

THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

BOOK LAUNCH

**'ETHICAL LEGAL PRACTICE AND PROFESSIONAL CONDUCT' BY
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THURSDAY 27 JUNE 2019

1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. The injustice which they have suffered at the hands of the common law serves us a reminder to us today that we should never take the current state of the law for granted. We must always be prepared to question it and evaluate for ourselves whether it accords with our present ideas about what is right and just, to help us avoid blindly repeating the oppression and dispossession of Indigenous people over two centuries.
2. Of course, it is not only in circumstances of great and, with the benefit of hindsight, obvious injustice when we lawyers are required to think critically about how we conduct ourselves. Ethical thinking does, and if not, then it should, pervade all aspects of legal practice, from the relatively mundane task of providing advice about a contract for the sale of land to the conduct of a defence to a murder charge. Indeed, if asked about the matter on the spot without time for reflection, I would have gone so far as to say that obedience to a comprehensive code of ethics was the defining characteristic of the profession of a lawyer.
3. I think that it is this theme which underlies this new textbook by Mr Esparraga, although he is careful to note that, in reality, it must in several respects be qualified. To know the history of the legal profession is to know that there will always be those who are tempted to act dishonestly and to use the position of trust with which they are

invested for personal gain, although hopefully far less often than the media likes to portray. But, as Mr Esparraga illustrates clearly, this is not the only manner in which practitioners can fall short of the standards which we are expected to meet. Unfortunately, it is common for practitioners to fail to act ethically not through any conscious dishonesty or wrongdoing, but from simple inadvertence to what their professional duties and obligations require.

4. It is for this reason, I think, that Mr Esparraga has chosen to structure his text in the way that he has. The first three chapters discuss the relationship between the ideas and concepts which underlie the law, ethics and morality, and the legal profession itself in a way which is accessible to the student, yet also refreshing for the practitioner who might only have encountered Aristotle, Kant, and Hegel while dozing off to sleep in a first-year university philosophy lecture. I should pause to comment that by no means do I admit to being such a student; I was quite happy falling asleep in my first-year economics lectures instead. The reminder is nevertheless useful, for it highlights how these ideas are not just intellectual abstractions, but real tools to use for practical reasoning in difficult situations.
5. And, as the balance of the text illustrates, these situations are many. The strictly legal rules governing the conduct of lawyers, voluminous as they may seem to many students, cover only a very small part of the total work which a lawyer is required to undertake. The remainder is dealt with through a comparatively small number of rules intended to be applied flexibly in a wide variety of circumstances. To achieve this end, these rules rely on a range of indeterminate concepts such as “fit and proper”, “good faith”, “fairness” and “reasonableness”, or the protean idea of fiduciary loyalty. These concepts do not call for the focused and pedantic approach which must be taken to some questions of legal analysis; rather, they demand that lawyers consider whether their actions are appropriate by reference to objective norms of conduct accepted by wider society.

6. Ascertaining what these norms require is difficult without an appreciation of the ethical and moral considerations by which they are influenced, and it is to this theme that Mr Esparraga returns when examining each of the different areas of professional regulation in the text. While there is the expected coverage of the relevant legislative provisions and cases, it is the sensitivity to these issues of practical reasoning for lawyers who are confronted by ethical dilemmas which sets this text apart from others in its field. There is no mere academic interest in the problems posed by the legislation and case law in this area; the text betrays the voice of a lawyer who has had first-hand experience of navigating the ethical conundrums presented by practice, although, I must be careful to add, no personal involvement in any breaches of the conduct rules himself.
7. Now, I do not think that the importance of texts which adopt this kind of approach can be overstated. They play a critical role in educating future generations of law students. The struggle to maintain ethical standards within the profession is not a battle which can be won conclusively once and for all. There is no magic statutory procedure or test in the case law which can guarantee that every practitioner will always attain the required ethical standard. It is an ongoing process in which all members of the profession participate in their everyday practice when deciding how to approach a case, or in considering what course of action is appropriate. This process is strengthened when lawyers actively turn their minds to and take steps to ensure that they fulfil their obligations. It is weakened when we walk past and ignore inappropriate behaviour. In either case, it is our collective attitude which informs the standard accepted by our profession.
8. We must recognise that the future will bring with it new ethical challenges for our profession, and that our ability to cope with them depends upon having a strong education in the principles which underlie ethical decision-making. Whether these challenges will require the profession to change radically, or stay largely the same, is a debate too large to enter into tonight, but forms the foundation for the final chapter of Mr Esparraga's text. Whatever the outcome, we can be certain that

the profession will not be successful in adapting if it forgets the ethical duties which lie at the heart of professional practice as a lawyer. It will not be enough to simply rely upon the conduct rules as written. We must be able to take advantage of our ability to reason practically based on strong ethical and moral principles if we are to retain the respect and trust of the community we serve.

9. To this end, all students and future lawyers will benefit from the intertwined approach to ethical decision-making and professional regulation taken by Mr Esparraga's text. For that reason, I am happy to declare this work well and truly launched.
10. Thank you.