CHAPTER 1

WHAT IS 'LAWYERING'?

INTRODUCTION

It might seem surprising to begin by asking, 'what is lawyering'? Yet this is an important question, not only for providing a basis for many of the ideas we will discuss, but also because 'lawyering' is a term often used but rarely defined.[1] In this chapter, we will start by outlining our view of what lawyering is and how notions of lawyering are currently the subject of many discussions. We will then look at who lawyers are, because the composition of the legal profession has changed significantly in recent years. From this point, we will consider the debate as to whether lawyering is a profession or a business, and the implications of that debate for the standards of lawyering. We will also consider the ways in which the increasing commercialisation of the profession is reshaping legal practice.

1 WHAT DO WE MEAN BY 'LAWYERING'?

As noted above, this may seem like a strange question, but many discussions proceed on the basis that 'lawyering' is a single, unified activity, when, in fact, 'lawyering' is diverse. You will be familiar with ideas of commercial lawyering, or corporate lawyering. But you may also have heard of 'cause lawyering' if you have watched American movies on civil rights. This refers to lawyers using legal means to achieve social change for those who are perceived as being treated unfairly in society. The term 'rebellious lawyering' also relates to a method of effecting social change through lawyering. You might have come across 'environmental justice lawyering', which is probably self-explanatory; but quite recently a further term has been coined—'reproductive justice lawyering'. This latter term has grown out of the freedom of choice movement that focuses on women's autonomy over their reproductive rights, and it seeks to promote the idea that choices can only be made if women (as it is in this case) have the resources to access the means to achieve that choice.[2]

---

1 Josiah M Daniel, III, 'A Proposed Definition of the Term "Lawyering"' (2009) *Law Library Journal* 207.

2 Sarah London, 'Reproductive Justice: Developing a Lawyering Model' (2011) 13 *Berkeley Journal of African-American Law & Policy* 71.

These examples suggest that some lawyers specialise in acting for clients with particular needs, or work to pursue particular outcomes.[3] But we also know that many practising lawyers in Australia are generalists, the equivalent of a medical GP (general practitioner). Our point is that lawyers operate in many different contexts and act in many different ways. This means that pinning down the meaning of 'lawyering' is difficult. This problem is reflected in Daniel's lament that, when we talk about lawyering, '[e]veryone seems to know what it means, but finding a published—and meaningful—definition of the word is exasperating'.[4] The literature identifies what are generally accepted to be the 'fundamental lawyering skills' such as problem solving, legal analysis, legal research, factual investigation, communication, counselling, negotiation, and litigation and alternative dispute resolution.[5] This list is useful, but does not tell us what it is we actually mean by 'lawyering'.

So what is it that lawyers do? For many, notions of lawyering are developed through popular culture. Asimow et al.,[6] for instance, researched law students from a number of different countries, including Australia. This study found that only news coverage is more helpful than popular culture in assisting students to form their opinions of what constitutes lawyering. In fact, the study found that news and popular culture were generally more helpful than other sources of information (such as having lawyers as friends or family members, personal experience with lawyers, conversations with family and friends, or classes in school) in forming an understanding of the role of a lawyer.

This phenomenon of viewing law through the lens of popular culture can be illuminating not only for seeing the ways in which our ideas of lawyering are shaped, but also for revealing our public attitudes to lawyers: one can see a change in the representations of lawyers over time, for instance,[7] and with this change has come a more overt hostility to lawyers. Post,[8] picking up on this latter point, makes the interesting observation that, in popular culture:

> lawyers are applauded for following their clients' wishes and bending the rules to satisfy those wishes; and they are at the very same time condemned for using the legal system to satisfy

3 This term was coined by Gerald P López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press, 1992). See further 'What is "Rebellious Lawyering"?' on the home page of the Rebellious Lawyering Institute, https://rebelliouslawyeringinstitute.org/what-is-rebellious-lawyering/.

4 Daniel, above n 1, 207.

5 American Bar Association, Section of Legal Education and Admissions to the Bar, *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (the 'McCrate Report'), July 1992, 135. See also Marjorie M Schultz and Sheldon Zedeck, *Final Report: Identification, Development and Validation of Predictors for Successful Lawyering*, September 2008, 12, 13, 18, www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf. This was a study of 2000 lawyers who identified 26 factors that they considered to be important to effective lawyering.

6 Michael Asimow, Steve Greenfield, Guillermo Jorge, Stefan Machura, Guy Osborn, Peter Robson, Cassandra Sharp and Robert Sockloskie, 'Perceptions of Lawyers—A Transnational Study of Student Views on the Image of Law and Lawyers' (2005) 13(3) *International Journal of the Legal Profession* 407.

7 PD Baron, 'The Emperor's New Clothes: From Atticus Finch to Denny Crane' in Francesca Bartlett, Reid Mortenson and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge, 2011) 85.

8 Robert C Post, 'On the Popular Image of the Lawyer: Reflections in a Dark Glass' (1987) 75(1) *California Law Review* 379.

> their clients' desires by bringing lawsuits at their clients' behest and using the legal system to get what their clients want, rather than to uphold the right and denounce the wrong.[9]

Such a dichotomy reveals a discrepancy between our aspirations and our realities: community and individual autonomy, the need for a stable and authentic self, and the fragmentation and disassociation of the roles we play in modern life.

Representations of lawyers in popular culture often focus on the work of criminal lawyers (both prosecution and defence), barristers and lawyers who work for large, well-resourced firms. The reality, however, is that lawyering is much wider than this. In Australia, lawyers may be barristers or solicitors or both; they may work in large firms, or as sole practitioners; they may work as in-house counsel or government lawyers; they may be generalists or specialists; work for the underprivileged or for the elite; work in one of the major cities, in the suburbs, or in regional or rural practice.

Because of the range of roles lawyers play in common law systems, there has always been some measure of diversity in describing what it is that lawyers do. Generally, however, the traditional conception of the lawyer was as an expert in law: advising, if not directing, the client; actively engaging in the litigation process; and upholding the rule of law. This tripartite rule can be seen in the Preamble to the American Bar Association Model Rules of Professional Conduct, which states: 'A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.'

As a representative of clients, a lawyer performs various functions. As adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

López argues that the most common assertion that can be made about what it is that lawyers do, irrespective of the context and the organisational structure in which they work, is that lawyers solve problems: 'Lawyering means problem-solving. Problem-solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction'.[10]

A body of literature, of which López's work is part, has identified what might be described as 'new lawyering'.[11] This does not call into question the notion of lawyer-as-problem-solver so much as challenge the traditional paradigms of problem solving; that is, the lawyer-as-expert directing the client; or the zealous advocate pursuing solutions through the adversarial system.

9 Ibid 380.

10 Gerald P López, 'Lay Lawyering' (1984) 32 *UCLA Law Review* 1, 2, cited in Daniel, above n 1, 214.

11 See, for instance, Julie McFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008).

This 'new lawyering' does not have a single definition, but its characteristics can be distilled from the literature. First, 'new lawyering' is client-centred, rather than directive. The autonomy of the client is seen to be of prime importance, so the lawyer's role is facilitative,[12] collaborative[13] and evaluative,[14] generating legal options for the client.[15] Second, rather than being focused on adversarial solutions to the problem, the new lawyer will look to a range of problem-solving methods, including alternative dispute resolution options. The new lawyer is a creative problem solver,[16] empathises with the client,[17] adopts the 'as if' quality (having an awareness of the client's needs as if they were their own),[18] and displays fidelity to the pursuit of a solution to the client's problem[19] rather than a concern to 'win' at all costs.[20] All this, of course, has led to calls for a rather different form of legal education.[21] For instance, as detailed in Chapter 9, 'Service and Access to Justice', the Australian Learning and Teaching Academic Standards[22] suggest that law students be encouraged to recognise that lawyers, acting in their public role, should promote justice and reflect on the fact that their professional decisions have consequences.[23]

2 WHO ARE THE LAWYERS? THE DIVERSITY OF THE PROFESSION

Traditionally, the practice of law was perceived to be elitist and masculine, a domain of power and prestige. Lawyering and the culture of lawyering were dominated by 'white, Anglo-Celtic,

12 Richard D Marsico, 'Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?' (1995) 1 *Clinical Law Review* 639.

13 Daniel, above n 1, 214.

14 Marsha M Mansfield and Louise G Trubek, 'New Roles to Solve Old Problems: Lawyering for Ordinary People in Today's Context' (2011–2012) 56 *New York Law School Law Review* 367.

15 Robert F Cochran Jnr, 'Enlightenment Liberalism, Lawyers, and the Future of Lawyer–Client Relations' (2011) 33(3) *Campbell Law Review* 685, 686.

16 Carrie J Menkel-Meadow, 'When Winning isn't Everything: The Lawyer as Problem Solver' (1999–2000) 28 *Hofstra Law Review* 905; Lisa A Kloppenberg, '"Lawyer as Problem Solver": Curricular Innovation at Dayton' (2006–2007) 38 *University of Toledo Law Review* 547; Janet Reno, 'Lawyers as Problem-Solvers: Keynote Address to the AALS' (1999) 49 *Journal of Legal Education* 5; James M Cooper, 'Towards a New Architecture: Creative Problem Solving and the Evolution of Law' (1997–1998) 34 *California Western School of Law Review* 297.

17 Ian Gallacher, 'Thinking like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education should Change to Reflect its Importance' (2010) *College of Law Faculty—Scholarship*, Paper 6, http://surface.syr.edu/lawpub/6.

18 Kristien B Gerdy, 'Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering' (2008) 87(1) *Nebraska Law Review* 1.

19 Robin S Golden, 'Collaborative as Client: Lawyering for Effective Change' (2011–2012) 56 *New York Law School Law Review* 393.

