed., 1995) Appendices 4 and 11 which reproduces the International Bar Association (IBS), *Code of Ethics* (adopted 1956, revised in 1988) and the Comité Consultatif des Barreaux Européens (CCBE), *Common Code of Conduct for Lawyers in the European Community* (adopted 1988 with Explanatory Memorandum and commentary adopted 1989)).

49. Kobori Shigeru, *Discussion Papers: Presented by the Japan Federation of Bar Associations Discussion*, 18 *DICK J. INT'L L.* 109, 111 (1999).

50. *Id.*

While the grammar and rhetoric of a global ethics code might well mimic those of domestic codes, its actual application and effects are likely to be shaped by the special features of the global ethical economy within which it operates. Thus a global code would almost certainly be written so as to send reassuring signals to a very specific public, essentially transnational corporations and other important actors in the global economy - and covertly to advance the interests of the great transnational law firms (mostly US and UK based) which serve that public.<sup>51</sup>

Second, as mentioned above in relation to the issue of law, culture, and identity, ethics are culturally based, and, accordingly, a universal code is likely to disinherit some from their cultural base and therefore be perceived as an attack on their identity. Historically, such moves have always resulted in deep resistance and either ultimate failure or lengthy and difficult periods of readjustment.

When viewed in the context of globalization, and more particularly in the sub-context of the globalization of law and ethics, we must be conscious of the paradigm within which this debate occurs—that of law—and acknowledge that failure to recognize the link between law, culture, and identity is to embrace paradigms that must be strenuously resisted by those who feel their culture or identity under attack.

#### IV. THE AUSTRALIAN LEGAL SERVICE SECTOR AND ITS RESPONSE TO MARKET DEMANDS

##### A. Australian Legal Market

While Australian firms do not have access to the size and volume of deals that their U.S. and U.K. counterparts do, transnational legal work is an important and profitable growth area. For example, global acquisition work for the Australian firm Malleon Stephen Jacques was valued at \$US89.9 billion (\$AUS139.9 billion) as compared to \$AUS17 billion in domestic mergers and acquisition work.<sup>52</sup>

In the past decade, there has been strong growth in trade in international professional legal services. In 1987-88, Australian legal exports were seventy-four million dollars, with imports at twenty-three million dollars, showing a surplus of fifty-one million dollars. By 1997-98, exports had risen to \$207 million and imports were eighty-three million dollars, with a surplus of \$124 million.<sup>53</sup> The

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51. Arthurs, *supra* note 48, at 64.

52. Piotrowicz, *supra* note 40, at 792.

53. YSAIH ROSS, *ETHICS IN LAW: LAWYERS' RESPONSIBILITY AND ACCOUNTABILITY IN AUSTRALIA* 121 (3rd ed. 2001).

latest figures, however, reveal that exports have stagnated—around two hundred million dollars in the past two years—while legal service imports have fallen by a dramatic forty percent in 1999-2000. It has been suggested that increased globalization “is keeping legal work on large international contracts above the equator.”<sup>54</sup>

While most lawyers in Australia still work in small to medium sized domestic practices, the Australian economy can clearly benefit from the liberalization of trade in transnational legal services, particularly in the Asia Pacific region where Australian expertise, location, and costs of services compare very favorably to their Northern hemisphere counterparts. As one Federal parliamentarian puts it, “Australia is in no position to advance the argument for liberali[z]ing transnational legal services if we are not practicing what we preach.”<sup>55</sup>

### B. *Foreign Lawyer Amendments*

Much work has been done in the past fifteen years to open up Australian markets to foreign lawyers. In 1986, the Commonwealth Attorney General established a Working Group on the Globalization of Legal Services.<sup>56</sup> Subsequently, the Law Council of Australia formulated a Blueprint on the Structure of the Legal Profession (1994), which encouraged globalization, and drafted a Model Practice of Foreign Law (1996). In 1997, the Standing Committee of Attorneys General gave their commitment to ensure access to Australian jurisdictions by foreign lawyers while the Law Council of Australia supported the introduction of a uniform Practice of Foreign Law Bill.

As such, the approach to transnational legal practice in Australia focuses on a limited licensing regime allowing practitioners of foreign law to submit for a license for the limited purpose of practicing the law of their home jurisdiction without examination for full admission to the host bar.<sup>57</sup>

In New South Wales, the Legal Profession Amendment (Practice of Foreign Law) Act 1998 provides for the registration of foreign lawyers in this jurisdiction.<sup>58</sup> These amendments are in line with moves by other jurisdictions around the world to allow foreign lawyers to practice.<sup>59</sup> For example, China has recently relaxed its

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54. Cherelle Murphy, *Imports of Services Fall to Five Year Low*, THE AUSTRALIAN FIN. REV., May 25, 2001, at 57.

55. Pyne, *supra* note 6, at 28.

56. ROSS, *supra* note 53, at 120-21.

57. Pyne, *supra* note 6, at 28.

58. Legal Profession Act 1987 § 48ZI (NSW).

59. See generally Roger J. Goebel, *Professional Qualification and Educational Requirement for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 TUL. L. REV. 443 (1989) (discussing the preparation for transnational legal practice

regulations to allow foreign law firms to set up in more than one city, and Singapore has opened its doors to foreign lawyers.<sup>60</sup>

The President of the Japan Federation of Bar Associations, Shigeru Kobori, states that since the introduction of a system of registration for foreign lawyers, Tokyo has become a global legal center with fifty-three foreign law firms establishing offices in that city.<sup>61</sup> "We would not say that this is the only way for globalization, but we believe that it is one of the practical and proper solutions for globalization . . . in this borderless society."<sup>62</sup>

In Australia, most foreign lawyers act in the capacity of legal consultants, providing advisory legal services in the law of their home jurisdiction or a third jurisdiction. Most of their work concerns international business transactions in the areas of trade, foreign investment, shipping and air disputes, corporate restructuring, cross border mergers and acquisitions, intellectual property rights, and strategic advice relating to investment overseas.<sup>63</sup>

In New South Wales, under section 48ZI of the Act, foreign lawyers must be registered with one of a group of specified foreign registration authorities.<sup>64</sup> Thus it provides for the registration of foreign lawyers in Australia to practice the law of their home country.<sup>65</sup>

Other requirements of registration include statements that the applicant is not the subject of any disciplinary proceedings or criminal or civil proceedings that may lead to disciplinary action.<sup>66</sup> Applicants must not be suspended or barred from practicing law in any jurisdiction and must specify restrictions imposed upon the applicants' practice of law.<sup>67</sup>

Foreign lawyers who are locally registered can do work and transact business in relation to the law of the foreign place in which they are registered and can provide legal services, including appearances in proceedings before any courts or other bodies and to certain arbitration proceedings with which knowledge of foreign law is essential.<sup>68</sup> They may also provide legal services in relation to conciliation, mediation, and other forms of consensual dispute.<sup>69</sup>

and the extent of the right to engage in transnational legal practice in major commercial centers).

