

## REVIEW ARTICLE\*

*Ethics in Law: Lawyers' Responsibility and Accountability in Australia* by STAN ROSS (Australia: Butterworths, 2nd ed, 1998), pp xxiv + 480. Recommended retail price \$77.00 (ISBN 0 409 31340 8).

Neither this book nor its first edition (published in 1995) is the first Australian publication addressing legal professional ethics. The topic is now better covered by a number of text books, treatises, law reform reports, undergraduate courses and admission training courses than ever before in this country. Are we better off in the standards attained by the legal profession as a result of this improvement in the study and teaching of legal ethics? Furthermore, are the perennial difficulties of legal practice, which raise ethical problems, any better resolved now than in the less self-conscious past?

Stan Ross' work unashamedly draws from a variety of sources. Most of the recognised texts and treatises have been considered, and in many instances acknowledged, in his attempt at synthesis. The challenge presented to a reader, especially an undergraduate reader, is to recognise and allow for the fundamental differences between strands of sociology, polemic, law reform proposals, law reform achievements, legislation, delegated legislation, private rules and anecdotally observed behaviour. The challenge is the greater because the author weaves together an eclectic group of jurisdictions in his attempt to divine principle from otherwise isolated cases, and in his brave attempt to predict trends of the near future. Thus, the sources of all his variety of material include not only Australian jurisdictions, but also the predictable, yet still necessary United Kingdom, the necessary, but less predictable United States of America, the inevitable Canada, and other common law territories.

There must be some doubt whether this rich mixture, which is an obvious feature of the text, is self-defeating if the purposes of the book is to inculcate a knowledge and, above all, a critical understanding of legal ethics in those who may become future legal practitioners. Nowhere does this book set out prescriptively anything resembling a code of conduct for an Australian practitioner. There is no convenient gathering of the law relating to any one Australian jurisdiction's rules and regulations governing legal professional conduct. For the same reasons, the book cannot be seen as a handbook for daily practice.

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But a reading of the whole, and especially a reading which takes advantage of the broad and catholic citation of other secondary scholarship in the area, renders these doubts no real criticism of the work. First, the various statutes, regulations and formal professional rules (official or otherwise) are all available, however inconvenient and multifarious they are, in our federal nation. Second, no law school should be so parochial as to privilege one Australian jurisdiction's formal requirements over any others'. Third, it is thoroughly beneficial that some of the techniques of descriptive comparative law be enlisted in an attempt to prod readers not yet familiar with legal practice into as broad a view of the rationale for ethical precepts, as can reasonably be expected of undergraduate training. Fourth, it is, perhaps paradoxically, probably a good thing that discussion of ethical practice and problems should raise questions without obvious answers, and should illustrate the different, and sometimes opposed solutions which have been attempted in other times and other places.

Above all, this book recognises the dual character - virtue and vice - of the Australian attachment to separately governed legal professions in every State and Territory. Such is that attachment that in several places the sole-practitioner Bar also continues to be separately regulated. The virtue of these geographical specialists differences is obvious: sophisticated variations can be devised to meet the particular requirements of local communities, economic conditions and specific forms of practice. A strength of this book is the recognition that not all professional standards have the same importance for, or even application to, all legal practitioners. On the other hand, not all local differences represent flourishing experiments or careful adjustments. Our national and professional history undoubtedly includes many instances where differences exist because of mutual ignorance of how we have each invented (or re-invented) the regulatory wheel in our different jurisdictions.

An important contribution Stan Ross has made in this book derives from his repeated recourse to the tentative, but solid, achievements by the Australian profession (a provocative, but now arguable expression) in the field of common national standards. At the official level, in relation to mutual recognition legislation for admission and permission to practice; and at the professional association level, in relation to uniform codes of conduct under the aegis of the Law Council of Australia, there have been advances in the last 10 years greater than anything since Federation. Perhaps the story partly told by Stan Ross is of a national profession emerging gingerly from the combined effect of mature confidence and globalisation upon traditionally separated professions, and arms of the profession. Perhaps sturdy local growths required an era of fiercely local independence before they can combine into a genuinely national profession.