20 Menkel-Meadow, above n 16.

21 Paul Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers' (1995) 58(3/4) *Law and Contemporary Problems* 5.

22 Sally Kift, Mark Israel and Rachael Field, *Learning and Teaching Academic Standards Project: Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, December 2010).

23 Ibid 16.

heterosexual, able-bodied, middle class' males.[24] In consequence, '[w]omen, indigenous people, NESB [non-English-speaking-background] people, working class people, gays and lesbians have been viewed as non-normative within the legal culture'.[25] In recent years, however, there has been a significant growth of diversity in the composition of the practising profession; in the organisational structures in which law is practised; in the specialisations within legal practice; and in the paths open to law graduates.

2.1 The diversity of the membership of the profession

Figures suggest that the number of practising lawyers is on the increase. A recent national report, *2018 National Profile of Solicitors* (hereafter the National Profile)[26] shows that as at October 2018 there were 76,303 practising solicitors in Australia, the vast majority of whom were on the east coast of Australia: 43 per cent in New South Wales; 26 per cent in Victoria; and 15 per cent in Queensland. The data shows that there has been an increase in the number of practising solicitors of 33 per cent since 2011.

The National Profile demonstrates that the membership of the profession is now much more diverse. It reports, for instance, that more women are joining the ranks of solicitors than men (+49 per cent compared to +16 per cent) since 2011, and this has resulted in women now outnumbering men as practising solicitors. This gender balance is reflected across all states and territories except Western Australia, where the ratio is 50/50. But while women outnumber men in the government (66 per cent) and corporate (59 per cent) sectors, there are more male solicitors (53 per cent) in private practice than women.[27]

However, the legal profession still has some way to go in terms of diversity. For instance, women still tend to cluster at the lower levels of legal practice, as employed solicitors and support staff, and as recently as May 2017 *Lawyers Weekly* referred to a report compiled by the Women Lawyers' Association of NSW that found that 'women make up just 18 per cent of equity partners, despite being equally represented at senior associate level'.[28] The quarterly statistics published by the Law Society of New South Wales reporting on data as at 31 December 2018 also evidence these trends: see Table 1.[29]

24 Margaret Thornton, 'Gender, Legality and Authority' (Paper presented at the Australian Lawyers and Social Change Conference, ANU, Canberra, 22–24 September 2004) 2, http://law.anu.edu.au/sites/all/files/users/u4081600/Conference_docs/thorntondiversity.pdf.

25 Ibid.

26 URBIS, *2018 National Profile of Solicitors: Final* (the 'National Profile'), 17 July 2019, https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf.

27 Ibid 1.

28 Tom Lodewyke, 'New Program Promotes Female Leadership', *Lawyers Weekly*, 25 May 2017, https://www.lawyersweekly.com.au/biglaw/21169-new-program-promotes-female-leadership. Although note the comment relating to the role of women solicitors as senior associates in law firms by Michael Pelly, 'Women are Taking Over the Engine Room of Law Firms' *Financial Review*, 12 July 2018, https://www.afr.com/business/legal/women-are-taking-over-the-engine-room-of-law-firms-20180708-h12ejk.

29 The Law Society of New South Wales, 'Practising Solicitors Statistics' as at 31 December 2018, https://www.lawsociety.com.au/sites/default/files/2019-01/201812%20Practising%20Solicitor%20Statistics%20-%20Dec%202018.pdf.

TABLE 1 SOLICITORS HOLDING PRACTISING CERTIFICATES IN THE STATE OF NEW SOUTH WALES

SOLICITORS BY PRACTISING CERTIFICATE CATEGORY	FEMALE	MALE	TOTAL
Principal of a law practice	2,804	6,325	9,129
Employee of a law practice	7,991	5,985	13,976
Corporate legal practitioner	3,911	2,591	6,502
Government legal practitioner	2,370	1,204	3,574
Volunteer	43	21	64
Total	**17,119**	**16,126**	**33,245**

Source: Law Society of New South Wales, 2018

A similar pattern can be seen in the recent numbers released by Victoria, reflecting statistics as at 1 October 2019: see Table 2.[30]

The National Profile noted that 519 solicitors—or 0.7 per cent of all practising solicitors nationally—identified as being of Aboriginal or Torres Strait Islander status in 2018, a slight decrease from 621 (1.2 per cent) in 2016. New South Wales (1.2 per cent) and Tasmania (1.1 per cent) had the highest proportion of Aboriginal and/or Torres Strait Islander solicitors.[31]

There are a number of reasons to explain the statistics that show that women are not equally represented in the leadership roles in the profession; for example, the lack of work practice flexibility and the fact that women are usually the prime care-givers for their families.[32] However, more generally, Thornton points to the influence of neoliberalism to suggest that that theory's reliance on the 'invisible hand of the market' is not working.[33] Moran

TABLE 2 LAWYERS REGISTERED IN VICTORIA BY LAWYER TYPE AND GENDER

	TYPE		
	SOLICITORS	BARRISTERS	TOTAL
Female	11,197	626	**11,823**
Male	9,839	1,459	**11,298**
Other	4	1	**5**
Total	**21,040**	**2,086**	**23,126**

Source: Victorian Legal Services Board and Commissioner, 2019

30 Victorian Legal Services Board and Commissioner, 'Lawyer Statistics', http://lsbc.vic.gov.au/?page_id=287.

31 National Profile, above n 26, 2.

32 Scarlet Reid, 'Year 101: What Next for Women in Law?' *LSJ online*, 10 May 2019.

33 M Thornton, 'The New Knowledge Economy and the Transformation of the Law Discipline' (2012) 19(2–3) *International Journal of the Legal Profession* 265, 268. Neoliberalism has been defined as 'a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices': David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 3.

points to more specific reasons by noting that judicial debates focus upon gender and ethnic diversity, but remain silent on the issue of sexuality.[34]

2.2 The diversity of organisational structures

Lawyers today work in a diversity of organisational forms. Traditionally, legal practices operated as either sole practitioners or partnerships. However, as reported by the Australian Bureau of Statistics in 2008,[35] there were at that time 11,244 businesses employing 84,921 people from the 'other legal services' category;[36] and, within that figure, 7,350 were unincorporated businesses, 2,264 were incorporated and the remaining 1,630 were trusts. New structures such as incorporated legal practices, multidisciplinary partnerships, and also corporations registered on the stock exchange are now acknowledged in legislation relating to practice structures.

The National Profile noted that as at October 2018, the majority of practising solicitors in Australia were private practitioners (69 per cent), 15 per cent practised as corporate solicitors, and 12 per cent worked in government. In terms of practice structures, the profile also noted that there were 18,748 private law firms operating in Australia of which the majority (79 per cent) were sole practitioner firms (firms with one principal).[37] Firms with 2 to 4 partners comprised 7 per cent of the private law firms, and the remainder was made up as follows:

- 5 to 10 partners: 1 per cent;
- 11 to 20 partners: less than 1 per cent;
- 22 to 39 partners: less than 1 per cent;
- 40+ partners: less than 1 per cent;
- Unknown: 12 per cent.[38]

Obviously there are still large numbers of legal practices that operate as sole practitioners and partnerships, but given that the firms that incorporate get the benefit of limited liability, easier entry and exit paths for ownership, acceptance of non-lawyer contributions, and an increased ability to raise debt and equity, and also avoid some very unattractive tax implications,[39] incorporation is becoming the popular organisational choice of law firms.[40]

---

34 Leslie J Moran, 'Judicial Diversity and the Challenge of Sexuality: Some Preliminary Findings' (2006) 28 *Sydney Law Review* 566.

35 Australian Bureau of Statistics, *Legal Services, Australia*, No 8667.0, 13, www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/ED9EDC3A4FFBF9BDCA2575DE0019F004/$File/86670_2007-08.pdf.

36 The Australian Bureau of Statistics categorises legal services into a number of sub-industries; that is, barristers, legal aid commissions, community legal centres, Aboriginal legal services, government solicitors, public prosecutors and other legal services: ibid 4. This latter category of 'other legal services' is further defined as 'solicitor firms, patent attorney businesses, service/payroll entities and businesses providing various legal support services': ibid 13.

37 National Profile, above n 26, 22.

38 Ibid 26.

39 Emma Ryan, 'Is Law Going to see the End of Partnerships?', *Lawyers Weekly*, 27 July 2018, https://www.lawyersweekly.com.au/biglaw/23719-is-law-going-to-see-the-end-of-partnerships.

40 Katie Walsh, '"You'd be Negligent": Why Professionals are Abandoning Partnerships', *Financial Review*, 14 August 2017, https://www.afr.com/business/legal/youd-be-negligent-why-professionals-are-abandoning-partnerships-20170721-gxfrtl.

The legislation governing legal practices also allows the formation of multidisciplinary partnerships. While the take-up of this organisational form has also been slow, the publication in New South Wales of *The Future of Law and Innovation in the Profession* report in 2017 (hereafter the FLIP Report)[41] suggests—in Chapter 3, 'New Ways of Working'—that this organisational form should be adopted.