60. *Id.* at 481-82.

61. Shigeru Kobori, *Remarks of Shigeru Kobori*, 18 DICK. J. INT'L L. 51, 52 (1999).

62. *Id.*

63. Pyne, *supra* note 6, at 28.

64. Legal Profession Act 1987 § 48ZI (NSW).

65. *Id.*

66. *Id.* § 48ZI(2)(d).

67. *Id.* § 48ZI(2)(c).

68. *Id.* § 48ZS(1)(a)-(c).

69. *Id.* § 48ZS(d).

There is, however, an overriding restriction that they cannot practice Australian law, the only exception being that foreign lawyers can advise on Australian law that is “necessarily incidental” to the practice of foreign law, and the advice is “expressly based on advice given on the Australian law by a domestic lawyer who is not a foreign lawyer.”<sup>70</sup>

Foreign lawyers can practice alone, in partnership with domestic lawyers, or as a part of a Multi-disciplinary Practice—the issue of which will be discussed below—and must make payments into the Solicitors fidelity fund.<sup>71</sup>

Locally registered foreign lawyers are subject to the local ethical standards set out in the professional codes<sup>72</sup> and can, subject to complaints, be disciplined under Part 10 of the Act,<sup>73</sup> that Part administered by the OLSC. Foreign lawyers who are no longer registered can also be the subject of disciplinary action. The only penalty for disciplinary breaches by foreign lawyers, however, appears to be a cancelling of their registration. Under section 171C(g1), orders normally able to be made by the disciplinary Tribunal against a solicitor, including the power to award compensation, cannot be made against foreign lawyers.<sup>74</sup>

### C. Towards a National Legal Services Market

Market pressures are not only affecting legal practice in its global relationships, but have created a greater demand for a more cohesive national legal services market that is both efficient and competitive.

Traditionally, the practice of law in Australia has mirrored that of the English, which is essentially based on a separation of functions between solicitors and barristers. In addition, the Australian Legal Profession is regulated on a State and Territory basis, each with their own regulatory codes of conduct. Today, several of these jurisdictions, including New South Wales, also have independent regulatory authorities whose powers are sanctioned by Statute.<sup>75</sup>

The Law Council of Australia—made up of representatives of the various Law Societies and Bar Associations throughout Australia—is the body that represents the legal profession at the national level.<sup>76</sup>

70. *Id.* § 48ZS(2), (3).

71. *Id.* § 48ZT(1)(a), (b), § 78A.

72. *Id.* § 48ZU.

73. *Id.* § 48ZV.

74. *Id.* § 171C(g1).

75. *See supra* note 11 (regarding the establishment of the Office of the Legal Service Commissioner in NSW and the scope of the OLSC regulatory powers).

76. Fabian Dixon & Peter Levy, *Discussion Paper: Presented by the Law Council of Australia*, 18 DICK. J. INT'L L. 137, 139 (1999).

The Law Council's role is primarily to speak on behalf of its constituent bodies on national issues and to promote the administration of justice, access to justice, and general improvement of the law. This body has its sole offices in Canberra, the Nation's capital. The Law Council's role is somewhat similar to that of the American Bar Association. Although individual lawyers of Australia are not necessarily members, their constituent professional associations in the various States are.

Law Council President Anne Trimmer said: "The development and integration of a national profession remains one of the key tasks of the Law Council in 2001. It is an anachronism that in Australia in the 21st century we have a narrow gauge rail approach to regulation of the legal profession with eight separate regulatory systems."<sup>77</sup>

While the Law Council of Australia has argued for a national regulatory regime in addition to their support for a national legal services market, constitutional and practical difficulties make this only a long term goal at best.

In practice, lawyers are already competing and advising across territorial boundaries. This is reflected not only in the growth of the large national firms, but also in the development of many smaller practices that cross state boundaries either as part of a national firm structure or by way of some looser association.<sup>78</sup>

The desirability of a national legal services market is not only market driven, but has been recognized at governmental and judicial levels as well as by the legal profession itself. McHugh J, in the High Court decision in *Street v. Queensland Bar Association*, stated:

It is a matter of national importance, that if they wish, State residents should be able to utilize the services of interstate practitioners in conducting litigation in the courts of their State. The practice of law also plays an increasingly important part in the national economy and contributes to maintaining the single economic region which is a prime object of a federalism.<sup>79</sup>

In Australia, several important changes have been implemented to facilitate a competitive national legal services market including: the introduction of Mutual Recognition Legislation; further plans to create a National Practicing Certificate Scheme; moves to standardize regulatory codes between the States, and major reforms to restrictive practices of the legal profession, particularly in regard to costs.

77. Anne Trimmer, Address at the Law Council of Australia, (Nov. 2000), at <http://www.lawcouncil.asn.au/aulw1100.htm#targ2>.

78. Australian Law Reform Commission, *Discussion Paper 89: Managing Justice: A Review of the Federal Civil Justice System*, ¶ 3.24 (2000), available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/>.

79. Australian Law Reform Commission, *Discussion Paper 62: Review of the Federal Justice System*, n.29 (1999), available at <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/ch5.html>.

In 1992 the Mutual Recognition Act (Cth) was passed by the Commonwealth Government. Since 1995, all Australian States and Territories have followed suit with complementary legislation.<sup>80</sup> Effectively, the legislation has established a legal framework for the mutual recognition by the States and Territories of each other's differing regulatory standards regarding goods and occupations.

Basically the Act states that a person who is a registered legal practitioner in a participating state is entitled, after notifying the local registration authority of another participating state, to be registered in that second state and practice there.<sup>81</sup> They will be subjected to trust account monitoring and must make fidelity fund contributions.<sup>82</sup> They also must hold the same level—or higher—of professional indemnity insurance as local practitioners.<sup>83</sup> This applies to practice in any State that has joined the National Legal Services Market.<sup>84</sup> So a practicing certificate gained in one State is equally valid in any other State that has joined the Scheme.<sup>85</sup>

This scheme is concerned, however, with the reciprocal recognition of admission to practice, rather than the recognition of academic or practical legal studies. It is of practical use only to persons already admitted in one Australian jurisdiction who seek to be admitted in another.<sup>86</sup>

A disciplinary body, such as the OLSA, can resolve disputes between any person and any legal practitioner in any participating state.<sup>87</sup> It can investigate a complaint made by any person against any legal practitioner in any participating state and can refer any complaint made about any legal practitioner in any other participating state to the appropriate regulatory authority in a participating State.<sup>88</sup> Any practitioner struck off in NSW—or any other state or territory of Australia—is deemed to be struck off in every other state.<sup>89</sup>

Also, as Legal Services Commissioner in NSW, I can investigate a complaint against any legal practitioner from any participating

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80. *See id.* For relevant legislation see *supra* note 10.

81. *See ALRC Discussion Paper 62, supra* note 79, ¶ 5.20.

