Professional Obligation, Ethical Awareness and Capital Market Regulation: An Achievable Goal or a Contradiction in Terms

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Synopsis

Why were the professions so close to the executive suites unwilling or incapable of exercising skepticism throughout, during and since the Global Financial Crisis? This is an existential question for both the established professions and those who would like to see the establishment of a professional standards board for banking, an idea canvassed but discounted (with cause) by the Parliamentary Commission on Banking Standards. The paper, therefore, assesses the nature of professional obligation in the context of capital market regulation. Particular reference is made to the legal and audit communities, both of which play pivotal, though contested ‘gatekeeper’ roles in upholding market integrity. The paper is structured as follows.

First, the approach by the banking industry to the reform agenda is outlined. It is argued that such was the power of the financial lobby that without the subsequent revelation of huge derivative trading losses, the manipulation of key financial benchmarks and breaching of trading embargos, it had the capacity to limit meaningful change. These revelations, which post-date the GFC itself and have changed, temporarily, the nature of political discourse, are then explored in an evaluation that links contemporary concern to the initial framing of debates of market conduct regulation. In the third section, the policy and regulatory implications of judicial rejection in Australia of a reliance on differentiating between investor classes as a defence are evaluated, as well as the efficacy of regulatory strategies designed to improve audit quality. This provides an evidential foundation to assess the extent to which codes of conduct can lead to an improvement in integrity, the long-stated goal of market conduct regulators, a subject addressed in the fourth section. Tracing the contours of the political debates from the inception of the Securities and Exchange Commission in 1934 to the submissions to the Banking Standards Commission in 2012 and 2013 in the fourth section reveals a core conceptual flaw in the disclosure paradigm. It has not and cannot work without commitment by industry to facilitate and work with regulatory purpose. This commitment was not there in 1933-4 and it remains absent. The paper concludes that unless duties and obligations are given as much attention as rights commitments to uphold market integrity will remain hollow making it likely that we will lurch, once again, into crisis.

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Introduction

At the heart of the disclosure paradigm governing market conduct regulation is a compromise that differentiates between classes of investors. The regulatory architecture presupposes that markets cannot function in a sustainable manner unless two core conditions are met. First, participants must act with integrity. Second, there is adequate disclosure to facilitate informed decision-making. What constitutes effective disclosure and whether certain core obligations transcend investor classification remain, however, exceptionally contested. All too often disclosure is reduced to technical considerations. This emasculated approach ignores the fact that disclosure was initially conceived as a means to an end rather than an end in itself. The paradigm was explicitly built on an ethical and normative foundation (e.g. Landis 1938). Reclaiming this lost heritage is essential if we are to ensure that within capital markets professional obligation meshes with, rather than, erodes societal welfare. When it comes to policing financial markets, consumer protection mandates have traditionally focused on retail markets. This is legitimated on the basis that these participants lack sufficient knowledge, or experience, to decide what information they need. Conversely, financially sophisticated participants in wholesale markets have been expected to attend to their own informational needs. The objective of regulating wholesale markets has, therefore, been primarily limited to ensuring that market infrastructure is sound and that markets are free from abuses. This approach is no longer sustainable in legal or policy terms.

In a remarkable ruling handed down in 2012, the Australian Federal Court, for example, found no legal basis for bifurcating between sophisticated or professional investors and retail clients (*Wingecarribee Shire Council v Lehman Brothers Australia*). Such an approach, it maintained, facilitated misleading and deceptive conduct. It brought the market into disrepute. The significance of the case lies in the fact that it was the first time globally that the differentiation between investor classes was subject to judicial determination. All prior cases had been settled without any admission of liability. Likewise, in the policy realm, there can be little doubting the significance of the final report issued by the Parliamentary Commission on Banking Standards (2013) in the United Kingdom. The Commission explored forensically how the interplay between corporate, regulatory and political culture led inexorably to the Global Financial Crisis (GFC). In so doing, it has torn asunder prior rationales for and limitations to external intervention. It advocates a fundamental reframing of regulatory purpose. It does so on the basis of profound scepticism of protestations from the finance industry that it has learnt the lessons of the past. The Commission is equally suspicious of the stated commitment by the sector to the development of higher professional standards. While noting the critical importance of culture, the Commission rightfully recognises that effective reform and oversight cannot be outsourced from core regulatory authorities. The Commission argues that adequate accountability structures must be put in place to guard against any further deterioration of public confidence because of either a lack of political will or regulatory capacity. The approach is designed to break the desultory cycle that often accompanies financial crises.