Firms can also choose to register on the Australian Stock Exchange. Firms that have done so include Shine Corporate Ltd, Slater & Gordon Limited, IPH Holdings, Xenith IP[42] and, as recently as June 2019, Australian Family Lawyers.[43]

The introduction of this practice possibility has attracted considerable attention and raised some concerns about a solicitor's duty to the client, given that these firms are companies under the control of directors. A recent event has increased that concern even further. The pioneer firm, Slater & Gordon Limited, has experienced some financial issues resulting in a consortium of hedge funds now owning 95 per cent of the company's equity.[44] This eventuality reportedly caused the loss of a number of influential partners in the firm, but more generally, it has again raised the duty question, specifically as it pertains to clients making personal injury/compensation claims.[45] Attwood Marshall, a firm that now represents a number of clients who have transferred to it from listed firms, reports that these clients feel:

> that their claim was being compromised or settled for an amount that was less than what they thought their claim would be worth. There was a feeling that their claim had been rushed and not properly prepared with a perception that the law firm wanted to settle their claim and get paid for their costs as soon as possible. This is a classic example of the ethical tussle between a listed legal firm having two masters—clients and shareholders![46]

In other words, lawyers working in listed companies are torn between prioritising their professional obligation to act in the best interests of their clients and acting in a way that primarily enhances the shareholders' profit. An exacerbating factor is that some owners of a listed company may not be solicitors. This may well create a threat to professionalism and the 'integrity of the role lawyers played in the administration of justice'.[47] This debate is examined below, in Section 3.1.

41 The Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (the 'FLIP Report'), 2017, https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf.

42 Stefanie Garber, 'Second IP Firm Debuts on ASX at $89m', *Lawyers Weekly*, 20 November 2015, www.lawyersweekly.com.au/news/17544-second-ip-firm-debuts-on-asx-at-89m.

43 Emma Ryan, 'Aussie Law Firm Makes ASX Debut', *Lawyers Weekly*, 11 June 2019, https://www.lawyersweekly.com.au/biglaw/25790-aussie-law-firm-makes-asx-debut.

44 Jeremy Roche, Attwood Marshall, 'Financial Problems with National ASX Legal Firms—Do they Answer to Clients or Shareholders?', 6 September 2017, https://attwoodmarshall.com.au/financial-problems-with-national-asx-legal-firms-do-they-answer-to-clients-or-shareholders/.

45 Ibid.

46 Ibid.

47 Andrew Grech, 'New Legal Practices Embracing Incorporation', *The Australian*, 9 July 2010, https://www.theaustralian.com.au/business/legal-affairs/new-legal-practices-embracing-incorporation/news-story/1e8b55f2703cfbdb04a376444b5bd046.

2.3 The growth of specialisation

One of the characteristics of lawyering in Australia has been the growth of specialisation, whereby practitioners confine their practice wholly or largely in certain practice areas, such as intellectual property or family law.[48] Specialisation is seen to be a consequence of the growing complexity of the law, and one effect of globalisation.[49]

Such specialisation is endorsed by the professional bodies in each of the Australian states and territories through their specialist accreditation schemes. Specialisation is seen to have a range of benefits in terms of improved access to legal services and reduced costs for the legal consumer. Lawyers are also seen to benefit from the ability to charge higher fees; law firms from the ability to compete more effectively in the marketplace;[50] and the legal system from the growth of specialist expertise.

The trend to specialisation has been subject to some critical comment, however, by former Chief Justice French,[51] who in 2009, in the context of the proposed national reforms to the legal profession,[52] called for a 'careful and rigorous consideration'[53] of the issue. Such consideration, he claimed, should aspire to 'a better generic understanding of the concept than presently exists, the criteria for defining particular specialties and the interests served and objectives advanced by their recognition and regulation'.[54] Justice French was particularly careful to separate out the two meanings of specialisation: concentration, meaning 'a limitation of activity to a particular area of practice'; and expertise, meaning 'the acquisition of knowledge and skills'.[55] His Honour observed that these two meanings of specialisation are distinct, though they may at times overlap.

While His Honour acknowledged the potential advantage of specialist practice in terms of efficiency and marketability of legal services, he was concerned as to the complexity and inconsistency of the regulation of specialisations across Australian jurisdictions. His Honour

48 This trend has been evident for some years. In 1993, for example, Clarke noted the increase in specialisation in legal practice and the greater advertising of such expertise as emerging trends in lawyering: E Eugene Clarke, 'Note: Legal Education and Professional Development—An Educational Continuum' (1993) 4(1) *Legal Education Review* 201.

49 Law Council of Australia, '2010: A Discussion Paper: Challenges for the Legal Profession', 2001. This discussion paper states: 'Global markets facilitate global specialisation: a lawyer's field of expertise can be quite narrow if the potential market is the world' (p. 44).

50 'Boutique appears to be the way of the future for medium firms … While medium sized firms will generally not be able to compete head to head with large firms in all practice areas, there is room for medium sized specialists to capture significant niche markets and quality clients in selected practice areas': ibid 114.

51 Justice Robert French, '"In Praise of Breadth"—A Reflection on the Virtues of Generalist Lawyering' (Paper presented at University of Western Australia Law Summer School, Perth, 20 February 2009), www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20feb09.pdf.

52 See Chapter 2, 'The Framework of Lawyering'. The Uniform Law Framework was adopted in 2015 by Victoria and New South Wales and in 2020 by Western Australia. See Legal Services Council, http://www.legalservicescouncil.org.au/Pages/uniform-framework/guidelines-directions.aspx.

53 French, above n 51, 2.

54 Ibid.

55 Ibid 6–7.

maintained that if there was to be national regulation of specialisation to overcome such complexity and inconsistency, that regulation should be devised thoughtfully, with greater attention to the meanings both of specialisation and the criteria that define the subject areas for specialisation.

Over and above these concerns, however, Justice French pointed out that the complexity of the contemporary legal environment is such that the law is not as easily segmented as specialisation would suggest: 'Any apparently discrete section of legal practice cannot avoid the pervasive influence of other areas which are of general application'.[56] For this reason, in His Honour's view, specialist lawyers must maintain currency in their knowledge of the general law. He argued:

> given the extent of overlap between different areas of the law and the inability to quarantine specialist areas from that overlap, how are the specialist practitioner and his or her clients to be protected from a dangerous narrowing of competencies? And how is the profession to be protected from fragmentation? If specialisation is to be supported and protected by accreditation, the objective of accreditation must ultimately be directed to serving the public interest and not just the commercial interests of the subset of lawyers who hold themselves out as specialists. Whatever system is devised ultimately it must recognise the disadvantages of specialisation and seek to mitigate them in particular deskilling in the areas of law outside the specialist's practice area.[57]

Justice French's concerns about specialisation were not confined to legal practice. He also urged some caution in relation to the creation of specialist courts and specialist divisions within courts. Along similar lines, some commentators have questioned the desirability of increasing specialisation among legal academics.[58] We discuss the issue of specialisation in relation to competence in more detail in Chapter 7, 'Competence'.

2.4 The diverse paths open to law graduates

Law graduates have a variety of career paths open to them.[59] They can obviously work in the legal services sector, but they can also choose to work in government departments, or accounting or corporate organisations.

While the data categorises lawyers, we suggest that it should not be assumed that the lawyers in each of these categories are homogeneous. For example, as already noted, many

56 Ibid 11. Justice Michael Kirby also referred to the 'increasingly narrowing effect of specialisation' in 1996: 'Legal Professional Ethics in Times of Change' (Paper delivered at the St James Ethics Centre Forum on Ethical Issues, Sydney, 23 July 1996), http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_stjames2.htm.

57 French, above n 51, 16.

58 Bryan T Horrigan, 'Reforming Law Reform's Engagement with the Academic Arm of the Legal Profession' (Paper presented at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, 10–12 September 2008) 3, http://ssrn.com/abstract=1448490.

59 The College of Law provide a useful summary on its website: https://www.collaw.edu.au/your-career/career-options-for-lawyers.

lawyers specialise in particular areas of law such as litigation, employment and labour law, tax law, corporate law or international law.

3 THE 'PROFESSION VERSUS BUSINESS' DEBATE

In addition to the changes outlined above, there has been increased commercialisation of legal practice in recent years, bringing with it questions of whether law is still a 'profession' or whether it has become a business. Such questions go to the purpose of the practice of law.[60] However, before discussing the 'profession versus business' debate, it is important to recognise that s 10 of the Uniform Law[61] dictates that only qualified lawyers or entities may engage in legal practice.[62] Section 6 of the Uniform Law defines 'engage in legal practice', 'entity' and 'qualified entity' as follows:

> *engage in legal practice* includes practise law or provide legal services, but does not include engage in policy work (which, without limitation, includes developing and commenting on legal policy).
>
> *entity* includes:
>
> (a) an individual, an incorporated body and an unincorporated body or other organisation; and
>
> (b) in the case of a partnership:
>
> (i) the partnership as currently constituted from time to time; or
>
> (ii) the assignee or receiver of the partnership.
>
> ...
>
> *qualified* entity means:
>
> (a) an Australian legal practitioner; or
>
> (b) a law practice; ...

60 Joshua JA Henderson, 'The Ethical Development of Law Students: An Empirical Study' (2009) 72 *Saskatchewan Law Review* 75, 84.

61 That is, the *Legal Profession Uniform Law* adopted in 2015 by Victoria and New South Wales and in 2020 by Western Australia. See Chapter 2, 'The Framework of Lawyering'.

62 Also note that r 10 of the General Rules that underpin the Uniform Law provides some exemptions from prohibition on engaging in legal practice. However, some states that have not adopted the Uniform Law may not abide by these exemptions. For instance, accountants and advisers in the Australian Capital Territory, South Australia and Western Australia should be warned that they could be held to be in breach of the rules relating to unqualified legal practice for supplying documents: see Miranda Brownlee, 'Tax Lawyer Cautions Tax Agents on Supply of Documents in Certain States', *Lawyers Weekly*, 28 April 2019, 23 April 2019, https://www.lawyersweekly.com.au/wig-chamber/25528-tax-lawyer-cautions-tax-agents-on-supply-of-documents-in-certain-states, referring to advice from John Morgan, a barrister in Victoria.

