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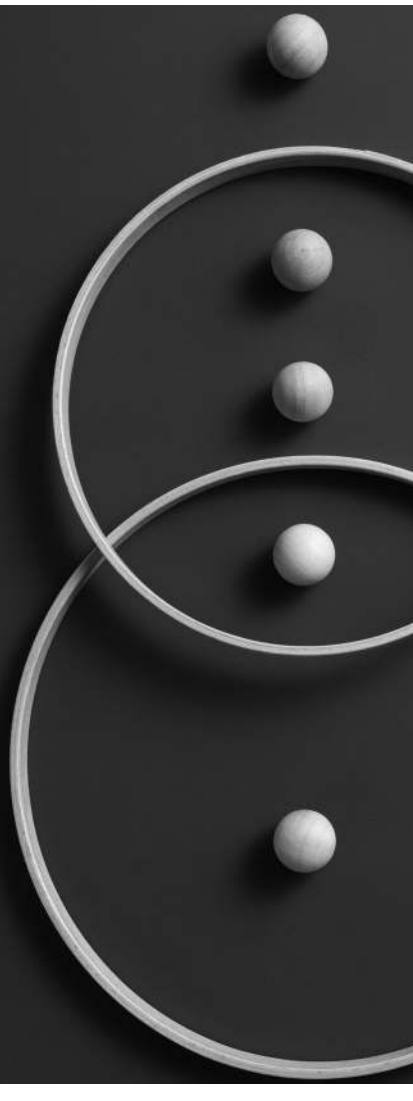
INTRODUCTION: VALUES IN PRACTICE



Introduction: an overview of this book

Previous editions of this book have explained how an individual lawyer's preference for a particular approach to making ethical decisions (for example, *adversarial* or *zealous advocacy*) influences their thinking about 'the right thing to do' in any particular situation. The third edition explained how good ethical decisions involve not just the application of a legal framework – such as the professional conduct rules and case law – but also a working understanding of moral philosophy, otherwise known as general morality. It also noted the importance of being able *to act* on ethical decisions. This fourth edition is structured around these same themes, while updated to take into account recent case law and legislative changes, and broader issues currently affecting the profession.

In this introductory chapter we first provide an overview of the whole book and discuss some global issues affecting legal practice and lawyers' ethics. We then explore insights from general morality as an underlying framework for the four approaches to lawyers' ethics explored in Chapter 2. This framework compensates, to some extent, for the lack of an explicit statement of values in our current rules of professional conduct. We consider the professional imperatives for ethical action (legal and cultural norms) and the ethical decision-making process, including the skills we need to put our ethics into action.

In Chapter 2 we describe four approaches to lawyers' ethics, and explore the strengths and limitations of each approach. The first two approaches are expressions of 'role morality – that is, what is the proper role of lawyers in our system of justice? A common answer to this question is *adversarial advocate*, which understands the lawyer primarily as agent for the client, advocating for the client's interests. Increasingly, however, lawyers are required to adopt a different role – *responsible lawyering*. *Responsible lawyering*, like *adversarial advocacy*, is based on the lawyer's role in the adversary system, but sees the lawyer as having more of a mediating role between the law and clients. We then consider two other approaches that apply more general ethics to the legal profession – the *moral activist* and *ethics of care* approaches. Both are underpinned by the general moral theory of virtue ethics. *Moral activism* sees social ethics, and particularly social justice, as the final arbiter of what lawyers' ethics should be, since the legal system should be concerned with advancing the virtue of justice. The *ethics of care* approach, which includes the idea that we ought to care for the earth community, sees relational ethics, the virtue of compassion and the minimisation of harm as the most important principles that should govern lawyers' behaviour.

Responsible lawyering suggests alternatives to, and limits on, excessive adversarialism within the terms of the adversary system itself, by proposing that lawyers behave as officers of the court as well as client advocates. Existing professional conduct regulation attempts (at least half-heartedly) to put this into practice, as we shall see in the chapters that follow. *Moral activism* and the *ethics of care*, by contrast, provide completely external critiques to adversarialism. They propose virtue ethics–based alternatives to the partisanship and non-accountability of *adversarial advocacy* and even at times question the appropriateness of the adversarial legal system itself as a method of resolving disputes and doing justice.