Unfortunately the formal government response, released in July 2013, has ignored many of the enhanced accountability mechanisms proposed, privileging instead the introduction of a new criminal charge of reckless conduct (Treasury 2013), which in practice is going to face enormous barriers to effective usage. In part this can be explained by the desultory cycle of regulatory politics within the financial sector. Extended regulatory reach in the aftermath of crisis, often underpinned by legislative change, leads inexorably to accusations of overreach (see O’Brien
2003; 2007; 2009). The GFC is no different. Indeed, the only remarkable thing was the speed of the pendulum shift until the revelation of further misconduct temporarily shifted the balance of material and ideational power within core regulatory regimes (Hood, Rothstein and Baldwin 2001).

This paper explores these competing dynamics and the impact on regulatory engagement, design and strategies. This evaluation takes place in the context of a broader investigation into the roles played by the professions as actors in the framing and implementation of regulatory rules, a heretofore under-researched dimension to the crisis. Why, for example, were the professions so close to the executive suites unwilling or incapable of exercising scepticism, the hallmark of expertise? This is an existential question for both the established professions and those who would like to see the establishment of a professional standards board for banking, an idea canvassed but discounted (with cause) by the Parliamentary Commission on Banking Standards. The paper, therefore, assesses a critical question. What is the nature of professional obligation in the context of capital market regulation? Particular reference is made to the legal and audit communities, both of which play pivotal, though contested ‘gatekeeper’ roles in upholding market integrity.

The paper is structured as follows. First, the approach by the banking industry to the reform agenda is outlined. It is argued that such was the power of the lobby that without the subsequent revelation of huge derivative trading losses, the manipulation of key financial benchmarks and breaching of trading embargos, it had the capacity to limit meaningful change. These revelations, which post-date the GFC itself and have changed, temporarily, the nature of political discourse, are then explored in an evaluation that links contemporary concern to the initial framing of debates of market conduct regulation. In the third section, the policy and regulatory implications of judicial rejection in Australia of a reliance on differentiating between investor classes as a defence are evaluated, as well as the efficacy of regulatory strategies designed to improve audit quality. This provides an evidential foundation to assess the extent to which codes of conduct can lead to an improvement in integrity, the long-stated goal of market conduct regulators, a subject addressed in the fourth section. Tracing the contours of the political debates from the inception of the Securities and Exchange Commission in 1934 to the submissions to the Banking Standards Commission in 2012 and 2013 in the fourth section reveals a core conceptual flaw in the disclosure paradigm. It has not and cannot work without commitment by industry to facilitate and work with regulatory purpose. This commitment was not there in 1933-4 and it remains absent. The paper concludes that unless duties and obligations are given as much attention as rights commitments to uphold market integrity will remain hollow making it likely that we will lurch, once again, into crisis.

1. Regulatory Pendulums and the Dynamics of Design

By 2011 bankers on both sides of the Atlantic had maintained that the time for apologies was over. The then Chief Executive of Barclays used a public lecture to warn ‘it sounds controversial to suggest banks must take risk, in the wake of a near collapse of the financial system, but banks serve little economic or social purpose unless they do so’ (Diamond 2011). In New York, his counterpart at JP Morgan Chase, Jamie Dimon, complained bitterly that plans to restrict proprietary trading were being championed by those who did not understand capital markets (Fox News 2012). Within months the reputations of both executives and their respective institutions were to go into free-fall.
Radical departures from internal procedures at JP Morgan’s London-based Chief Investment Office severely compromised Dimon’s assertion that the bank could and did control risk. Initially dismissed by the bank as a ‘tempest in a teacup’, a subsequent Congressional investigation found that ‘inadequate derivative valuation practices enabled traders to hide substantial losses for months at a time; lax hedging practices obscured whether derivatives were being used to offset risk or take risk; risk limit breaches were routinely disregarded; risk evaluation models were manipulated to downplay risk; inadequate regulatory oversight was too easily dodged or stonewalled; and derivative trading and financial results were misrepresented to investors, regulators, policymakers, and the taxpayer public who, when banks lose big, may be required to finance multi-billion-dollar bailouts’ (Permanent Sub-Committee on Investigations 2013: 1). Dimon has, to date, survived the controversy. Bob Diamond was not so fortunate. Following the revelation of systematic attempts to manipulate the London Interbank Offered Rate (Libor), for which Barclays negotiated a settlement in July 2012 without admitting liability, Diamond was forced to resign. He was seen as primarily responsible for driving a culture within Barclays that privileged the transactional over the relational. His definition of culture in the BBC lecture as being ‘how people behave when no-one is watching’ (Diamond 2011) was treated with derision in scathing reports issued by the Treasury Select Committee (2012) and the Parliamentary Commission on Banking Standards (2013).