82. Mutual Recognition Act 1992 c. 198 § 27(3)(a).

83. *See id.*

84. *Id.* § 5(1).

85. *Id.* § 20(1).

86. G.E. DAL PONT, *LAWYERS' PROFESSIONAL RESPONSIBILITY IN AUSTRALIA AND NEW ZEALAND* 35 (LBC Information Services ed., 2001).

87. Legal Profession Amendment Act (National Practising Certificates) 1996 Division 4.

88. *Id.*

89. Mutual Recognition Act 1992 (CW) § 33.

state, applying the standards set in NSW but impliedly taking account of the standards of the participating state.<sup>90</sup>

A national legal service market protocol on information exchange and regulatory practice has been established with all participating states signing. These protocols cover the exchange of information on practitioners who have been disciplined, practitioners under investigation, and where appropriate, the conduct of investigations, fidelity fund arrangements, and trust account inspections.<sup>91</sup>

Further, the Law Council of Australia has proposed to extend the existing mutual recognition regime to allow a legal practitioner, with the right to practice in one jurisdiction, to practice in any other jurisdiction without the requirement for further admission or licensing.<sup>92</sup> This would involve a portable practicing certificate, similar to a driver's license, issued by one jurisdiction but recognized in all other Australian jurisdictions. The National Practising Certificate Scheme has been supported in principle by all professional associations in Australia, although States and Territories with small professions have been concerned to maintain their identity, competitiveness, and market share.<sup>93</sup>

This scheme, it would seem, allows the disciplinary body of any participating state to: resolve disputes between any person and any legal practitioner in any participating state, investigate a complaint made by any person against any legal practitioner in any participating state, and refer any complaint made about any legal practitioner in any participating state to the regulatory authority in any other state.

In practice, however, it has been the case that resolution of disputes and the investigation of complaints will occur in the State where either the preponderance of evidence exists, or it is most convenient for the parties. Consideration is given to the outcomes available in each State and whether they met the needs of the consumers of legal services.

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90. Legal Profession Amendment, *supra* note 87.

91. *Id.* § 48(2)(c).

92. ALRC DISCUSSION PAPER 89, *supra* note 78, ¶ 3.52 (supporting the principles of the 1993 Hilmer National Competition Policy Review and the 1994 Trade Practices Commission Report, particularly the objective of a national legal services market).

93. *Id.* ¶ 3.53, n.36. Presently legislation recognizing a traveling practicing certificate regime is in effect in New South Wales, Victoria, and the Australian Capital Territory. Legislation was passed in South Australia in early 1999, but is not to take effect until a number of procedural matters, including recognition of disciplinary procedures, are finalized. The Law Society of NT has agreed to enter the scheme, and will be making recommendations to the NT government to introduce legislation for a traveling practicing certificate regime in 1999. The Law Society of WA has similarly agreed to participate in the scheme.

Currently, there are no national professional practice rules with regulatory force, but the Law Council of Australia has developed model rules with the aim of establishing them on a national basis.<sup>94</sup>

The Australian Law Reform Commission notes that “[t]he experience in the United States highlights the problems that can arise with disparate professional practice standards across the same national market, even in the situation where the ABA Model Rules provide some focus for uniformity.”<sup>95</sup> As such, it supports “the development of a national profession and harmonize[s] regulatory arrangements for legal practice in each State and Territory. The Commission encourages States and Territories to adopt cooperative regulatory models which facilitate this result.”<sup>96</sup>

It is perhaps interesting to note that the model rules developed by the Law Council of Australia are almost identical to the rules presently in place in New South Wales. Indeed, the differences between the rules of professional conduct in the various States are actually quite small, but the structures that administer the rules differ somewhat widely.

While these efforts to harmonize legal systems between jurisdictions—both on a national and global scale—is directed at facilitating a more efficient and effective delivery of legal services in response to market demands, my concern is that harmonization may well end up as homogenization, with the perhaps unexpected consequences of undermining the positive effects of globalization.

Without careful thought on the cultural implications of ethical systems and the impact of their application, the globalization of law and its ethical systems may face the same difficulties and create the same instabilities that produce such a difficult challenge for the globalization of economics.

This move in Australia for “harmonization” of practices perhaps could be seen as a microcosm of the attempt worldwide to “harmonize” legal practice and ethics in line with the move towards globalization. It must be remembered, however, that these moves in Australia are within one culture, however varied and diverse that culture may actually be. Accordingly, any extrapolation to the entire world is dangerous.

Besides the obvious commercial social benefits in harmonizing legal systems and their regulatory regimes, there is the driving force of competition policy, and this has been particularly powerful in Australia.

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94. *Id.* ¶ 3.54.

95. *Id.* ¶ 3.57.

96. *Id.* ¶ 3.66.

Currently in Australia, the move towards an effective market driven national legal service sector has been bolstered by the removal of anti-competitive arrangements from within the legal profession. In 1993, an Independent Committee of Inquiry on National Competition Policy recommended that the competitive conduct rules in the Trade Practices Act 1974 (Cth) be extended to include all non-incorporated businesses.<sup>97</sup> As a result, legal practice came under the scrutiny of the Australian Competition and Consumer Commission.

Today each State and Territory has adopted its own Competition Policy Reform Act, which enacts the agreement reached between the state and federal jurisdictions for the implementation of a national competition policy.<sup>98</sup> As a result, those arrangements existing within the legal profession that were deemed to be anti-competitive—including price fixing, third-line force, and resale price maintenance—are now barred.<sup>99</sup>

So too the traditional scales of professional costs are under attack as they constitute a form of price fixing—amounting to an arrangement or understanding between practitioners in competition with one another as to the cost they will charge or the basis of charging.<sup>100</sup>

The major reforms of the 1990s of the restrictive practices of the legal profession that result from rigid structures came about because of the high degree of consumer awareness; community demands for increased accountability and responsibility for lawyers; and the realization by legal professional associations that competition was a generally a healthy development for the legal profession.<sup>101</sup>

Competition policy is based on the axiom that all barriers to competition must be removed unless the cost of their removal is greater than that of their retention. This gives rise to a practical as well as an ethical dilemma. If the costs referred to in the axiom include the concept of social costs or indeed social capital, society may well benefit greatly from its application. If the costs considered are exclusively financial, such a policy may well prove to be extremely damaging.

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97. DAL PONT, *supra* note 86, at 12, n.63. Report by the Independent Committee of Inquiry, National Competition Policy (AGPS, Aug. 1993), pp. 136, 357. Dal Pont also refers readers to Baxt, *Professions and the Challenge of Competition: Why the Hilmer Report and its Endorsement Create New Opportunities for the Professions*, 8 CORP. & BUS. L.J. 1 (1995).

98. *Id.* at 12. Basically the State and Territory Legislation applies Part IV of the Trade Practices Act 1974 (Cth) to partnerships and individuals, which do not fall within the constitutional competence of the Commonwealth.