One small deficiency in this book, no doubt dictated by a need to limit its scope, is the restricted discussion of the way in which likely Australian developments in the business structures of lawyers will affect, and be affected by, ethical issues. Partnership or shareholding with other occupations and professions raises a number of current controversies - all of which could be solved by a renewed emphasis on the individual, that is personal, responsibility of a lawyer, wherever he or she practices so far as business structure or

government employment is concerned. The overtly capitalist and entrepreneurial form of practice now considered necessary to serve the big end of town (especially when the town is partly overseas) represents more urgently a test for the ethical requirements of disinterestedness, frankness and client service. Conflicts with which all practitioners are familiar, including those sharpened by the probably inevitable resort to time-charging as the primary means of calculating remuneration, are likely to be an increasing focus of legislative, judicial, regulatory, consumerist and disciplinary attention in the next decade. This book does not neglect these topical issues; but one is left wishing that some of the author's tart insights could have been turned more discursively upon them.

A further topic one regrets has not attracted more extended treatment from Stan Ross, given his demonstrated capacity to illustrate problems with a sometimes bemusing variety of view points, is the problematical obsession in some regulatory quarters, with competition policy. Once upon a time, this would have been an absurd criticism of a book entitled *Ethics in Law*, but nowadays the two cannot be so comfortably kept apart. Competitiveness requires, we were told 5 years ago, that lawyers be free to advertise. Apparently, it also requires that we be free to organise our business structures, through which we provide our professional services, in any way otherwise legal. Quaint anomalies have emerged, such as the suggestion that the sole-practitioner Bar is for that reason anti-competitive; notwithstanding that abolition of the sole-practitioner rule is nothing more, nor less than permission for competitors to combine with each other. The author's discussion of the cab-rank principle, and of access to justice issues involved in the availability of counsel or legal representation for clients in need, or clients with no popular appeal, would have been improved by more attention in this area. Perhaps his distinctive voice could have resembled Cassandra's in this area. As it is, the word "competition" does not appear even in the index.

Thoughtful coverage is provided by Stan Ross about practical matters of client care as they verge towards ethical standards, particularly concerning the imperative of communication between lawyer and client. These sections of his text could usefully be prescribed for all beginning lawyers, and not only before they have started practice. There is an important interplay, noted by the author, but perhaps lacking in sufficient analysis by him, between the importance of timely and appropriate reporting and explanation, on the one hand, which has ethical content, and the prudence of self-defensive measures concerning the scope of retainers and the accepted limitation of services provided, on the other hand, which concerns the tortious duty of care.

The author proposes that the common law immunity for advocates is likely to survive in the High Court. This bland assurance will soon be tested, in the litigation stemming from the resumption of land for Darling Harbour. Although Stan Ross thoroughly expounds the results and reasons of the most important reported cases in the area, it is a pity that he confined his expressions of personal opinion as he did. This is an excellent area for scholars and teachers to contribute their voices to the debate which will ultimately be held in the High Court, and perhaps thereafter, in our Parliaments. The horrible prospect of

collateral litigation where an important witness, the judge, cannot be called and the equally horrible policy of negligently caused losses going uncompensated are the Scylla and Charybdis of advocates' immunity, about which one could have usefully read more in this book. This is not to decry the treatment of professional negligence by the author, which is both useful and provocative.

The author's qualifications include not only teaching, but also active participation in the ethical disciplinary system conducted under statute by the New South Wales Bar. For these reasons, combined with the wide reading noted above, his perspective is one which legal practitioners, politicians, regulators and performers have most conveniently and usefully provided to them by this book. It is to be hoped that its readership extends into those groups beyond its undergraduate audience.