The manner in which the banking industry conceives of culture, however, remains exceptionally vague and self-interested. This calls into question whether self-referential reports on improving practice are in themselves sufficient to rebuild trust. In May 2013, for example, the major New York investment bank Goldman Sachs published the results of its Business Standards Committee Impact Report. Goldman Sachs’ intention was to present to the markets a reframed conception of business ethics and accountability. The gravity of the task was indicated by the prodigious workload undertaken. Goldman Sachs (2013: 3) claimed that its report was the result of ‘tens of thousands of hours of discussion, analysis, planning and execution, and importantly training and development, which alone totalled approximately 100,000 hours’. Drawing upon the bank’s experience of the Global Financial Crisis (GFC), the report begins with a stated recalibration of the firm’s strategy. It emphasises the need to put the interests of clients first. Two additional drivers are also referenced, namely ‘reputational sensitivity and awareness and the individual and collective accountability of our people’ (Goldman Sachs 2013: 3). Curiously, there is no mention of the fact that the stated commitment to reform derives from a settlement agreement with the Securities and Exchange Commission.

The settlement dealt with allegations that the pre-existing standards and practices at the bank in relation to the design, marketing and sale of complex financial products violated each of these noble objectives (see O’Brien 2013a). In August 2013 a former Goldman Sachs junior trader, Fabrice Tourre, was found guilty of violating securities law by failing to disclose to investors the identity of the counterparty in the notorious Abacus transaction, a hedge fund controlled by John Paulsen, with the connivance of the bank was betting that the investment would fail. One of the most remarkable aspects of the court proceedings, which this author, attended, was the open characterisation by both prosecution and defence that the Collateralised Debt Obligation market as a speculative gamble devoid of real economic benefit.

Goldman Sachs was, of course, far from being the only offender. The GFC demonstrated in startling detail the externalities caused by emasculated conceptions of responsibility and accountability. Corporate executives and their professional advisors conspired to push through deals and strategies informed by legal technicalities and accounting conventions as well as market norms. These strategies led to sub-optimal results for both the sustainability of specific corporate
models and the professional standing of their advisors. Existing codes of conduct at corporate, industry or professional level proved incapable of addressing hubris, myopia and the decoupling of ethical considerations from core business. The failure to articulate and integrate purpose, values and principles within a functioning ethical framework created or exacerbated socially harmful corporate cultures.

These cultures elevated technical compliance over substance. Ethical obligation was stated but not delivered. Deterrence was defective and ineffective. There was little or no accountability. No credible mechanisms to identify institutional or systemic risk were put in place. The fact that the statute of limitations has run in most jurisdictions without the bringing of criminal charges for willful blindness poses a series of fundamental and unresolved questions. Has the panoply of reform initiatives at national, regional and global level addressed the core normative problem of systemic unethical conduct? Alternatively, have we privileged the politics of symbolism, creating the illusion of a robust architecture capable of withstanding a crisis of similar magnitude? It is in this context that the revitalised Goldman Sachs Business Standards initiative, linked directly to a strengthening of its code of conduct, is so interesting. The critical question, therefore, is whether the revised approach, which covers client relationships, conflicts of interest, structured products, transparency and disclosure, broader governance, and training and development, is a robust improvement or a cynical privileging of symbolism? On this front, the evidence is decidedly mixed.

In sharp contrast to earlier reliance on *caveat emptor*, the bank now claims that its suitability framework has been enhanced. This, it is claimed, will help us [i.e. Goldman Sachs] better assess whether our clients have the background, experience and capacity to understand the range of outcomes from transactions they execute with us, particularly those transactions that are strategic or complex’. Secondly, the firm has introduced what it claimed to be a ‘systematic, integrated and comprehensive firm-wide framework for reputational risk monitoring and management’. Thirdly, there is an explicit emphasis on culture. ‘We know that while formal processes and rules are important, they cannot alone substitute for sound judgment and experience and an environment in which every person in the firm feels equally accountable for the firm’s reputation’, the report concludes. So far so good one might say. Reputation, however, is determined by risk. In this regard the report reads much more defensively.