99. *Id.*

100. *Id.* at 12-13.

101. ROSS, *supra* note 53, at 88.

#### D. *Multi-disciplinary Practices and Incorporation*

In light of the moves to greater openness in the Australian legal services market, both internally and on a global level, there has emerged a push to make the structure of legal service providers more efficient, flexible, and profitable in today's market driven economy.

In 1994, the Australian Trade Practices Commission—now known as the Australian Competition and Consumer Commission—in its Final Report on the Study of the Legal Profession (1994) recommended:

In all jurisdictions, rules preventing lawyers from sharing profits from legal practice with non-lawyers and from incorporating their practices (where they apply) should be repealed to permit the formation of MDP and incorporated practices, including practices involving non-lawyer equity holders or partners, subject to the adoption of appropriate rules of ethical and professional conduct to protect the interests of clients and the system of justice.<sup>102</sup>

To date, New South Wales has been the only jurisdiction in Australia to implement such reforms with the introduction of multi-disciplinary practices and is the only jurisdiction in the world to allow legal entities—including MDPs—to incorporate as businesses. I will discuss these changes below, but first I want to briefly examine the debate that has centered on the phenomenon of MDPs.

Alongside NSW, at least three other jurisdictions internationally—Germany, the Netherlands, and Upper Canada—permit some form of multi-disciplinary practice, although the degree of integration permitted between lawyers and nonlawyers varies from jurisdiction to jurisdiction.<sup>103</sup> In addition, professional bodies in a number of jurisdictions are actively considering the regulation of MDPs, including the Law Society of England and Wales, the Federation of Law Societies of Canada, the Canada Bar Association, the Paris Bar Council, and the French National Bar Council.<sup>104</sup>

A multi-disciplinary practice can be defined as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services,

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102. Dixon & Levy, *supra* note 76, at 141-42.

103. Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 883-85, 908-09 (1999).

104. *Id.* at 886-89.

including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.<sup>105</sup>

The role of multi-disciplinary practice in the legal services sector is a contentious one, and its perceived benefits and disadvantages have been vigorously debated on a global scale.

According to a leading legal ethicist in Australia:

[O]ne of the main justifications for permitting lawyers to engage in multi-disciplinary practice, aside from giving effect to competition principles, is the notion of a one stop integrated professional service to clients. Not only can a client of an MDP secure advice from more than one discipline within the one practice, it is argued that the quality of the approach is likely to be higher because a "holistic" approach to giving that advice is adopted.<sup>106</sup>

At the 1999 Paris Forum on Transnational Practice for the Legal Profession, however, resistance to MDPs was strong with the American Bar Association, the CCBE, and the Japanese Federation of Bar Associations (JFBA) all voicing their opposition. In 2000 the American Bar Association again rejected draft recommendations by its Commission of Multi-disciplinary Practice for the introduction of MDPs.<sup>107</sup>

At the core of this opposition is the belief that professional and ethical standards would be compromised by entering into business arrangements with members of other occupational groups.

The JFBA warns:

[T]here are fundamental differences between the specialist professions such as lawyers and certified public accountants (CPA) with regard to their systems of social responsibility, independence, professional ethics and consumer protection that not only result in lack of protection and loss of benefit for clients, but may even result in grave harm to the judicial and lawyers systems themselves which institutionally guarantee the function of the legal profession to service the public interest.<sup>108</sup>

The main areas of concern with regard to the operation of MDPs include governance and regulation, independence, confidentiality, and conflict of interest, which provide the ethical bedrock upon which the legal profession is founded.<sup>109</sup>

In particular, the formation of multi-disciplinary partnerships between accountants and lawyers is seen to be a potential threat to the ethical standards of the legal profession. For example, an

105. ABA Comm'n On Multidisciplinary Practice, *Report to the House Delegates: Recommendation* (2000), available at <http://www.abanet.org/cpr/mdprecommendation.html>, cited in DAL PONT, *supra* note 86, at 525-26.

106. DAL PONT, *supra* note 86, at 526.

107. See generally ABA Comm'n On Multidisciplinary Practice, *supra* note 105 (recommending rules and regulations for multidisciplinary practice).

108. Kobori, *supra* note 49, at 112.

109. DAL PONT, *supra* note 86, at 526-27.

auditor's duty of disclosure to the public may conflict with a lawyer's duty of confidentiality to his client. In fact, arguments setting out the scope of practice for MDPs suggest that auditors and lawyers should not simultaneously be allowed to offer services to the same client.<sup>110</sup>

From this emerges one of the major practical concerns about multi-disciplinary practice, that is, any impact that might flow on to the concept of legal professional privilege. It is clear that any involvement by a nonlawyer member of an MDP with a legal matter involving confidential information will put at risk any claim the legal practitioner within that MDP might otherwise have had that such information attracted legal professional privilege.

The Law Council of Australia's 1997 Working Group noted and expressly endorsed conclusions about confidentiality and legal professional privilege in a 1992 report on MDPs adopted by the Law Society of New South Wales:

The lawyer's duty of confidentiality in respect of information received in acting for a client is vital. As other partners and staff of an MDP will have access to that information, they must carry the same obligations of confidentiality as the lawyer, notwithstanding that the requirements of their own profession may not be as stringent. It should be the obligation of the lawyer partners to ensure that their non-lawyer partners abide by that requirement, and it should desirably be a requirement of any MDP that the non-lawyer partners irrevocably contract to observe that confidentiality as well as other relevant restraints such as avoidance of conflict.<sup>111</sup>

Certainly legal partnerships, in their traditional structures, are not immune to the problems of conflict of interest. The mega-firms are particularly prone and circumstances frequently arise where one client has competing or opposing interests to another client. In the past, firms have tried to use the concept of Chinese walls to get around the problem. While American courts show more leniency towards the erection of Chinese walls in large law firms, courts in Australia, Canada, New Zealand, and England generally frown upon the concept.<sup>112</sup>

Legal ethicist Ysiah Ross observes:

There is skepticism towards Chinese walls and a hardening of attitudes towards potential conflicts of interest . . . the Courts also appear less willing to believe in the honor and integrity of members of the legal profession. There is less willingness to believe that

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110. Terry, *supra* note 103, at 896 (providing a brief review on scope of practice issues).

111. Dixon & Levy, *supra* note 76, at 144-45.

112. ROSS, *supra* note 53, at 414-23 (discussion on the use of Chinese walls).

undertakings to keep confidences from other members of a firm will be adhered to.<sup>113</sup>

The governance of MDPs is also problematic, as it may be difficult to determine what the scope of legal practice is and if the rules of professional conduct should apply to nonlawyers who perform what are apparently legal tasks.