In each succeeding chapter we examine in more detail what the four ethical approaches and underlying general morality might mean, and which values would be appropriate to apply, in different contexts. In doing so we critique the extent to which the rules and

regulations, particularly the *Australian Solicitors' Conduct Rules*[1] as they currently stand, do a good job of demonstrating appropriate values, and how these rules and regulations influence individual lawyers' capacity to put values into action. We argue that common law approaches might at times align more closely with the ethical approaches than with the rules. But while the approach in this text may seem to undervalue the conduct rules, we do not say that they are pointless or of no value; on the contrary, they are in themselves a reflection of the underlying general moral principles we describe. They indicate a commitment to ethical practice and provide a framework for professional regulation through the disciplinary system. We have emphasised the conduct rules in separate text boxes in all relevant chapters, so that they stand out; but we maintain the view, expressed in earlier editions, that a compliance-like attitude to their observance will never be enough for good decision-making.

In each chapter, we make extensive use of case studies to illustrate our points and to provide an opportunity for students (and other readers) to develop their own values-based judgements and apply the law of lawyering in respect of the topics covered.

The broad topics covered are as follows. Chapter 3 discusses the regulatory systems that govern Australian lawyers and some of the history of its evolution and likely future trajectory. Chapter 4 explores lawyers' fundamental duty of client confidentiality, and the place of whistleblowing in our system of justice. Chapter 5 deals with the ethics of criminal justice, for both defence and prosecution lawyers. Chapter 6 addresses the issues that arise in civil justice resolution, from litigation to alternative dispute resolution, and provides new perspectives on the challenges of technology and competency in this area of law. Chapter 7 covers the complex issue of conflicts of interest. Although conflicts are now seen as a broad social issue not limited to lawyers, lawyers have particularly complex principles and conduct rules to apply when confronted with conflicts. Perceived and actual conflicts of interest have led to much case law and are a consistent source of client complaint. However, the largest area of client complaint concerns fees and costs, and the whole of Chapter 8 is dedicated to these challenges in the context of the detailed regulatory environment lawyers must understand in order to bill their clients ethically. Chapter 9 deals with corporate lawyers and, for the first time in this fourth edition, we also explore the ethical responsibilities of government lawyers: both these groups of lawyers act for powerful clients and there are interesting overlaps in the ethical issues they face. In a wholly new Chapter 10, we examine the role of lawyers in one of the defining challenges of our times – climate change and environmental degradation. We conclude in Chapter 11 by examining the connection between personal values and professional practice. We finish that chapter with further discussion of how case studies and ethics assessment can be used to build lawyers' and law students' values awareness and strengthen their ethical resolve.

1 We also refer to the ethical conduct rules applying to barristers across the country. The Australian Bar Association drafted model rules that were adopted in most jurisdictions in 2011. In 2015, these rules with amendments were enacted (as part of the *Legal Profession Uniform Law* in New South Wales and Victoria) as the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. In the book we refer to the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (*'Barristers' Conduct Rules'*) as these represent the approach in the majority of jurisdictions, but will indicate where there is significant local variation.

Global issues affecting legal practice and lawyers' ethics

Some of the global trends noted in the last edition as impacting on legal practice have accelerated significantly. One such trend is the use of legal technology, with the COVID-19 pandemic seeing a wholesale shift online in many areas of practice, including court hearings. The extent to which these changes are transformative is yet to be seen, but it is unlikely that the profession will return to work practices that were normal before the pandemic but have been replaced by digital innovations. These developments underscore the importance of lawyers being digitally competent. We discuss what the greater use of legal technology means for lawyers' duties of both confidentiality and competence in Chapters 4 and 6.

The legal profession continues to deal with the serious issue of mental illness within its ranks – an issue exacerbated for some by lengthy COVID-19 lockdowns. The profession has taken steps to address this challenge, which is certainly discussed more openly now than it was a decade ago. Law societies offer resources and assistance to lawyers experiencing mental health problems. We applaud these moves; however, we consider that there is a lot more work to be done by the profession to address the structural issues that affect the wellbeing of lawyers, such as long working hours, pressure to 'make budget' and secondary trauma. We also draw attention to research shedding light on the links between workplace ethical climate,[2] mental wellbeing, and job and career satisfaction. Research by Stephen Tang, Vivien Holmes and Tony Foley[3] shows that new lawyers have a clear perception of the values of their workplace, and this affects them in significant ways. New lawyers' positive sense of professional wellbeing is enhanced in workplaces characterised by both integrity and an ethic of care. Conversely, their wellbeing suffers in workplaces where power and self-interest are the prevailing norms, and also in workplaces with little ethical awareness or relational engagement. These findings support the view that lawyers' mental wellbeing cannot be simply reduced to an individual's personal experiences, disconnected from the ethical climate of the organisation in which they work.