While these definitions are useful, a clear understanding of what it means to engage in legal practice and, in particular, to provide legal advice is still a focus of judicial comment, especially now that consumers can access legal information and documents on the internet. For instance, in the case of *ACCC v Murray*,[63] the court held that if a provider, who does not hold a practising certificate, simply makes forms available for a consumer, then that would not amount to the provision of legal advice. However, if the provider helps the consumer select the appropriate form and assists by explaining terminology or in completing the form, then the provider would be considered to be breaching what is now s 10 of the Uniform Law.

Section 9 of the Uniform Law provides that the reservation of legal work for lawyers is required for the administration of justice and to ensure client protection, but protection of the public is not a universal rationale for such provisions. In the UK 'legal advice' does not feature in the list of reservations set out in s 12 of the *Legal Services Act 2007*. In the USA there are some very strong views expressed in relation to services offered on the internet. These views suggest that regulators should be focusing on how to best regulate online providers rather than shutting them down for unqualified legal practice, as their services are best viewed as innovative ways of providing access to justice.[64]

In Australia, however, the theme of 'protection of the public' runs throughout all of the legislation that regulates lawyers and extends to other restrictions: '[a]n entity must not advertise or represent, or do anything that states or implies, that it is entitled to engage in legal practice unless it is a qualified entity'.[65] A recent decision of the Supreme Court of Queensland shows that this matter is taken very seriously. The Queensland Law Society discovered that a Gold Coast company, Stenton & Moore Pty Ltd, was running a legal practice without a lawyer. Neither its executive director, Nerise Moore, nor any staff member had a practising certificate to engage in legal practice. The Supreme Court made orders restraining the firm from engaging in legal practice and has since ordered that the firm be taken over by receivers.[66] In response to this, the President of the Queensland Law Society, Bill Potts, warned that '[t]he Society will not stand for any form of fake lawyer endangering the public'.[67]

In addition, firms that intend employing disqualified or convicted people as lay associates must get approval from the Law Society or the Bar Association.[68] Criminal penalties apply in each case.

63 (2002) 121 FCR 428, 448.

64 See Robert Ambrogi, 'Latest Legal Victory has LegalZoom Poised for Growth' (2014) *ABA Journal* , www.abajournal.com/magazine/article/latest_legal_victory_has _legalzoom_poised_for_growth.

65 Uniform Law s 11(1).

66 Queensland Law Society, 'QLS Protects Good Lawyers by Taking Action', 20 March 2019, https://www.qls.com.au/About_QLS/News_media/News/QLS_protects_good_lawyers_by_taking_action.

67 Jerome Doraisamy, 'Be Wary of Fake Lawyers "Endangering the Public"', *Lawyers Weekly*, 15 March 2019, https://www.lawyersweekly.com.au/wig-chamber/25254-be-wary-of-fake-lawyers-endangering-the-public. For further examples of the seriousness of non-certified lawyers, and of non-qualified people representing that they are lawyers, see *Council of the Law Society of New South Wales v Aslan* [2019] NSWCATOD 159; *Law Society of New South Wales v Mulock* [2018] NSWCATOD 147.

68 Uniform Law s 121. See the definition of 'lay associate' in s 6 of the Uniform Law, and the definition of 'designated authority' in the *Legal Profession Uniform Law Application Act 2014* (NSW) s 11 and the *Legal Profession Uniform Law Application Act 2014* (Vic) s 10.

However, regulating providers is becoming increasingly complex with the introduction of new technologies. The University of Melbourne's Networked Society Institute recently published a discussion paper, *Current State of Automated Legal Advice Tools*.[69] This paper seeks to understand the practice settings in which automated legal advice tools (ALATs)[70] are being adopted, and issues regarding their effective management. It also explores the legal, regulatory and ethical risks and consequences, and how these will shape access to delivery of legal services. In particular, this paper seeks to clarify whether these new services are just offering legal information or whether they are engaging in legal practice—giving actual legal advice.[71]

The implications of new technologies are, however, contested. For instance, recommendation 16 of the FLIP Report states that 'the Law Society [of New South Wales should] investigate bringing legal information within the regulatory fold',[72] whereas the Law Society of Western Australia, in its paper on engaging in legal practice in 2017, appears to be quite strongly of the view that only qualified entities can give legal advice.[73] It states: 'An entity that is not a qualified entity may not in this jurisdiction give to another entity a product or thing that provides, or is capable of providing, legal services unless the second entity is a qualified entity'.[74]

Despite these debates, it seems that relevant legislation[75] reinforces the view that law is a profession. This implies a recognition that the purpose of lawyering is to protect the public interest for the purpose of improving society and 'to help citizens maximise their legal rights (regardless of their economic power or commercial considerations)'.[76] These are rather different aims to those of a business, where the purpose of lawyering is considered 'in terms of its commercial opportunities (as a vehicle for maximizing client interests with a view to making money for both the client and the lawyer)'.[77]

---

69 Judith Bennett et al., *Current State of Automated Legal Advice Tools*, Networked Society Institute, University of Melbourne, April 2018, https://networkedsociety.unimelb.edu.au/__data/assets/pdf_file/0020/2761013/2018-NSI-CurrentStateofALAT.pdf. Also note the fact sheet recently published by the Legal Services Council: *Legal Technological Innovation and the Uniform Law*, August 2019, http://www.legalservicescouncil.org.au/Documents/information-res/Legal%20tech%20innovation%20and%20the%20UL.pdf.

70 ALATs are 'technologies whose major purpose is "giving legal advice" as regulated by the legal profession'; the authors of the discussion paper admit that this is a 'rather circular' definition.: Bennett et al., ibid, 9.

71 Ibid 16.

72 FLIP Report, above n 41, 104.

73 Law Society of Western Australia, *Position Paper: People Unlawfully Engaging in Legal Work: Protecting the Community*, 4 August 2017, p 8, https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017AUG04-Law-Society-Position-Paper-People-Unlawfully-Engaging-in-Legal-Work-Web.pdf. See also this thought repeated in Law Society of Western Australia, *The Future of the Legal Profession*, 12 December 2017, p 12, https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2017DEC12-Law-Society-Future-of-the-Legal-Profession.pdf.

74 Law Society of Western Australia, *Position Paper: People Unlawfully Engaging in Legal Work: Protecting the Community*, ibid, 14.

75 See, for example, s 3(c) of the Uniform Law, which states that the objectives of this law include 'enhancing the protection of clients of law practices and the protection of the public generally'.

76 Henderson, above n 60, 84.

77 Ibid.

Many senior lawyers and jurists have also supported this notion of professionalism over many years. By referring to a set of 'professional' attributes identified by Justice Gleeson, the Law Council of Australia argues that the practice of law is a profession, by which it means:

- [it involves] the exercise of some special skill not held by the general public, based on an organised body of learning, imparted systematically by an institution;
- members usually enjoy some form of exclusive right to provide their services to the public for reward;
- the profession avows obligations of service to the community, and the community accepts that such obligations constrain their pursuit of self interest;
- [members] are permitted, and actively pursue, a substantial degree of self regulation.[78]

Similarly, Justice de Jersey, former Chief Justice of Queensland, appealed to members of the Queensland Law Society to recognise that they are part of a profession:

> [The relationship between lawyer and client is] not like the relationship of supplier to consumer, vendor to purchaser. It is a relationship specially characterized by the expectation, and correlative duty, of confidentiality and privilege, and of exemplary professional ethics. The client accepts that the lawyer is to guide the matter appropriately through the legal process or system, and expects the lawyer to do so. That need usually arises from what has been termed an 'information asymmetry'. But it does not mean that the delineation of the professional relationship should follow some sort of business model.[79]

Along similar lines, Justice Kirby has asserted that '[t]he bottom line is that law is not just a business. Never was. Never can be so. It is a special profession. Its only claim to public respect is the commitment of each and every one of us to equal justice under law'.[80] Further, Justices Alstergren, McK Robson and Wilson gave the following advice to law students at Deakin University in February 2019:

> Aside from the philosophical imperative that you are expected to act honourably at all times in the practice of an ancient and noble profession, in the practice of the law the pursuit of profit is subordinated to the maintenance of a strict and uncompromising body of rules that sets the practice of the law apart from almost every other professional calling on earth. Our ethics must prevail at all times. Our ethics take priority over profits.[81]

78 Justice Murray Gleeson, 'Are the Professions worth Keeping?' (Paper presented at the Greek-Australian International Legal and Medical Conference, Kos, 31 May 1999), www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_areprofe.htm, cited in Law Council of Australia, above n 32, 120.

79 Chief Justice Paul de Jersey, 'Opening Address' (Paper presented at the Queensland Law Society Vincents' Symposium 2010, Brisbane, 27 March 2010), http://archive.sclqld.org.au/judgepub/2010/dj270310b.pdf.

80 Justice Michael Kirby, 'Law Firms and Justice in Australia' (Paper presented at the Australian Law Awards, Sydney, 7 March 2002), www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_award.htm.

81 Justices EDW Alstergren, R McK Robson and Josh Wilson, 'Judges on Ethics' (Twilight Lecture, Deakin University, 25 February, 2019) 5, http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2019/speech-wilson-judges-ethics.