As one commentator explains:

[T]he definition of the "practice of law" is frustratingly illusive. Indeed aside from a few obvious functions (like the filing of pleadings in court or the rendering of formal opinions), it is almost impossible to define with precision what constitutes the practice of law in the United States today, at least in any exclusive sense. . . . it is very difficult to come up with a comprehensive list of many things that *only* lawyers can do.<sup>114</sup>

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113. *Id.* at 424. Note though a recent Australian case, *TVSN-v-Price Waterhouse Coopers Legal*, unrep, FCA, 106 Conti J. (the dissenting judge) indicated Chinese walls may be an effective buffer for conflicts of interest.

114. Terry, *supra* note 103, at 873 (quoting written remarks of James W. Jones (APCO Associates, Inc) (Feb. 6, 1999)). Section 48B of the N.S.W. Legal Profession Act (1987) provides that a person must not act as a solicitor unless he or she holds a current practicing certificate. *See* Legal Profession Act 1987 § 48B(1) (NSW). Section 48E(2) provides that a person cannot perform any "general legal work" for a fee unless that person is a barrister or solicitor. *Id.* at § 48E(2). General legal work is defined as "the work involved in drawing, filling up or preparing an instrument or other document that: (a) is a will or other testamentary instrument, (b) creates, regulates or affects rights between parties (or purports to do so), or (c) affects real or personal property, or (d) relates to a legal proceeding." *Id.* at § 48E(1)(a)-(d).

What is "drawing and preparing" a document? Lord Widgery CJ in *Green v Hoyle* [1976] 1 WLR 575; [1976] 2 All ER 633 held that "draw and prepare in this context seems to me to mean the use of the intellect to compose the document, the use of the brain to select the correct words, put them in the correct sequence so that the document expresses the intention of the parties." A service provider should therefore ensure that as part of performing services it does not draw up or prepare documents that: (a) create, regulate or affects rights between parties (or purports to do so); (b) affect real or personal property; or (c) relate to a legal proceeding, as this is work reserved to lawyers. The common law helps further delineate what is permitted. For example, in *The Barristers' Board v Palm Management Pty Ltd* [1984] WAR 101 at 108 the Court held that: (a) the transfer of a partnership business to a company; and (b) preparation of memorandum and articles of association, a deed of settlement and a superannuation trust deed, constituted work that "involved the possession of legal skill and knowledge of the law greater than possessed by the average citizen." It was the type of work that can only be traded by lawyers, and clearly there is scope for the type of prohibited work to change over time depending on commercial practice and the skills of the average citizen.

In NSW, as in other jurisdictions, there is not only a prohibition on the trade of certain types of work, but a prohibition on a person doing something that implies he or she is qualified to practice. Legal Profession Act 1987 § 48C(2) (NSW).

In *Law Society of New South Wales v. Seymour*, it was held that if a person's conduct leads to a reasonable inference that he or she is a solicitor, and if that person does not have the correct Practising certificate, then that person will be in breach of Part 3A of the Act and is likely to have having his or her conduct restrained by an injunction issued by the Supreme Court of NSW. *See Law Society of New South Wales v. Seymour*, (1979) NSWCA 117 (unreported).

Like many other jurisdictions around the world, the Australian legal profession has seen a shrinking in traditional areas of legal work, which, it may be argued, are not over balanced by the new areas of legal practice that are opening up. Since 1993 in New South Wales, the sale of private property—traditionally the exclusive domain of the legal profession—has been opened up to allow licensed conveyancers to practice in this area, without formal legal qualifications.<sup>115</sup> In addition, under Federal law, migration agents now provide advice and assistance to those with immigration problems.<sup>116</sup> Several Tribunals have now been constituted whereby lawyers are either excluded from acting on behalf of clients or may only appear at the discretion of the Tribunal. For example, in the Fair Trading Tribunal, which has jurisdiction to hear consumer claims up to a monetary limit of twenty-five thousand dollars, legal representation is allowed only in “exceptional circumstances.”<sup>117</sup>

A concern expressed by members of the legal profession is that further attempts to better define what is meant by the term “legal practice” will result in additional areas of legal work being isolated and removed from the exclusivity of the legal profession.

As such, an accountant within an MDP may provide a service in regard to taxation, which could also be performed by a lawyer. Would the legal professional rules override those for accountants and what, specifically, would the disciplinary jurisdiction be?

Conversely, within MDPs, to what extent will outside interests and ancillary business impact upon lawyers integrity, independence, or competence?<sup>118</sup> The JFBA states:

[A] society governed by justice and the rule of law can only be realized when lawyers are, under a social regime, guaranteed free unhindered practice of their profession.

. . . Problems arising from a conflict of professional ethics do not easily occur in regard to a partnership of lawyers within a firm due to their mutual observance of the same ethical code which precludes one lawyer from damaging the independence of another.<sup>119</sup>

While formal MDPs are currently not an option for many jurisdictions, many quasi MDPs have already emerged. Accountancy firms, particularly the Big Five, have effectively and practically managed to sidestep restrictions on MDPs by forming strategic alliances with law firms or establishing them as entirely separate

115. Conveyancers Licensing Act 1995 (NSW) brought conveyancers under Part 10 (commenced 1 February 1996) of the Legal Profession Act 1987 (NSW). N.S.W., Conveyancers Licensing Act 1995 § 82 (NSW); Legal Profession Act 1987 Notes (NSW).

116. Migration Act 1958 § 276 (delineating role of a migration agent).

117. Fair Trading Tribunal Act 1998 § 33(2) (NSW).

118. DALPONT, *supra* note 86, at 526.

119. Kobori, *supra* note 49, at 113-14.

entities. In fact, "three of [the Big Five accounting firms] rank among the top ten global employers of lawyers, and many of the largest law firms in France, Spain, and other European countries are owned or affiliated with accounting firms."<sup>120</sup>

Professor Laurel Terry warns:

If a regulator ignores the MDP phenomenon, the result will be parallel worlds of lawyers. One set of lawyers will practice in a traditional law firm setting and will be regulated through the ethics rules. The other set of lawyers will practice in an MDP setting, which necessarily requires that lawyer to assert that he or she is not practicing law with nonlawyers. Consequently, that lawyer may ignore those ethics rules which apply only in connection with a lawyer's practice of law.<sup>121</sup>

I now would like to look specifically at the New South Wales situation and examine the problems I see arising from the current legislation regime in light of the issues raised above.

#### *E. The New South Wales Position*

NSW has been the most aggressive jurisdiction in Australia to embrace new models of legal professional practice structure. In the past two decades, there has been a huge shift in psychology in the profession here, challenging the traditional view that lawyers' ethical and professional standards would be compromised by forming partnerships with nonlawyers.

The drivers for this major shift have been Government defined and directed competition policy, pressure from clients who it is said are interested in the concept of one-stop shopping—although I have yet to be convinced that this pressure is as great or extensive as often claimed—and the growing belief in the profession that traditional practices cannot survive in the face of increased competition and client demands for reduced costs.