Another deeply concerning issue with which the profession is grappling is the high incidence of sexual harassment and bullying within its ranks. A 2019 report by the International Bar Association ('IBA')[4] drew attention to the global nature of the problem. In the same year, a report by the Victorian Legal Services Board and Commissioner[5] noted that nearly two-thirds of women surveyed indicated they had experienced sexual harassment

2 Employee perceptions of the 'ethical climate' of an organisation are their perceptions of 'how the members of an organization typically make decisions concerning "events, practices, and procedures requiring ethical criteria"': John B Cullen et al, 'The Ethical Climate Questionnaire: An Assessment of Its Development and Validity' (1993) 73(1) *Psychological Reports* 667, 669.

3 Stephen Tang, Vivien Holmes and Tony Foley, 'Ethical Climate, Job Satisfaction and Wellbeing: Observations from an Empirical Study of New Australian Lawyers' (2020) 33(4) *Georgetown Journal of Legal Ethics* 1035.

4 Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (IBA Legal Policy and Research Unit, Report, 2019).

5 Victorian Legal Services Board and Commissioner, *Sexual Harassment in the Victorian Legal Sector* (Report, 2019).

at work. Reports on sexual harassment in Victorian courts[6] and in the South Australian profession[7] generally confirm these findings. These reports indicate that the problem of sexual harassment in the legal profession is worse than in workplaces generally, and has particular features.[8] Importantly, the IBA report reminds us that '[b]ullying and sexual harassment do not occur in a vacuum'. It emphasises that 'mental health challenges, a lack of workplace satisfaction and insufficient diversity are all related issues' and that these aspects of a legal culture also need to be understood and addressed.[9]

In relation to gender diversity, as Margaret Thornton and others have long documented, women were long the 'fringe-dwellers'[10] in law, due to many interlocking structural and social barriers erected against women's acceptance as equal members of the profession. These barriers ranged from indirect factors such as an expectation to show 'commitment' to the firm by working very long hours, or direct discrimination in promotion and career opportunities.[11] While women now represent more than half the practising profession[12] (53%, although this is in the more numerous solicitors' branch) they still lag behind in most places of seniority such as equity partnership and senior counsel (often called Queen's Counsel).[13] Given that male-dominated hierarchies are a risk factor for sexual harassment, it is important that the profession continues efforts to advance women in its ranks.[14]

While the profession has begun to address the issue of sexual harassment and bullying, it will take sustained efforts by all levels of the profession to significantly minimise or eliminate the problem. Given what we know about the cultures in which sexual harassment thrives (cultures with little regard for integrity, fairness or an ethic of care), we suggest that, as part of the profession's efforts, a focus on the ethical culture of a workplace may produce dividends.[15]

6 Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations* (Report and Recommendations, March 2021).

7 Government of South Australia, Equal Opportunity Commission, *Review of Harassment in the South Australian Legal Profession* (Report, 2021).

8 Vivien Holmes et al, 'Sexual Harassment: Is Strengthening Ethical Culture the Answer?' (2021) 95(10) *Law Institute Journal* 20, 21.

9 Pender (n 4) 10.

10 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).

11 Hilary Sommerlad, '"A Pit to Put Women in": Professionalism, Work Intensification, Sexualisation and Work–Life Balance in the Legal Profession in England and Wales' (2016) 23(1) *International Journal of the Legal Profession* 61–82.

12 Urbis, *2020 National Profile of Solicitors* (Final Report, July 2021).

13 More than half of all female solicitors have been admitted for 10 years or less, and are overrepresented in the younger brackets compared to male solicitors: ibid 2. While there are no recent national reports on seniority by gender, our desktop reviews of barristers lists indicate that women represent approximately 9% of senior counsel. See the report on the recent appointment of 12 new female senior counsel in New South Wales raising the percentage of women senior counsel from 6.7% to 9.4%: 'Record Number of Female Silks Appointed', Women Lawyers Association of NSW (Web page) <https://womenlawyersnsw.org.au/press/record-number-of-female-silks-appointed/>. In recent years, the solicitors' branch has done far better through concerted campaigns for equality. For example, within the large law firm sector over 30% of partners are women: Hanna Wootton, 'Female Law Partners Breach Through 30pc Barrier' (The Australian Financial Review (online at 10 December 2020) <https://www.afr.com/companies/professional-services/women-partners-break-through-30pc-barrier-20201130-p56j7u>.