The notion that law is a profession is, however, contested. Some take the midway view that law is a profession with commercial aspects to its practice. For instance, Justice Hayne has stated:

> Both elements have always been present in the practice of the law—the self-abnegating pursuit of some higher ideal and the pursuit of commercial success. We cannot for a moment delude ourselves into thinking that the commercial element of practising law has emerged only recently. It has always been there. But the balance appears to have changed.[82]

In a similar vein, Chief Justice Bathurst, recounting his discovery of early English textbooks on the recovery of costs, claims '[i]t was a stark reminder … that legal practice has been a commercial enterprise from the time the first legal enthusiast charged money for what had previously been a gentleman's hobby'.[83] This latter view—that the practice of law is in reality a profession with commercial aspects—is an opinion widely supported by many leaders of the profession.[84] For instance, the Chief Executive Officer of Legal Mosaic in the USA suggests that Law should be regulated as both a profession and an industry: 'Regulation of the practice of law and the business of law should be bifurcated. Let lawyers regulate practice and independent business professionals oversee the industry.'[85]

For others, however, lawyering is seen to be primarily a commercial enterprise. For instance, an empirical study of legal practitioners in New South Wales found that participants considered themselves as primarily conducting a business: 'regardless of the rhetorical flourishes from legal societies, lawyers are more interested in business orientation and not service orientation … Social justice and public service are the least of their worries. They see these social values as unrealistic goals.'[86]

This finding is supported by an empirical study of Queensland legal practitioners. When asked whether they considered the practice of law a business or a profession, 75 per cent answered without hesitation that the practice of law is a business and that its focus is the generation of profit.[87] Interestingly, they did acknowledge that 'the public considers their firms

82 Justice KM Hayne, 'Lessons from the Rear-View Mirror' (2002) 22 *Australian Bar Review* 1, also available at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_leocussen.htm.

83 Chief Justice TF Bathurst, 'Commercialisation of Legal Practice: Conflict *Ab Initio*; Conflict *In Futuro*' (Paper presented at the Commonwealth Law Association Regional Conference, Sydney, 21 April 2012) 1, http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Bathurst/bathurst_2012.04.21.pdf.

84 See, for instance, the Legal Services Commissioner for New South Wales, Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173, 1174.

85 Mark A. Cohen, 'Law is a Profession and an Industry—It Should be Regulated That Way', Forbes Media Inc, 29 March 2018, https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/#39215c266598.

86 Roman Tomasic (ed), *Understanding Lawyers: Perspectives on the Legal Profession in Australia* (Law Foundation of New South Wales and George Allen & Unwin, 1978) 45, 48.

87 Lillian Corbin, *Redefining Professionalism in the Legal and Accounting Marketplace: An Empirical Study of Students, Graduates and Experienced Legal and Accounting Participants in South-east Queensland, Australia* (Lambert Publishing, 2010) 139.

as professions' and reasoned that 'they are justified in claiming to be a profession because they possess technical or expert knowledge'.[88]

A Law Council report notes that there can be different views within the profession depending on context: it suggests that suburban practitioners cater to the personal needs of their clients, whereas larger firms mainly focus on commercial issues.[89] Empirical studies conducted in the UK and USA have found a similar pattern. They have found that large firms dealing with corporations take a different approach to lawyering in comparison with lawyers servicing individual clients.[90] Wallace and Kay's study—which examines two work contexts, solo practitioners and law firm settings—proposes that the version of professionalism adopted by lawyers depends on the nature of the legal work undertaken, particularly with respect to dealing with corporate clients, and the importance the lawyer (or the lawyer's workplace) gives to achieving a profit.[91] Hanlon suggests that this pattern exists because practitioners in large firms rely on entrepreneurial and managerial skills, and identify with the commercial interests of their clients. He suggests that '[t]hese are the values of business rather than the professions', whereas small firm lawyers 'appear to want to retain at least elements of the older form of professionalism'.[92]

More recent empirical work supports the fact that corporate law firms, at least, are very business oriented. For instance, an Australian qualitative study, conducted by Bagust, of 50 lawyers who were employed by major commercial law firms in Melbourne found that corporate law firms are '(re)forming themselves into the image of the ever-merging, "big business" clients they serve'; they operate on the basis that 'the client is always right', thereby diminishing lawyer autonomy,[93] and note that 'lawyers are likely to find it more difficult to be able to adhere to professional and ethical principles that do not cohere with their client's objectives'.[94] Recognising that her study was conducted prior to the Global Financial Crisis in 2007, Bagust referred to the 2010 study conducted by Eversheds, a London law firm, entitled 'Law Firm of the 21st Century: The Client's Revolution', where 130 general counsel and 80 partners of law firms were interviewed.[95] She noted:

> Inhouse lawyers are becoming far more powerful than they were before the downturn … major law firms are placed under increasing pressure to redefine their role and their worth to their corporate clients … [who are] now at the centre of the legal services solar system, and the major law firms in obedient orbit …[96]

88 Ibid.

89 Law Council of Australia, above n 49, 354–357.

90 See John P Heinz and Edward O Laumann (eds), *Chicago Lawyers: The Social Structure of the Bar* (Northwestern University Press, 1982); Gerald Hanlon, 'A Profession in Transition?—Lawyers, The Market and Significant Others' (1997) 60 *Modern Law Review* 798, 799.

91 Jean E Wallace and Fiona M Kay, 'The Professionalism of Practising Law: A Comparison Across Two Work Contexts' (2008) 29 *Journal of Organizational Behaviour* 1021, 1043.

92 Hanlon, above n 90, 820–821.

93 Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35(27) *Sydney Law Review* 27, 29.

94 Ibid 46.

95 Ibid 51.

96 Ibid.

Bret Walker SC agrees that there is a close relationship between the views of lawyers and their wealthy clients and that, in fact, they tend to imitate them.[97] He then goes on to suggest these lawyers ought to be regulated along with management consultants, accountants, finance brokers and merchant bankers, rather than by the legal profession, as they appear to be focused on 'big money' clients and have no interest in the administration of justice.

3.1 The implications of the 'profession versus business' debate for conduct

At the core of the debate as to whether lawyering is a business or a profession is the question of 'whether profit motivations compromise the core values and obligations of professional conduct'.[98] Definitions of professionalism focus primarily on the conduct that professionals should exhibit when dealing with their clients. Notions of traditional professionalism found in the Anglo-American model[99] are based in the view that professionals have special expertise and autonomy,[100] and provide a service to the public. The model thus maintains that legal professionals will altruistically use their specialised knowledge and skills to advance the good of the community in preference to their own self-interest. In exchange for this altruism, they are given the privilege of self-regulation (autonomy).[101] A number of commentators have referred to this arrangement as a contract between the profession and society:

> Perceiving a social need, and the profession's competence to handle it, the society negotiates a deal with the profession: the society will confer the benefits and privileges of a legal monopoly upon the group in return for a promise of public service, i.e., a promise to carry on professional practice in accordance with high standards of performance, for the public good.[102]

In accordance with the contractual concept, Paterson suggests that both parties have their expectations and obligations. For instance, the profession (the lawyers' side) expects to be given

97 Bret Walker, 'Lawyers & Money' (2005 Lawyers' Lecture, St James Ethics Centre), referred to in Steve Mark, 'Re-imagining Lawyering: Whither the Profession?' (Keynote Address, Australian Academic of Law Symposium 2008, 25 May 2008), http://www.olsc.nsw.gov.au/Documents/reimagining%20lawyering%20whither_profession.pdf.

98 Bathurst, above n 83, 2.

99 More specifically, Weisbrot, in 1990, suggests that professions in Australia are more closely aligned to those in the UK. For instance, he says that American jurisprudence, having its foundation in the writings of Roscoe Pound, sees law as more open and affected by its social environment—that is, as having its judgments influenced by moral, economic and other considerations—whereas the British are more prone to seeing law as a closed system in the positivist tradition: David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 9.

100 Rayman L Solomon, 'Five Crises or One: The Concept of Legal Professionalism, 1925–1960' in Robert L Nelson, David M Trubek and Rayman L Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, 1992) 146.

101 Russell G Pearce, 'The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law Review* 1229.

102 L Newton, 'Professionalization: The Intractable Plurality of Values' in W Robinson, M Pritchard and J Ellin (eds), *Profits and Professions* (Humana Press, 1983) 34.

high status, reasonable rewards, restraints on competition, and autonomy.[103] The monopolistic situation that results is granted 'as a sort of *quid pro quo*', with the profession providing competence, access to the legal system, a service ethic and public protection (the clients' side).[104] While describing the relationship between lawyers and society as contractual, Paterson asserts that there is 'no assumption in this analysis that the balance between the two sides was a fair one, or that the parties to the "contract" were equally matched, or that the profession gave good measure for what it received in terms of the "bargain"'.[105] However, the claim that legal professionals really strive to attain this 'service ideal'—a 'public interest' goal—is now met with a certain amount of scepticism.[106] Kritzer suggests that whatever the professional rhetoric:

> few professionals are selfless actors seeking solely to advance their professional horizons or the well-being of humankind; professionals are workers who are engaged in an activity to earn a living. Professionals, like other workers, are concerned about both the size and the security of their livelihoods.[107]

This view pervades the legal community according to Holmes et al.,[108] and Moorhead, Paterson and Sherr report that lawyers exhibit a significant decline in altruism over time.[109]

Increasingly, firms face greater competition, and the trends towards incorporated legal practices (ILPs) and so-called 'mega-firms' (such as those created by the merger of Mallesons Stephen Jacques with the Chinese firm King and Wood, and Blake Dawson's merger with the international firm Ashurst LLP)[110] have brought with them further concerns about the pursuit of profit in the legal practice context. Yet, as Chief Justice Bathurst observes, 'commercialisation is not inherently bad or evil; it is a different set of means and ends, which both complement and conflict with the means and ends of professional legal practice'.[111] There is broad acceptance that increased competition and informed consumers are driving professionals to offer services that are efficient, commercially aware, and economically profitable to clients.[112] This signifies a shift in the professions' goal from 'performing a task for the "public good" towards the concept of somebody doing their job "well or expertly"'[113] for the paying client.[114]

---

103 Alan A Paterson, 'Professionalism and the Legal Services Market' (1996) 3(1–2) *International Journal of the Legal Profession* 137, 140.