Evidence is emerging that shows that many clients no longer maintain firm loyalty but shop around to find the best services at the most acceptable price.<sup>122</sup>

The NSW Legal Profession Act was amended to permit Solicitors and Barristers to form multi-disciplinary partnerships with persons who are not legal practitioners, subject to the Solicitors Rules.<sup>123</sup> Limited sharing of receipts was permitted by section 48G(3)(d) of the Act.<sup>124</sup>

120. Becker, et. al., *supra* note 39, at 49.

121. Terry, *supra* note 103, at 872.

122. ALRC Discussion Paper 89, *supra* note 78, ¶ 3.24 (citing E. Nosworthy, *Ethics and Large Firms*, in *LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES* 57 (S. Parker & C. Sampford eds., 1995)).

123. Legal Profession Act 1987 § 48G(1) (NSW).

124. Legal Profession Act 1987 § 48G(3)(d) (NSW).

In 1994 changes to the N.S.W. Professional Conduct and Practice Rules Legal Profession Act (1987) further liberalized the requirements for MDPs while still requiring that Lawyers have majority voting rights in the affairs of the MDP<sup>125</sup> and that lawyers retain at least fifty-one percent of the net income of a partnership.<sup>126</sup>

In 1997 the Report of the Legal Profession Advisory Council (LPAC) in respect of MDPs and the Solicitor's Professional Conduct and Practice Rules that related to them, found that these rules were anti-competitive, not in the public interest, and should be declared inoperative.<sup>127</sup>

Subsequently, the 1998 National Competition Policy Review of the Legal Profession Act also concluded that the Rules were anti-competitive and recommended their repeal. Thus, in December 1999, the Solicitors Professional Conduct and Practice Rules for NSW were amended to allow, *inter alia*, for MDPs to be established without the historic requirement of legal profession control.<sup>128</sup>

There are currently twenty-six multi-disciplinary partnerships involving solicitors practicing as solicitors in partnership with nonlawyer partners practicing in NSW. A number of these are in the form of limited partnerships in which the limited partners take no part in the management and operation of the multi-disciplinary partnership.

The usual multi-disciplinary partnership is a small partnership involving either an accountant, a migration consultant, industrial relations consultant, insurance consultant, or other service provider with one solicitor or a small number of solicitor partners. Some partnerships do not deliver multi-disciplinary services but are structured as such in order to reward or recognize a nonlawyer—a financial controller in a firm with partnership status. A number of larger partnerships have recognized a particular skill in an individual—an engineer or health professional—and brought this into the practice by making the individual a partner.

When multi-disciplinary partnerships were first contemplated, there was considerable concern expressed that the large accounting practices would establish multi-disciplinary partnerships. This has not occurred in New South Wales, but rather traditional law firms have been established with an association with the accounting firm—Andersen Legal, KPMG Legal, PriceWaterhouseCoopers Legal. It is

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125. N.S.W. Professional Conduct and Practice Rules Legal Profession Act 1983 R. 40.1.1 (1994, repealed 1999) [hereinafter NSW Conduct and Practice Rules].

126. *Id.* at R. 40.1.6. (repealed 1999).

127. LEGAL PROFESSION ADVISORY COUNCIL, INCORPORATION OF SOLICITORS' PRACTICES UNDER THE CORPORATIONS LAW (1997) (report prepared for submission to the N.S.W. Attorney General).

128. N.S.W. Conduct and Practice Rules, *supra* note 125, at R. 40 (1999).

also interesting to note that as yet there have been few problems experienced in relation to these unfettered MDPs and my Office has received very few complaints in relation to those that have been established.

In spite of the advent of MDPs, the National Competition Policy Review found what many believed to be continuing restrictions on the business structures of the legal profession and recommended that solicitors should be permitted to practice in corporations governed by the Corporations Law with limited liability and voting shareholders who are not solicitors.<sup>129</sup>

As a result, the Legal Profession Amendment (Incorporated Legal Practices) Act No. 73 2000 and the Legal Profession Amendment (Incorporated Legal Practices) Regulations 2001 were proclaimed and commenced on July 1, 2001.<sup>130</sup> In first introducing the Act as a Bill into Parliament, the NSW Attorney General stated:

Government is of the view that incorporation will lead to more transparent management structures in law firms, because of the requirements of the Corporations Law. Within a corporate structure, the accountability of individuals for the management of the practice will be enhanced, and this is likely to lead to better delineation of responsibilities within firms and to more efficient service provision.<sup>131</sup>

The Law Society of NSW indicates that it has had a number of enquiries since the passing of the Act, under which incorporated legal practices are considered to be companies within the meaning of the Corporations Law and any corporation is eligible to be an incorporated legal practice, though as yet no such incorporations have occurred.<sup>132</sup>

The Act allows for the formation of a multi-disciplinary practice by the corporation, stating that "any incorporated legal practice may provide any other service and conduct any other business that the corporation may lawfully provide or conduct (other than a managed investment scheme . . . .)"<sup>133</sup> Previously, a solicitor corporation incorporated pursuant to Part 10A of the Legal Profession Act could

129. Legal Professional Act 1987 part 10 (NSW) (repealed 1999). Previously part 10 of the Legal Profession Act allowed solicitors a very limited form of professional incorporation with limited commercial advantages. These have since been repealed, though existing solicitor corporations will not be affected.

130. Legal Profession Amendment (Incorporated Legal Practices) Regulation 2001 part 2 (2001) (NSW).

131. Parliament of N.S.W., Legislative Council Hansard, June 23, 2000, at 7624.

132. Legal Profession Amendment (Incorporated Legal Practices) 2000 § 47B (NSW) (defining a Corporation as a Company within the meaning of the Corporations Act 2001), *id.* at § 47(C)(1) (defining an incorporated legal practice as a Corporation that provides legal services); *id.* at § 47D(1) (providing that any corporation is eligible to be an incorporated legal practice unless prohibited by the act under §§ 48D and 48E).

133. *Id.* §47C(2).

only engage in legal practice, but this provided limited commercial advantages and few such corporations have actually been formed.

Commentators have long argued that the partnership model for legal practice is outdated and unwieldy when larger firms are concerned, as the decision making process when partners have an equal interest can be complex and inefficient. Additionally, some commentators believe that the structure of the large commercial firms, with multi-jurisdictional offices, undermines the concept of mutual responsibility, which is integral to a partnership.<sup>134</sup>

Certainly, the proposed corporate structure under the new Act has perceived benefits. Among them are limited liability for partners—at least to the extent that the corporate veil still has substance—greater flexibility for taxation or profit distribution than under a partnership, and better opportunities for expansion.<sup>135</sup>

An incorporated legal practice can capitalize on a wide range of capital borrowing options—by granting security over its assets or by way of unsecured debentures, bills of exchange, and other debt securities—and also has the potential to raise equity capital by floating on the stock exchange and to retain profits by taking advantage of a more favorable corporate tax rate.<sup>136</sup>

Also, the advent of nonlawyers as directors and shareholders offers the potential to broaden the firm's range of skills beyond the legal and creates possible reward incentives for nonlawyer employees.<sup>137</sup>

It is hoped that with the unbundling of the roles of partners into their discrete roles as shareholders, employees, directors, and managers, the legal practice can more equitably distribute income in accordance with real contribution of skills, responsibility, leadership, service, and capital.<sup>138</sup>

#### F. Problems with the New Structures

While supporters of incorporation believe it will lead to more transparent management structures in legal practices, due to the requirements of the Corporations Act,<sup>139</sup> I believe that the new

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134. Catherine Morgan's paper was delivered to the Continuing Legal Education Seminar (Mar. 28, 2000) (paper on file with the Library of the Department of the NSW Attorney General).