14 We acknowledge the need for broad diversity in the profession. See, eg, Law Society of New South Wales, *Diversity and Inclusion in the Legal Profession: The Business Case* (October 2021). Below we discuss the need for greater representation of First Nations Peoples.

15 See further Holmes et al (n 8).

Another area of important focus for the profession is the justice system's relationship with Australia's First Nations Peoples. As the Uluru Statement From The Heart reminds us, Aboriginal and Torres Strait Islander sovereignty 'has never been ceded or extinguished and co-exists with the sovereignty of the Crown'.[16] The Statement calls for constitutional change and structural reform, including establishment of a Voice to Parliament. The Law Council of Australia supports the call for constitutional recognition; its 2021 President, Dr Jacoba Brasch QC, noted:

> The discrimination and intergenerational trauma that Aboriginal and Torres Strait Islander peoples face on a day-to-day basis cannot be alleviated unless and until their rightful place in this country is recognised and the legacy of colonialism confronted. The legal and justice system has played an undeniable part in this history of colonisation, discrimination and trauma.[17]

The legal profession has much work to do to redress that history. Some important work has begun – for example, in Aboriginal Circle Sentencing Courts[18] – but much remains to be done, including ensuring that First Nations Peoples are properly represented in the profession. Further, as Canadian scholar Pooja Parma argues, 'the ethical practice of law requires attention to Indigenous laws, legal practices, and epistemologies as sources of ethics and professionalism'.[19] We suggest that that an *ethics of care* approach (see Chapter 2) may help facilitate the necessary dialogue between the profession and First Nations Peoples about sources of ethics. We have much to learn about ethics from First Nations Peoples. For example, 'dadirri', or 'deep listening' to Country to discern right ways of living, is an Aboriginal ethic taught by Dr Miriam Rose Ungunmerr-Baumann, Aboriginal Elder and 2021 Senior Australian of the Year.[20] We consider in Chapter 7 what difference an *ethics of care* approach might make in dealing with conflicts (a significant issue in remote Aboriginal communities)[21] and in Chapter 10 we discuss the *ethics of care* underpinning 'earth jurisprudence', which is itself informed by First Nations legal systems.

Taking into account all of the issues covered in this book, and being aware of the wider social, economic and political concerns described above, our focus on the general morality that underlies ethical type and choice can only do so much. We cannot directly advance the careers of ethical lawyers, eliminate sexual harassment in the profession or improve lawyers' mental health issues, let alone address environmental destruction. But we can suggest that law students and lawyers who are ethically aware are better equipped to

16 The Uluru Statement, 'The Uluru Statement From The Heart' <https://ulurustatement.org/the-statement>.
17 Law Council of Australia, 'Time to Enshrine a First Nations Voice to Parliament' (Media Release, 10 December 2021).
18 See, eg, *Owen Patterson v Wendy Brookman* [2021] ACTMC 16.
19 Pooja Parma, 'Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence' (2019) 97(3) *Canadian Bar Review* 526, 557.
20 'Dadirri', *Miriam Rose Foundation* (Web Page) <https://www.miriamrosefoundation.org.au/dadirri/>.
21 Judy Harrison submission to Law Council of Australia's Review of the ASCR (8 December 2020). Copy on file with authors.

improve the profession and to provide greater value to clients, in a manner that addresses the longer-term interests of those clients, our system of justice and indeed our society. We also believe that attention to ethics underpins profitable and sustainable legal practice. At a time dubbed the 'great resignation' in many industries, including the legal sector across the common law world, attention to engendering a firm culture that is ethical and promotes lawyer wellbeing seems to make very good business sense.[22] And we suggest that lawyers' greater awareness of general morality, and the choices this awareness enables, will help them to step back from daily practice and make informed choices about whose interests they serve. This in turn may well help inoculate them against the depression that affects some members of the profession.