104 Ibid.

105 Ibid.

106 William M Sullivan, 'Markets vs Professions: Value Added?' (2005) 134 *Daedalus* 19.

107 Herbert M Kritzer, 'The Dimensions of Lawyer–Client Relations: Notes Toward a Theory and a Field Study' (1984) 2 *American Bar Foundation Research Journal* 409, 413.

108 Vivien Holmes et al., 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2010) 15(1) *Legal Ethics* 29, 33.

109 Richard Moorhead, Alan Paterson and Avrom Sherr, 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales' (2003) 37 *Law and Society Review* 765.

110 Bathurst, above n 84, 3.

111 Ibid.

112 Gerard Hanlon, '"Casino Capitalism" and the Rise of the "Commercialised" Service Class—An Examination of the Accountant' (1996) 7 *Critical Perspectives on Accounting* 339, 345.

113 Ibid 346.

114 Ibid 348.

Some writers, such as Hanlon, advocate that professionals should acknowledge that they[115] now practise within this 'commercialised professionalism' paradigm.[116] Hanlon observes that the skills for success within this paradigm are: (a) technical ability; (b) managerial skill (the ability to balance budgets, manage the firm and satisfy clients); and (c) entrepreneurial skills (the ability to bring in business).[117] He suggests that a person's ability to bring in new business is the most prized skill as it has the most potential to create a profit, and 'personal professional success is related to profitability, not to serving clients in need'.[118] Hanlon also suggests that new entrants to firms are, through the socialisation process, introduced to these attributes of professionalism and are particularly advised that those who are 'commercially aware' may one day 'make it to partner'.[119]

Commercialised professionalism positions the provision of legal services in the market with other providers. Justice Spigelman critiques this view by comparing the traditional understanding of professionalism to the activities of the market. He suggests that a profession values historical traditions:

> [whereas] a market wakes up every morning with a completely blank mind … a profession has an ethical dimension and values justice, truth and fairness. The market recognises self-interest and self-interest alone. … the operation of a market gives absolute priority to a client's interest. A profession gives those interests substantial weight, but it is not an absolute weight.[120]

Chief Justice Bathurst, in assessing the challenges to ethical practice brought by commercialism, recommends a two-step process. The first is to identify what remains constant: he identifies that professional duties (fidelity, candour, good faith, and public trust in the profession) 'remain steadfast', though their application may change in the contemporary environment. The second step is to engage in debate about how traditional ethical standards should be upheld and reinforced in the modern world.[121] His Honour observes a number of trends: that young lawyers in the new mega-firms may, in the pursuit of career advancement, be motivated to bill as much as possible, a practice that may conflict with duties to act

115 This is particularly so in the corporate firms. Although Hanlon argues for a redefinition of professionalism towards a commercial-entrepreneurial approach, he still acknowledges that firms 'serving individual, non-influential clients and markets' are trying to adhere to the traditional understanding of professionalism; that is, one that is more social service minded: Hanlon, above n 90.

116 Gerard Hanlon, 'Professionalism as Enterprise: Service Class Politics and the Redefinition of Professionalism' (1998) 32 *Sociology* 43, 50.

117 Ibid.

118 Ibid.

119 Hanlon, above n 112, 349. It has been suggested that it is now naïve to consider technical skills as the determinant that defines merit for promotional purposes. See Donald C Langevoort, 'Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament' (2004) 61 *Washington & Lee Law Review* 1615, 1625. This author suggests that there are other factors that can be more highly valued, but ultimately the person who is promoted is one who recognises what is valued and accommodates those characteristics into his or her work practices.

120 Justice James Spigelman, 'The Value of an Independent Bench and Bar' (1998) 17 *Australian Bar Review* 105, 106.

121 Bathurst, above n 83, 4–5.

in good faith, with honesty and in the best interests of the client; that the development of multidisciplinary 'one-stop shops' for services may generate a tendency to sacrifice ethical obligations in the pursuit of profit; and that some of the projects undertaken may be so large that lawyers, focusing only on a small aspect of the whole project, may fail to perceive ethical problems.[122] He also points to the rise of the litigation-funding industry—now worth $50 million a year and growing rapidly—and notes that litigation funders are motivated by profit but are not, as lawyers are, bound by notions of a duty to the court.[123] Nevertheless, the Chief Justice argues that ethics and professional conduct are dynamic, and that issues such as these need to be discussed and debated in open forums.[124]

3.2 The change environment

Whether one holds the view that commercialisation has always been part of the legal profession but is on the increase, or that the rise of commercialisation is a new phenomenon, there can be no denying that the pressures of commercialisation are changing the ways in which lawyers relate to each other, to other professions and to clients. In Australia, the Federal Government's adoption of a National Competition Policy in the 1970s resulted in changes to the regulation of lawyers that effectively labelled and treated the legal profession as just another group of businesses.[125] Economic benchmarks such as market efficiency and transparency now apply to the professions in an effort to erase any anti-competitive practices.[126] A study conducted in New South Wales in 1998 confirmed that this goal had been met, as it found that the legal profession was experiencing increased competition from 'within the profession, from other professions, and potentially, global competitors'.[127] This change in regulation and other factors—such as the introduction of new technologies and marketing practices—have caused legal practices to prioritise managerial, budgetary and entrepreneurial skills,[128] and to consider expanding into associated non-law services; for example, under the MDP (multidisciplinary practices) model or simply by prioritising their legal services into the public affairs arena.[129]

122 Ibid 7–8.

123 Ibid 11.

124 Ibid 5.

125 Some of these investigations have resulted in reports. See Law Society of Western Australia, *Flexible Practice Structures for Lawyers: Position Paper*, 1999; New South Wales Attorney General's Department, *National Competition Policy Review of the Legal Profession Act 1987: Final Report*, 1998, www.lawlink.nsw.gov.au/report%5Clpd_reports.nsf/pages/ncpf_toc.

126 Anonymous, 'Task Force Examines the Future Regulation of the Profession: Hilmer, TPC Reports Recommend More Competition' (1993) 31(10) *Law Society Journal* 72.

127 John Gray, Philip King and Robin Woellner, 'Facing Up to Change' (1998) 36 *Law Society Journal* 44, 47.

128 Hanlon, above n 116, 50.

129 Chris Merritt, 'The Law Firms of Tomorrow Take Shape', *The Australian*, 25 October 2018, https://www.theaustralian.com.au/business/legal-affairs/how-the-law-firms-of-tomorrow-are-taking-shape/news-story/bd021ef59d3b42a230143f81ad26d6c6.

3.2.1 Technological advance

The Law Society of New South Wales' FLIP Report, released in early March 2017, acknowledges the importance of technology.[130]

McGinnis and Pearce[131] analysed the ways in which the practice of law will be changed by the rise in machine intelligence. Arguing that law itself is an information technology—a code that regulates social life—they assert that legal practice will soon face a great disruption:

> Information technology has already had a huge impact on traditional journalism, causing revenues to fall by about a third and employment to decrease by about 17,000 people in the last eight years and very substantially decreasing the market value of newspapers. Because law consists of more specialized and personalized information, the disruption is beginning in law after journalism. But, its effects will be as wide ranging. Indeed they may ultimately be greater, because legal information is generally of higher value, being central to the protection of individuals' lives and property.[132]

As they observe, intelligent machines are better than humans in terms of performance and cost. Their increasing sophistication has 'enormous implications for every aspect of law—legal practice, jurisprudence, and legal education', and will ultimately serve to weaken lawyers' market power over the provision of legal services. In fact, some authors pose the question whether technology will make lawyers redundant. LegalVision responds to this by suggesting that technology has the potential to replace some manual and repetitive processes currently performed by lawyers, but also asserts that 'there is no single technology' that has the potential to perform all of the many functions completed by a lawyer.[133] Further, others imply that the effectiveness of the machine will rely on lawyers to help construct the questions and answers used—without this, the data has the potential to be biased and to produce inaccurate results. For example, Richardson has made the following statements:

> People often view AI [artificial intelligence] and algorithms as being objective without considering the origins of the data being used in the machine-learning process … Biased data is going to lead to biased AI. When training people for the legal profession, we need to help future lawyers and judges understand how AI works and its implications in our field.[134]

LegalVision also make it clear that the technology currently being adopted is primarily facilitative; that is, technologies such as document automation and management tools

130 FLIP Report, above n 41.

131 John O McGinnis and Russell G Pearce, 'The Great Disruption: How Machine Intelligence will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82(6) *Fordham Law Review* 3041.

132 Ibid 3041.

133 LegalVision, 'Transforming the Legal Landscape: The NewLaw Philosophy', 21 October 2017, 11, https://www.legalbusinessworld.com/single-post/2017/10/20/Transforming-the-Legal-Landscape-THE-NEWLAW-PHILOSOPHY.