135. Philip King, *Legal Practice: Should Your Firm Incorporate?*, 39(2) LAW SOC'Y J. (NSW) 44, 44-46 (2001). See Terry Purcell, *Legal Practice: Management Systems for your Incorporated Legal Practice*, 39(2) LAW SOC'Y J. (NSW) 46, 46-47 (2001), available at, [http://www.lawsocnsw.asn.au/resources/lsj/archive/mar2001/46\\_3.html](http://www.lawsocnsw.asn.au/resources/lsj/archive/mar2001/46_3.html).

136. King, *supra* note 135, at 44.

137. *Id.* at 45-46.

138. *Id.* at 44.

139. Morgan, *supra* note 134, at 9.

structures also present clear ethical and practical problems, some of which have major implications for the regulation of the legal profession in NSW.

In general terms, the Incorporated Legal Practices Act raises concerns as to its impact on the quality of legal service provided to consumers. Many of the arguments against permitting MDPs apply equally to incorporated legal practices under the act, namely that there is potential for a compromise of solicitors' independence and duty of confidentiality—including legal professional privilege—as well as a greater risk of conflict of interest.

More specifically, it is unclear where incorporated legal practices may stand with regard to conflict of interests and the use of 'Chinese walls' as discussed above. In Australia, the Corporations Law allows for limited use of Chinese walls in relation to representation or recommendations about securities<sup>140</sup> and as a defense to inside trading allegations.<sup>141</sup>

While the Amendment Act contains a general provision for the Legal Profession Act and Regulations to prevail over the Corporations Law in any clash, it is still unclear precisely what this will mean in practice.<sup>142</sup>

The NSW Law Society states that the focus should be on the conduct and standards of individual practitioners licensed under the Legal Profession Act 1987 rather than the business structures that we are discussing here.<sup>143</sup> I agree in principle with this statement, but there are perceived practical difficulties with the new structures, which will make regulation in this area very difficult.

While it remains the case that individual legal practitioners who hold current practicing certificates are bound by the Solicitors Rules and the terms of the Legal Profession Act 1987—and in particular Part 10, which deals with complaints and discipline—MDPs, unless they incorporate themselves, are now arguably unregulated.

One potential difficulty with the amended Rules as they relate to incorporated legal practices is that they appear to place restrictions on the partnership itself, such as requiring that "the services offered by the partnership are accurately and fairly represented to clients

140. ROSS, *supra* note 53, at 418 (citing Corporations Act 2001 § 849(2), 850(2)); see also Corporations Act 2001 § 849(2), 850(2).

141. *Id.* at 418 (citing Corporations Act 2001 1002M, 1002N); see also Corporations Act, 2001 § 1002M 1002N.

142. *Id.* § 47S.

143. N.S.W. Law Society, *Legal Practice: Corporations Submission Goes to Attorney General: Minimal Restrictions Best, Argues Law Society*, 36(5) LAW SOC'Y J. (N.S.W.) 70 (1998), available at [http://www.lawsocnsw.asn.au/resources/ljs/archive/jun1998/70\\_5.html](http://www.lawsocnsw.asn.au/resources/ljs/archive/jun1998/70_5.html).

and potential clients and that the partnership should disclose to clients the qualifications of persons providing those services."<sup>144</sup>

This requirement does not appear to be restricted to the provision of legal services but to services offered by the incorporated legal practices as a whole. Questions arise as to the ability of the Rules to impose such a requirement and, further, how a breach could ever be pursued effectively.

Incorporated legal practices must include at least one solicitor director on the board of directors, who is required to hold an unrestricted practicing certificate and generally be responsible for the legal services it provides.<sup>145</sup>

It appears that amendments to the Legal Profession Act and the Solicitors Rules seek to make certain legal partners of incorporated legal practices personally liable for ensuring that the partnership or company complies with legal professional and ethical obligations in relation to the legal practice and delivery of legal services.<sup>146</sup>

This introduction of vicarious liability of solicitor directors for the conduct of employed solicitors is a development that will test the current disciplinary system. At present, liability is restricted in practice to situations in which the legal practitioner is directly responsible for misconduct, and that misconduct has an element of willfulness or at least reckless disregard of the consequences of the practitioner's behavior.<sup>147</sup>

In the context of a large corporation in which there are potentially dozens of employed lawyers and necessarily only one lawyer partner or director, it is difficult to see how that one lawyer partner or director could, or should, be vicariously liable in terms of possible disciplinary action with its general requirement of willfulness.

Not only does this present a conceptual difficulty, it presents real problems in relation to proof of any conduct complaint against an individual when his or her liability is vicarious:

Supporters of the legislation claim that the purpose of the provision is not just to target the solicitor-director, or directors, and make them accept responsibility for everything that might go wrong in the legal practice. The provision is really intended to bolster the position of the director on the board. We know that one director cannot control the actions of a board, shareholders or other directors. But the solicitor director can say to his or her fellow directors: 'well, I must comply with these provisions or lose my livelihood. If you do not do what I advise in connection with the legal practice, I will have to resign. You will have

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144. Legal Profession Amendment (Incorporated Legal Practices) Regulation 2001, *supra* note 132, § 13K.

145. *Id.* § 47B, 47E (1)-(2).

146. *Id.* § 47E(3).

147. *See id.* § 47N.

to find another solicitor-director who is willing to take responsibly for what you are doing, or propose to do?<sup>148</sup>

There are provisions in the Amendment Act that require solicitor directors to disclose to the Law Society or Australian Securities & Investments Commission (ASIC) if the solicitor director believes other directors are not of good fame and character. Solicitor directors must resign if they are not satisfied as to the good fame and character of the other directors.<sup>149</sup> As the incorporated entity will not be allowed to trade without a solicitor director, this is considered to be a significant level of quality control for the non-solicitor directors. Only time will tell whether or not this assumption is correct.

This issue of the solicitor director's responsibility or liability for the conduct by other legal service providers within the entity gives rise to another interesting question: Does this in practice mean that complaints can now be lodged and accepted against firms—at least in so far as the complaint is made against the solicitor director—rather than as traditionally accepted in Australia requiring that complaints be made against individuals?