It is to this last, very personal, issue that we now turn. In the next section we want to emphasise that mental health and communication problems are not fringe issues for the profession and that, apart from distorting ethical behaviours, poor communication and abusive conduct can affect client relationships very powerfully. The 2021 Annual Report of the NSW Office of the Legal Services Commissioner notes:

> Once again, this year a significant proportion of the consumer complaints have dealt with communication issues. In [some instances] it has become clear that the lawyer may be suffering with mental health problems. … This Office … commends the considerable resources offered by the Law Society to lawyers who may be suffering work or life stresses.[23]

We therefore begin our case studies with a disciplinary case that confrontingly illustrates how lawyers' personal wellbeing – upon which all of their productivity, service and justice impacts ultimately depend – is in need of pre-emptive attention.

CASE STUDY 1.1 **STAYING ON THE RAILS**

In many if not most cases, the wider impact of a lawyer's work is beneficial and adds to justice. But to illustrate what can happen to lawyers under stress and to make the point that failures of legal ethics are neither trivial nor uncommon, this case study takes extracts from a disciplinary tribunal decision that graphically describes the breakdown of a lawyer–client relationship.

It concerns a lawyer with a small regional practice and 13 years' experience who was charged with three counts of misconduct in relation to 'conduct which would be beyond the contemplation of reasonable practitioners'. The first count related to the 'discourteous, unprofessional and abusive tone and content of his correspondence with his clients'.[24]

The transcript of the Tribunal's decision includes these paragraphs:

22 Thomson Reuters Institute and Georgetown Law, *2022 A Report on the State of the Legal Market: A Challenging Road to Recovery* (Thomson Reuters, 2022).
23 Office of the Legal Services Commissioner (NSW), *Annual Report 2020–2021* (Report, 2021) 12.
24 *Legal Services Commissioner v Lynch* [2015] VCAT 772, [1].

Charge 1 – Unprofessional Language

6. Charge 1 is as follows:

   Professional misconduct within the meaning of section 4.4.3(1) of the [*Legal Profession Act 2004* (Vic) ('the Act')], namely misconduct at common law, as the Respondent's conduct in communicating with his client, Mr Marshall and with members of Mr Marshall's family in a manner that was discourteous, unprofessional; and/or abusive would be reasonably regarded as disgraceful and dishonourable by professional brethren of good repute and competency.

7. Attached to the Application for Order are 18 emails and one letter from Mr Lynch to his client. Most were sent to Adam Marshall, but some were sent to his father Ronald Marshall.

8. This correspondence was frequently hectoring, aggressive, disrespectful and abusive in tone towards his clients. The language was quite informal and unprofessional. The emails were peppered with profanities and intemperate language. They generally did not contain salutations or sign offs (although sometimes they ended 'me'). There was liberal use of capitalisation, bolding and varied font sizes. There were threats to cease acting.

9. The following examples are illustrative:

   - email of 17 October 2011

     3 THINGS:

     1. THE F … CONCILIATION IS GOING ON. LISTEN TO ME AT SOME STAGE;
     2. I WILL MEET YOU AT 2.15 PM IN THE FOYER. I DO9 [sic] NOT NEED MY HEAD FILLED WITH EXTANEOUS [sic] CRAP I KNOW WHAT I AM DOOING [sic] AND
     3. THE PRICK THAT PUT MY ATTACHMENTS OUT OF ORDER IS GOING TO DIE LIKE A DOG. THINGS GO 11 12 13 NOT 13 11 12.

   - email of 19 October 2011:

     sweet jesus. Don't you buggers ever learn. What in the hell are you writing to the Commissioner for

   - email of 5 December 2011:

     Adam;

     YOU HAVE 10 MINUTES TO ANSWER THIS STARTING NOW On the basis of appropriate lawyering, I send the attached. Based on this, DO YOU WANT TO CHANGE ANYTHING. NOTE if your instructions remain the same, then I shall give it to her with both barrels.

     ANSWER BY 4:30 PM TODAY AS AT 4:31 I DO THE ABOVE.