134 L Song Richardson, Dean of the University of California, Irvine School of Law, cited in Neil Sahota, 'Will AI Put Lawyers Out of Business?' Forbes, February 2019, https://www.forbes.com/sites/cognitiveworld/2019/02/09/will-a-i-put-lawyers-out-of-business/#6feee27c31f0.

promote efficiencies in the delivery of legal services.[135] On the other hand, LegalVision observes that intelligent machine learning which will enable 'a computer processor to access and synthesise' data to make decisions and predict actions that should be taken, is only at the experimental stage.[136] Kellogg observes:

> The Canadian province of British Columbia has created the first of that country's online tribunal[s] to resolve small claims disputes and condo conflicts of up to $10,000. The Civil Resolution Tribunal (CRT), also available as a mobile app, is in beta testing now and will launch later in 2016. Officials are offering CRT as a voluntary means of resolving disputes, but they expect it to become mandatory for certain cases. The system's built-in process includes party negotiations, a mediation-type phase, and an adjudication that has the same force as a court ruling.
>
> Another project—designed by two law professors and a data scientist and consultant—is applying machine learning and artificial intelligence techniques to predict the outcomes of cases before the US Supreme Court. So far the computer model has an accuracy rate of 70 percent, which is considered remarkably high for these kinds of predictive projects.[137]

Already it is well accepted that technology enables lawyers to 'deliver quality services at lower cost'.[138] The implications of this trend are explored by Hausman,[139] who discusses the rise of virtual legal offices (VLOs). She argues that VLOs provide an additional mode of delivering legal services that can assist access to justice, and provide legal practitioners with a more flexible and less expensive mode of practice. In addition, the increased availability of information through the internet, and the introduction of related technology, enables clients—who are now quite educated consumers—to demand a different relationship with their lawyers. Some lawyers report that clients already demand 24-hour accessibility.[140] More generally, clients now expect to be treated in a more consultative and collaborative manner and, in particular, are demanding alternative pricing strategies, based on technology that can 'capture time spent on making calls or emails on your handheld device straight into WIP [work in progress]'.[141]

135 LegalVision, above n 134, 9.

136 Ibid 11. This topic is also being investigated by the University of Melbourne's Networked Society Institute: Bennett et al., above n 69.

137 Sarah Kellogg, 'The Uncertain Future: Turbulence and Change in the Legal Profession', *Washington Lawyer*, April 2016: see DC Bar, https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/april-2016-uncertain-future.cfm.

138 HM Kritzer, 'The Professions are Dead, Long Live the Professions: Legal Practice in a Post-professional World' (1999) 33 *Law & Society Review* 729.

139 Jordana Hausman, 'Who's Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Law Offices' (2012) 25 *Georgetown Journal of Legal Ethics* 575.

140 Law Council of Australia, above n 49, 33.

141 Brian Armstrong, 'Adding Some Science to the Billing Debate', *Australasian Law Management Journal*, January 2011, 15.

The major law firms are embracing technology for its ability to reduce their costs, but new technologies bring new challenges, particularly in the areas of protection of confidential information, competency[142] and courtesy. For instance, cloud computing is an increasingly popular means of file storage, although there are warnings about privacy issues;[143] and concern has been expressed about the use of email communication, in terms of both confidentiality and lawyer civility (discussed in Chapter 8, 'Civility and Courtesy').

Technological advance also has significant implications for legal education. Otey[144] argues that 'a 21st-century legal education must prepare Millennial students to think critically about the ethical and interpersonal consequences related to their pervasive use of technology'. She notes that fewer 'big law' jobs are available to law graduates, so that more graduates will work in small firms, work for solo practitioners or work for themselves. They will increasingly rely on technology to organise and maintain their law practices, but currently legal education does not provide adequate training in this regard.

3.2.2 Corporate clients

All clients—individuals and corporations—are now more educated than in the past regarding their legal rights, although they have different demands.[145] Individual clients and small organisations may want a relationship with their lawyer, whereas larger corporations tend to see their lawyers as service providers,[146] or supplying a commodity.[147] Flood suggests that these corporations, by virtue of their size, can pressure (and even bully) their lawyers into giving prominence to commercial factors rather than legal concerns,[148] and Hanlon notes that these corporate clients 'shop around' and appoint different lawyers to handle different types of matters.[149] Hanlon also quotes a company secretary of a large insurance firm, who states that lawyers are evaluated in terms of whether the quality of their advice matches the price they are charging.[150] Most corporate clients are looking for efficient outcomes, rather than

142 See Erik Mazzone and David Ries, 'A Techno-ethics Checklist: Basics for Being Safe, Not Sorry' (2009) 35 *Law Practice* 35, 35.

143 See James M McCauley, 'Cloud Computing—A Silver Lining or Ethical Thunderstorm for Lawyers?' (2011) 59 *Virginia Lawyer* 49; Thomas Margoni, Mark Perry and Karthick Ramachandran, 'Clarifying Privacy in the Clouds' (4 February 2011), http://ssrn.com/abstract=1755225 or http://dx.doi.org/10.2139/ssrn.1755225.

144 Brittany Stringfellow Otey, 'Millennials, Technology, and Professional Responsibility: Training a New Generation in Technological Professionalism' (2013) 37 *Journal of the Legal Profession* 199, 262.

145 Hanlon, above n 90, 799. This author suggests that firms servicing large corporations are driven by the commercial-entrepreneurial understanding of professionalism, whereas those who act for individuals act in accordance with the social service version of professionalism. See also Heinz and Laumann, above n 91.

146 Kritzer, above n 106.

147 Hanlon, above n 90, 799.

148 John Flood, 'Doing Business—The Management of Uncertainty in Lawyers' Work' (1991) 25 *Law and Society Review* 1, 41.

149 Hanlon, above n 90, 799.

150 Ibid.

long-term relationships,[151] although there is a growing view that corporate clients want their lawyers to act as their business partners, and have an understanding of their goals.[152]

Given the strong link that pervades the corporate client/lawyer relationship, Whelan and Ziv[153] are of the view that the rise of the corporate client needs to be addressed in future theories of lawyer professionalism. Noting the calls for lawyers to be guardians of corporate ethical responsibility, they observe that corporations are increasingly guardians of lawyers' ethical responsibility. Privatising professionalism appears to be the reality for large corporate clients.

3.2.3 Human resources

A firm's business strategies obviously have the potential to affect its human resources; for instance, in relation to the demands of competition generally and the firm's insistence on its members achieving a particular level of billable hours.[154] In fact, it is now the case that market mentality extends to assessing potential partners[155] and even existing partners with respect to their entrepreneurial abilities. Hanlon concludes that 'partnership is no longer for life',[156] and he identifies four functions that influence firm appointments:

1 Fee earning—has the candidate for partnership met their billing targets, do they consistently bill more than three times their salary, do they meet and exceed their chargeable hours target, and do they regularly keep on top of their unpaid bills?

2 Practice development—has the candidate brought in valuable new clients, do they take part in marketing activities (writing articles, presenting seminars, etc), do they display a positive attitude to client entertainment?

3 Management and development of staff—does the applicant get on with and motivate colleagues and staff, do they delegate work, and do they take part in training and evaluating staff?

4 Management—does the applicant demonstrate a willingness to participate in management, have they served in any managerial role, do they have any suggestions for improving the firm, do they follow firm procedures or do they act alone?[157]

151 Deborah L Rhode, 'The Professionalism Problem' (1998) 39 *William & Mary Law Review* 298.

152 Melissa Coade, 'What Clients Want: Law Firms are Conditioning Themselves for High Client Expectation', *Lawyers Weekly*, 27 December 2017, https://www.lawyersweekly.com.au/biglaw/22491-what-clients-want. See also BDO Australia, 'Clients Want Lawyers to be More Like Business Partners: Latest BDO Global Survey', 25 October 2017, https://www.bdo.com.au/en-au/news/media-releases/clients-want-lawyers-to-be-more-like-business-partners.

153 Christopher J Whelan and Neta Ziv, 'Privatizing Professionalism: Client Control of Lawyers' Ethics' (2012) 80(6) *Fordham Law Review* 2577.

154 See William Reece Smith Jnr, 'Professionalism and Commercialism in the Practice of Law' (Paper presented at the 9th Commonwealth Law Conference, Auckland, 1990) 53. For an empirical analysis of the effect of billable hours, see Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problem and Pressure Points' (2005–2006) 33 *Fordham Urban Law Journal* 171.

155 Lee refers to this as the 'tournament for partnership'. See R Lee, 'From Profession to Business: The Rise and Rise of the City Law Firm' (1992) 19 *Journal of Law and Society* 1.

156 Hanlon, above n 90, 811.

157 Ibid 810–811.

These business-oriented goals have been blamed for the fact that lawyers are feeling pressured and insecure.[158] It is now common to see practitioners defecting from one firm to another, and in some cases even 'the defection … of whole departments or groups'.[159]

Of particular concern is the claim that, in many cases, lawyer stress and dissatisfaction result in high rates of mental illness among lawyers, particularly anxiety disorders, depression, addiction and substance abuse.[160] There is now an increasing volume of empirical research showing that law students and lawyers have much lower rates of well-being than other disciplines and professions.[161] Much has been done to raise awareness of this issue, and a number of initiatives have been introduced to try to address the problem.[162]

It seems that the issue is complex and not susceptible to any single remedy. It does seem clear, however, that the issue of lawyer well-being is related to legal professionalism and ethics in at least two ways.

First, direct links have been made between lawyer well-being and both workplace[163] and professional behaviours. Krieger asserts that satisfaction and professional behaviour are manifestations of a well-integrated and well-motivated person, and that depression and unprofessional behaviour among law students and lawyers typically proceed from a loss of integrity—a disconnection from intrinsic values and motivations, personal and cultural beliefs, conscience, or other defining parts of their personality and humanity.[164] Krieger explains that lawyers:

> who are deeply committed to their own values are less likely to pursue the values or desires of their clients with unethical or abusive tactics. … [Conversely] an attorney who does the work primarily for the money or to bolster his image will be more frustrated with the process, less effective, and much less pleasant to work with (or against).[165]

158 Smith Jnr, above n 154, 53.

159 Ibid. The empirical work carried out by Frenkel, Nelson and Sarat reported on this phenomenon. See Douglas N Frenkel, Robert L Nelson and Austin Sarat, 'Introduction: Bringing Legal Realism to the Study of Ethics and Professionalism' (1998) 67 *Fordham Law Review* 704.