While I have been advocating for some time the utility of bringing complaints against firms rather than individuals, notwithstanding the evidentiary problems that invariably exist in proving such complaints, it seems that this issue may now be emerging through the introduction of the incorporation amendments.

Ethical problems also arise. A solicitor director disagreeing with the rest of the board over a matter concerning the legal practice may face a conflict of interest between his or her duties as a legal practitioner and his or her duty as a director to the shareholders of the corporation. It is not clear how such a conflict would be resolved, notwithstanding the intended supremacy of the Legal Profession Act over the corporations law.

In the longer term, concerns have been expressed about the impact of MDPs without legal profession majority or control and incorporated legal practices on general practices, which are usually small and located either in the suburbs or in the regions. The potential emerges for one of the large supermarket chains, for example, to open up shop-front legal practices within supermarkets throughout New South Wales, subsidizing the provision of legal services from the sale of groceries and undercutting all small local firms in areas like product liability, personal injury, small property transactions, wills, and even family law. This could drive the local legal practitioners out of business and allow the MDP to subsequently raise prices as it sees fit. While this may be somewhat far-reaching, it does focus on one of the major concerns that I share with many

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148. Morgan, *supra* note 134, at 13.

149. See § 47 E(3)(b); see also § 47O, 47P, 47Q.

commentators about the legal profession when practitioners find themselves competing over price for legal services rather than engaging in competition based on value. History has shown that when legal practitioners compete with other providers on price, the profession invariably loses and the standard of service delivery to consumers often suffers.

If a corporation providing legal services is subject to takeover and the new controlling directors or shareholders no longer wish to provide legal services, clients of the corporation may be placed in an awkward position. Again, the arrangements for the future conduct of their legal affairs are unclear in the legislation.

It is also interesting to note that the structure of incorporated legal practices will have the effect of isolating the high ethical standards established by the solicitor and barrister rules and the Legal Profession Act to those providing legal services rather than extending the application of these ethical standards to others involved in the corporate entity.

It may be, however, that the concerns I have expressed in this Article in relation to MDPs and incorporated legal practices will, at least in the short term, have little effect. My reason for this is that few MDPs have been established notwithstanding the move in New South Wales to totally unfetter their structural controls. In addition, incorporation, which was originally considered to be largely for the benefit of the big firms, is no longer considered as such.

The large firms in Australia, particularly national firms, will have little use for incorporation, particularly where it is only available in New South Wales and no other State. It may also be the case that those large firms who are looking overseas for clients, as well as for strategic alliances with other firms, may find the aversion to MDPs and incorporation, particularly in the United States and the United Kingdom, as a disincentive to pursue these structures in Australia.

Several Australian States, however, are actively considering changing their rules in relation to incorporation and MDPs to bring them into line with New South Wales, which is Australia's most populous State with the highest number of legal practitioners. Changes in leadership at the SEC in the U.S. and within the politics of Western Europe may also make such structures more attractive in the future. My concern remains that the drivers behind these changes are not necessarily based on promulgating the high ethical standard of the legal profession, which is not only a profession, but also a business, and one of the pillars of pluralist democratic societies.

## V. BUSINESS OR PROFESSION? THE FUTURE OF LEGAL PRACTICE

Following on from the above arguments, I believe that the move towards MDPs and the incorporation of legal practices has the potential to undermine the historical, philosophical, and ethical foundations of a legal profession in favor of a pure business or “profit” motive. As we have seen, the difficulties and inconsistencies that arise in the formation and regulation of such entities may be too great for the weight to be in their favour.

I take heed of the NSW Chief Justice, JJ Spigelman’s warning:

There is a multifaceted and on-going debate in many nations about the degree in which the legal profession should be treated simply as a business and regulated on the assumption that lawyers operate primarily if not exclusively as profit maximisers. Those responsible for the application of policy to the profession, particularly competition policy, operate on the assumption of a business paradigm and regard arguments based on a professional paradigm as just another form of rent seeking. There is no doubt that too much of past professional self regulation was exposed as merely protectionist. But it is not all such. The difficulty with the application of competition principles is that it may very well have an element of self-fulfilling prophecy. If lawyers are treated as if they are only interested in money, that is what they become.<sup>150</sup>

It is my view that those who attempt to characterize the profession only in terms of historical concepts of a profession are as wide of the mark in reality as those who state that legal practice is a business and only a business. Surely, the legal profession is both a profession and a business.

The main issue facing the legal profession, aside from the regulatory zeal that flows from governments who believe that there are no votes in protecting or preserving it, is the changing nature of client need. Clients at both the big end of town and in the suburbs or regions are increasingly seeking problem-solvers rather than only legal analysts.

The question of whether our present day or future legal practitioners have the skills to provide the solutions sought must be the subject of a different paper.

The pressure on the legal profession to provide solutions in an increasingly economic rationalist and globalizing world make, for many, a debate about ethical values seem somewhat a luxury. It is my strong view that this is a very dangerous position to take if there be value in retaining a legal profession with high ethical standards.

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150. J.J. Spigelman, Address at the Law Term Dinner for the Law Society of N.S.W., Law Society of NSW (Jan. 29, 2001).

## VI. CONCLUSION

Most of the debate or discussion about globalization and the legal profession has been centred on the desirability of breaking down the barriers to allowing those to practice in jurisdictions other than their own. This has been largely presented as an economic argument supported by the desirability of "harmonizing" our various legal and ethical systems to allow for free movement, clarity, and consistency. New South Wales has not only joined the march, but in some respects is at the leading edge of change in terms of legal structural reform.

As a regulator of the legal profession in New South Wales, I see many emerging practical and conceptual difficulties in what I believe to be more a homogenization than a harmonization of legal practice and ethics. Perhaps this is because I view my role as a regulator not as one who controls, but in a way more consistent with the definition of regulation that embraces the concept of allowing to flow or making function successfully.

Ethics, including legal ethics, are culturally-based, and culture is the crucible of identity.

Globalization, driven largely by the U.S. dollar, in which the English language has become the international language of commerce and in which English law is becoming the tool in defining relationships and resolving disputes, results in an increasing danger of homogenization rather than harmonization.

Successful globalization depends not only on free markets, but on stable societies with strong infrastructures and social safety nets. These are largely supplied through the rule of law and legal processes. If globalization as we know it today is based on a paradigm constructed by the U.S. dollar, English language, and English law, it must clash with other paradigms, particularly those whose basis is foremost on individual or collective responsibility rather than individual rights.

We must be aware of this and sensitive to the resistance that must arise when cultures not within the present paradigm of globalization are confronted with the new regime and believe that to succumb to it would be to lose their identity.

The future of not only the legal profession, but of the rule of law, depends upon high ethical standards, and indeed, ethics is the glue that holds the legal profession together. Failure to understand this, and to assume that market forces are everything, will not only hinder the development of social capital in societies presently within the globalization paradigm, but will result in perhaps insurmountable resistance in those societies outside of the globalization paradigm who, it is hoped will benefit most from participation.

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