FOREWORD

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The workings of a sophisticated society and the quality of the lives to be lived in it depend in no small measure on the availability of expert advice. The more complex the transaction, the greater the need for expert advice and assistance. The greater the need for expert advice and assistance, the more must reliance be placed upon the expert. And so, as our society has become more sophisticated, the law has had to prescribe the level of knowledge and skill which should be possessed by those who hold themselves out as providers of expert advice and assistance, the care they should employ in performing their functions, the independence which should protect the integrity of their advice, and the scope of their liability to those who choose to rely upon it.

Mr Black's valuable conspectus of the laws governing securities brokers - "The Professional Responsibility and Fiduciary Obligations of Securities Brokers" - shows that this industry is governed not only be the law of contract and the doctrines of equity but significantly by a mass of statutory provisions and stock exchange regulations. The regulatory regime is of enormous magnitude and complexity. Detailed regulation comes at a cost and the cost must be borne ultimately by the public, either as taxpayer or as consumer. Is it not possible to articulate general standards to cover the transactions and situations to which the regime is directed? It must be acknowledged that the appropriate balance between necessary regulation and freedom in commercial transactions is difficult to strike, but it would be regrettable if the exercise of entrepreneurial talent were dampened excessively by formidable volumes of regulations.

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Courts and professional associations as well as legislatures have been engaged in developing appropriate standards to be applied by professionals in their respective fields. Such standards are not necessarily to be prescribed by the law alone: ethical norms are of critical, perhaps primary, importance in regulating the relationship of client and professional adviser. Some professions are better controlled by broad ethical norms than by detailed statutory regulation. Indeed, it is characteristic of a profession that its standards can neither be fully defined nor completely enforced by the law. Professional standards do not consist only in what the professional is bound to do, nor even in a catalogue of what the professional ought to do: standards are ascertained by reference to what the professional, instructed by learning, experienced by practice and formed by peer contact, does. Professional standards transcend the legally permissible. Professional culture, shared by the general membership of a profession and enforced by peer pressure, is arguably more effective than law in securing a satisfactory standard of professional service.

Those who regard professional culture as the best teacher and guarantor of professional standards will object to laws which impinge on ethical norms and will see those laws as working against the public interest. Thus Professor Partlett and Mr Szweda perceive "The Role of Lawyers in the Regulatory State" to be imperilled by laws which chill the lawyer's representational function. Indeed, they see the responsibility of representing clients to be undermined even by notions of a wider social responsibility. Here we encounter a familiar problem: should the special powers and privileges which society confers on a profession be exercised to the detriment of that society? The answer depends on the societal interests served by those powers and privileges. It is not self-evident that those interests are better perceived by courts than by the legislature.

Architects and engineers, it appears, have codes of ethics which recognise the possibility of conflict between the interests of clients or employers and the public interest. But, Mr Cooke tells us - "Architects and Engineers: Practising in the Public Interest" - that the governing bodies of these professions are not able to provide practical guidance on the conflicts between the responsibility of satisfying clients' particular requirements and the wider obligations owed to society. Perhaps the growing consciousness of the environment will facilitate the adjustment of these responsibilities, so that the client is persuaded that his or her long-term interests are compatible with the interests of the public.

It is difficult to identify the optimum position of the line dividing legal from ethical duties or the boundary between the proper domains of legal rules and ethical norms. An ethical solution has been propounded to safeguard the integrity of professional advice and the confidentiality of client information in corporations or large firms acting on behalf of numerous clients in a multitude of transactions. That solution bears the description of Chinese walls, a description which evokes the metaphors of crumbling, penetration, scaling and flanking. Professor Tomasic ("Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professionals Firms") has noted a "dissonance between

legal theory and commercial reality" apprehending "a corrosive effect" of commercial pressures on legal principles. The recognition of Chinese walls by the proposed ASX Code of Conduct and by s 850(2) of the *Corporations Law*, discussed by Mr Black, suggests that some see the corporate veil as cloaking commercial reality. If Chinese walls are to limit the obligations of corporations or firms by treating the client as the client only of particular employees or partners, corporate or firm advertising may require reconsideration and the liability of a corporation or firm may have to be restated as no more than vicarious liability for the acts and omissions of its disconnected and distinct parts. The relationship between client and corporation or between client and firm will require radical reappraisal.

It is one thing to determine the proper domains of the law and of ethical norms; it is another thing to ascertain the content of the law. Sometimes the latter is as problematic as the former. Thus Mr Davies, fastening on the controversial topic of "The Liability of Auditors to Third Parties in Negligence", analyses the differing terms in which the Supreme Court of Canada (*Haig v Bamford* (1976) 72 DLR (3d) 68), the Court of Appeal of New Zealand (*Scott Group Ltd v McFarlane* [1978] 1 NZLR 553) and the House of Lords (*Caparo Industries Plc v Dickman* [1990] 2 AC 605) state the criteria of auditors' liability. The difference in approach is not surprising. The legal dust is still settling after the judgment in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465. The legal problems following that case have not been fully analysed and the law is grappling with the fact that professional advice, by whomsoever it is commissioned, may attract reliance upon it by any to whom it is disseminated.

The ordinary consequence of a failure to observe professional or expert standards is a loss to the client or customer. The loss will frequently be of an economic kind. The assessment of damages or compensation for economic loss, whether in contract, tort or equity, raises problems of some difficulty. Mr Justice Brownie ("The Liability of Professionals; The Way Ahead?") addresses the question of time limitations which are particularly troublesome in cases of latent damage. His Honour points to a compromise between the protection of plaintiffs and the safeguarding of defendants and their insurers against the risks of delayed litigation.

The satisfactory resolution of the social and legal issues that arise in the giving and receiving of professional advice is important to the progress and good order of our society. The papers in this thematic issue of the University of New South Wales Law Journal will usefully stimulate their consideration and provide helpful indicia for their solution.