160 Norm Kelk et al., *Courting the Blues: Attitudes Towards Depression in Australian Law Students and Legal Practitioners* (Brain & Mind Research Institute, University of Sydney, 2009).

161 James Duffy et al., 'The "I Belong in the LLB" Program: Animation and Promoting Law Student Well-being' (2016) 41(1) *Alternative Law Journal* 52, 52.

162 See, for instance, The College of Law, 'Resilience', https://www.collaw.edu.au/learn-with-us/our-programs/practical-legal-training-programs/coursework/resilience; Council of Australian Law Deans, *Promoting Law Student Well-being: Good Practice Guidelines for Law Schools*, March 2013, https://cald.asn.au/wp-content/uploads/2017/11/Promoting-Law-Student-Well-Being-Good-Practice-Guidelines-for-Law-Schools.pdf. Most law societies now have confidential helplines for lawyers.

163 See, for example, P Baron and L Corbin, 'Ethics Begins at Home' (2016) 19(2) *Legal Ethics* 281.

164 Lawrence S Krieger, 'The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness' (2005) 11(2) *Clinical Law Review,* 425, 426.

165 Ibid 430.

Krieger argues that a person's well-being 'results from experiences of *self-esteem, relatedness to others, autonomy, authenticity,* and competence'.[166] This argument is in line with definitions of well-being emphasising that it extends beyond physical health:

> Wellbeing is about more than living 'the good life': it is about having meaning in life, about fulfilling our potential and feeling that our lives are worthwhile … our personal or subjective wellbeing is shaped by our genes, our personal circumstances and choices, the social conditions we live in and the complex ways in which all these things interact.[167]

In recent empirical work conducted in the USA, Krieger and Sheldon[168] found that extrinsic motivations, such as money and status, did not contribute to the well-being of the lawyers in the study. Rather, factors such as autonomy, relatedness, self-determination and competence were important to well-being. This was borne out by the fact that the study found that lawyers in large firms and other prestigious positions were not as happy as public service lawyers; and that junior partners in law firms were no happier than senior associates, despite the better pay and higher status of the partners.

The second way in which the issue of lawyer well-being is directly related to legal professionalism and ethics is that mental disorders in lawyers have, in turn, been linked to allegations of misconduct.[169] Mental health issues are thus increasingly important considerations in Australia in admissions proceedings and in misconduct matters. These issues are addressed throughout the book, but particularly in Chapters 3 and 8.

3.2.4 Marketing

Marketing has grown in importance in law firms in recent years. Marketing is defined as 'the management process responsible for identifying, anticipating and satisfying customer requirements profitably'.[170] As Hodges[171] points out, in an increasingly competitive and globalised marketplace for legal services, most lawyers no longer have the luxury of waiting for business to come to them, and technical competence alone will not necessarily bring in new business or keep existing clients. Marketing is necessary to ensure firm survival. Yet

166 Ibid [*original emphasis*].

167 Richard Eckersley, 'The Politics of Happiness' (2007) 93 *Living Now* 6, 6, www.richardeckersley.com.au/attachments/Living_now_happiness.pdf.

168 Lawrence S Krieger and Kennon M Sheldon, 'What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success' (2015) *George Washington Law Review* 554.

169 See further John Briton, 'Lawyers, Emotional Distress and Regulation' (Paper presented at the Bar Association of Queensland Annual Conference, March 2009). Briton estimated that, as Legal Services Commissioner of Queensland, some 30 per cent of the complaints he received involved issues of lawyer mental health.

170 The Chartered Institute of Marketing, quoted in Neil A Morgan, *Professional Services Marketing* (Butterworth-Heinemann, 1991) 5.

171 Silvia Hodges, 'I Didn't Go to Law School to Become a Salesperson: The Development of Marketing in Law Firms' (2013) 26 *Georgetown Journal of Legal Ethics* 225, 225.

the professional service firms, particularly legal firms, were slow to accept the necessity for marketing, and many law students still graduate without understanding that law is a business and that they will be expected to engage in the promotion and marketing of their firm.[172] For lawyers, marketing involves 'getting the target client to want a meeting with them'.[173] It is an increasingly recognised practice for large law firms to amalgamate or consolidate their practices for reputational or 'brand name recognition' purposes.[174] But, as Hodges points out, marketing is now essential for all firms. She argues that, in order to market effectively, firms need to embed marketing in their firm culture, providing top management support, good marketing professionals, education, and a marketing structure within the firm.[175] Most importantly, she claims, 'for marketing to succeed in a professional firm, every professional must participate and understand the competitive advantages of participating'.[176] In effect, law firms are increasingly being made aware of the importance of having 'a clearly articulated culture' in relation to 'strategy, organisational structure and governance arrangements'. Culture is seen to influence reputation, which in turn determines how law firms are perceived by clients, shareholders and 'top talent' staff.[177]

3.2.5 Managerialism

As has been identified, the legal profession has experienced change because of the introduction of new technologies, human resources departments and marketing practices. These developments have necessitated the adoption of managerialism,[178] 'a belief that good management is able to solve the problems of human service organisations, and make them more effective and efficient'.[179] In turn, this has prompted the larger law firms to employ non-legal professionals to manage the firm.[180] Traditionally, professionalism was seen as an occupational principle distinct from other work organisation methods, including managerialism.[181] Where professionalism is often characterised by notions of public interest,

172 Ibid 226.

173 Clifford J Ferguson, '"Selling" Professional Services: A Practical Approach—Part II' (1996) 34 *Management Decision* 19.

174 Ward Bower, 'Trends in the Legal Profession and Planning Implications for Law Firms' (1998–2000) (out of print, held by author).

175 Hodges, above n 171, 260.

176 Ibid.

177 Emma Ryan, 'Corporate Culture Wreaking Havoc on Legal and Reputation Risk', *Lawyers Weekly*, 8 May 2019, https://www.lawyersweekly.com.au/biglaw/25594-corporate-culture-reeking-havoc-on-legal-and-reputational-risk.

178 It should be noted that this is one of the elements of the new 'commercialised professionalism' paradigm discussed above.

179 Jim Ife, *Rethinking Social Work: Towards Critical Practice* (Longman, 1997) 16.

180 Hanlon, above n 90, 811.

181 Daniel Muzio and John Flood, 'Entrepreneurship, Managerialism and Professionalism in Action: The Case of the Legal Profession in England and Wales' in M Reihlen and A Werr (eds), *Handbook of Research on Entrepreneurship in Professional Services* (Edward Elgar, 2012) 369, 369.

collegiality, self-regulation and individual responsibility, managerialism is associated with bureaucracy, managerial control and dehumanising tendencies.[182]

The implications of the trend towards managerialism were considered by Sommerlad over 20 years ago. Although legal practice may have required reform, she argued, managerialism had far greater potential impact, posing:

> a reconceptualisation of both the notions of justice and what is meant by service, through a managerial ideology which, using the methods of accountancy, is ultimately concerned to cut costs by relativising the notion of quality as a concept which in turn gains meaning from the constituency for whom the commodity is intended.[183]

At the time Sommerlad was writing, it was common for managing partners with no real business expertise to run Australian firms through partnerships.[184] Today, contemporary legal practice in Australia for many lawyers is carried out in large global firms, which employ many practitioners across jurisdictions and where the working environment is bureaucratic.[185]

A number of writers since Sommerlad have expressed concern about managerialism and its influence on legal practice. Dirks, for example, suggests that managerialism reduces lawyers' work to a mechanical process that allows the practice to 'be managed as a business. Each client … is merely the raw material and the finished product is a completed file. It is imperative that the cost of completing the work is reduced to a minimum in order to achieve maximum profit'.[186] Other critics suggest that whatever theorists argue to be the benefits of managerialism, in reality it aims to cut costs, improve efficiencies and raise productivity under the pretence of worker 'participation and a climate of choosing options that take into consideration the interests of those involved'.[187] All of these factors have changed the way that firms operate and ultimately affect the practitioners working within them, particularly in their dealings with clients. However, it has been argued that competitive pressures alone do not determine the character of an organisation. Individuals ultimately make their own choices about how they will conduct themselves.[188]

182 Ibid.

183 Hilary Sommerlad, 'Managerialism and the Legal Profession: A New Professional Paradigm' (1995) 2 *International Journal of the Legal Profession* 159, 181.

184 Law Council of Australia, above n 49, 105.

185 Muzio and Flood, above n 181, 369.

186 James Dirks, *Making Legal Aid Pay and Franchising Development* (Sweet and Maxwell, London, 1994), cited in Sommerlad, above n 183, 172.

187 H Braverman, *Labour and Monopoly Capital: The Degradation of Work in the Twentieth Century* (Monthly Review Press, 1974), cited in Sommerlad, ibid 172.

188 Michael J Kelly, 'Thinking About the Business of Practicing Law' (1999) 52 *Vanderbilt Law Review* 985.

CONCLUSION

In summary, we have suggested that the fundamental characteristic of lawyering is problem solving, and that this occurs across a number of dispute resolution locations and in a variety of workplaces, including private law firms, corporate organisations and government departments. We have also noted that the legal practice environment has changed markedly as a result of factors such as technological advances, well-educated clients and the expectation of instant communication. Such changes have raised the question of whether law is now a business or a profession. In other words: is legal practice now operating under the commercialised professionalism paradigm, rather than the traditional understanding of what it means to be a lawyer? We suggest—particularly in the chapters on 'Fidelity to the Law' (Chapter 4) and 'Service and Access to Justice' (Chapter 9) that the future of the legal profession ultimately depends on how individual lawyers choose to carry out the task of lawyering. This is a question that each individual lawyer must decide given their personal goals, and subject, of course, to the culture of their workplace; these matters are discussed in the next chapter, 'The Framework of Lawyering'.