   - email of 22 April 2012:

     Here is the bloody thing. You have until I get back from dinner (in about 3 hours) to advise of any spelling mistakes and or info I need provided. I WILL NOT BE F … AMENDING ANY STUPID SHIT AS IT HAS ALREADY COST U A FORTUNE TO DO WHAT I HAVE DONE NOR WILL IN [sic] BE

> EXPLAINING AGAIN ANY STUFF 6X IS ENOUGH IF NO CHANGES TONITE IT WILL BE AT YOUR PLACE FOR DELIVERY TOMORROW AND YES YOU DO HAVE TO GIVE THE ATTACHMENTS AGAIN.
> ME.
>
> 10. Mr Lynch had a personal relationship with the Marshall family before he acted for Adam Marshall in this proceeding. He indicated their relationship was characterised by robust language. For example, Ronald Marshall had on one occasion encouraged the use of such language, in a jocular email in July 2011.
> 11. In the hearing, whilst on the one hand acknowledging his communications were discourteous and 'out of order', on the other hand, Mr Lynch also suggested that the LSC's concerns about language were out of touch with the modern world. He also said his clients were 'hard work'. They expected to be able to speak with him at any time or place, and came to his house.
> 12. …
> 13. Amongst other things, this case is obviously illustrative of the inadvisability of a practitioner acting professionally for friends.
> 14. I reject Mr Lynch's suggestion that the LSC's concern about the use of such language is out of date. Yes, times have changed, and communication is generally more informal nowadays. But practitioners must be careful not to slip down the path towards communication which could be construed as overly aggressive, disrespectful, abusive, imprecise or otherwise unprofessional.
> 15. Obviously, this case is an extreme example. I have no hesitation in finding the conduct in this case constitutes misconduct at common law. Applying the well known test, it is conduct which colleagues of good repute and competency would reasonably regard as disgraceful and dishonourable. As such, it falls within the inclusive definition of professional misconduct in s 4.4.3 of the Act.[25]

The lawyer gave evidence in his defence that he suffered from bipolar disorder, but offered no medical report in support, despite maintaining that the disorder was controlled by medication under the supervision of a psychiatrist and his general practitioner. He was effectively friendless, appearing before the Tribunal without anyone to represent him. The Tribunal recognised that the case itself had eventually been settled on terms favourable to the clients, but found that the lawyer lacked insight into his offences.[26] In other words, whatever the truth of his condition he was not able to effectively control his outbursts, because to some extent he did not accept he had behaved poorly.[27]

25 Ibid [6]–[15] (citations omitted).
26 Ibid [31], [35].
27 Lynch was reprimanded, prevented from obtaining a practising certificate for 12 months, required to obtain a mental health assessment before being granted a practising certificate in the future and ordered to pay the costs of the Legal Services Commissioner: ibid [30], [35]–[36]. Chapter 3 discusses professional discipline, specifically its regulatory structures and common law principles.

A lawyer who is chronically ill will have an uphill battle holding everything together. When you are ill it is common to lose the ability to recognise and act when things are going off the rails. Yet the capacity to 'know yourself' is critical to a successful legal career, not just in terms of your own health but also, as we will see throughout this book, in relation to taking an ethical stance on many different issues. In all of these issues our objective must be to develop and maintain an ethical reputation for integrity – something that usually takes years to acquire, but is easily lost in a few emails.

Discussion questions

1. Do you know any lawyers who have little insight into the way they are perceived by others, or who are suffering from 'hidden' health issues (such as alcoholism, gambling addictions or other mental health issues) that you think are affecting them, even if they do not think so?
2. What can you do about anyone you have identified who needs help but who is reluctant to 'own' their issue? Did you know that the legal profession is very aware of the risks to lawyers' health and is now publicising resources designed to help?
3. Can you safely talk to your friend or colleague and let them know that there are pathways to health that may help?

Being unwell but not realising it is a particular hazard. But just as risky is *self-aware* conduct that has repercussions for reputations and lives far wider than a single case. In these matters the debate is the one more central to this book – the question of allegiance. To whom are we accountable for our intentional actions?

In Case study 1.2 we see a different example of the challenge of how to link our personal and professional lives in an integrated ethical manner. It raises some important questions about the role of lawyers and about limits to the dominant lawyering type of *adversarial advocacy*, and asks: 'When is it just too hot for a lawyer to take a different stand in their personal life, compared to their paid professional work?'

What is the role of lawyers?

CASE STUDY 1.2 THE CASE OF THE PHILANTHROPIST QC AND THE TOBACCO COMPANY

In 2012 a leading commercial and constitutional law barrister and supporter of the arts, higher education, civil liberties and medical research was appointed to the Board of the fundraising arm of Australia's highest-profile cancer hospital. He was a prominent Queen's Counsel ('QC') who had previously acted in many important and high-profile cases for a great variety of private clients, both for and against government agencies and in royal commissions. He was also a highly successful businessman in his own right and among