The defensive tone rings—or should ring—alarm bells. It suggests the commitment to enhanced disclosure and transparency reflects only external imposition. Indeed, the report is explicit on this point. Goldman Sachs (2013: 7) notes that ‘the uncertain impact of regulatory reform on both our clients and the firm currently is a consistent theme across our businesses’. Simultaneously it seeks refuge in a highly selective reading of its illustrious past. It notes that ‘suitability will always be an important focus for us as will conflicts and business selection’ (Goldman Sachs 2013: 7). The failure to provide effective mechanisms to deal with this fundamental problem within a functioning ethical framework, however, is what got Goldman Sachs into such trouble in the first place. Moreover, presenting enhanced levels of disclosure and transparency as voluntary initiatives when in fact they are mandated through legislative change and regulatory settlement negotiations is dissembling of the first order. It takes much away from the authenticity of the report. Paradoxically, the report itself goes on to spell out the forced nature of change. ‘Our Investment Management Division has been concentrating on new regulations and requirements related to suitability, many of which impact a broader range of clients than in the past and call for enhancements to disclosure, documentation and controls’, (Goldman Sachs 2013: 7).
At the same time, Goldman Sachs (2013: 14) remains sanguine that ‘professional investors generally have the background, experience and risk profile to make their own investment decisions’. As the Tourre civil proceedings made clear, however, this was manifestly not the case. It has, nonetheless, established vetting procedures related to the design and purpose of specific instruments offered by the firm. These are designed to ensure ‘the instrument is appropriate for the markets and that the relevant risk factors associated with the instrument are adequately addressed and disclosed’ (Goldman Sachs 2013: 15). The unmistakable message is that Goldman will design, market and sell the product if it thinks it can get away with it, not on whether it is appropriate or socially useful. *Plus ça change, plus c’est la même chose*—the more things change, the more they stay the same.

This extended vignette tells us much about the corporate and regulatory response to the GFC. Six years on from August 2007 and the vapourisation of the securitisation market, regulatory authorities across the globe remain mired in crisis rather than engaged in strategic management. Within that timeframe, we have moved progressively from a rubric of ‘too big to fail’ to a dawning recognition that systemically important financial firms are not only too big to manage, to regulate, but also to litigate effectively against and arguably now too complex to insure. At the same time, the global investigation into the manipulation of the London Interbank Offered Rate (Libor) suggests the problem is systemic. The Libor investigation, which remains at an early stage, has exposed corruption in the rate-setting process, as most recently noted by an umbrella grouping of financial regulators in the United States:

Recent investigations uncovered systematic false reporting and manipulations of reference rate submissions dating back many years. This misconduct was designed to either increase the potential profit of the submitting firms or to convey a misleading picture of the relative health of the submitting banks. These actions were pervasive, occurred in multiple bank locations around the world, involved senior bank officials at several banks, and affected multiple benchmark rates and currencies, including LIBOR, EURIBOR, and the Tokyo Interbank Offered Rate (TIBOR). Each of the banks that faced charges engaged in a multi-year pattern of misconduct that involved collusion with other banks. These revelations have undermined the public’s confidence in these benchmarks [emphasis added] (Financial Stability Oversight Council 2013: 137).

Similarly, the Parliamentary Banking Standards Commission in the United Kingdom has expressed grave concern at the failure of restraining forces. It links ‘prolonged and blatant misconduct’ in the Libor and associated scandals to a ‘dismal’ and ‘striking limitation on the sense of personal responsibility and accountability’ (Parliamentary Banking Standards Commission 2013: 16). The paucity of institutional memory in leading banks and the fact that such manipulative activities continued even after bailouts have made business ethics appear as little more than an oxymoron. While unethical conduct was widespread, it is important to note that much that occurred in the GFC was deemed to be technically legal or compliant with accounting standards. With the partial exception of the Tourre case, enforcement has been lacking. Given that the statute of limitations has run in the United States, the reality is that no criminal or civil prosecutions will be staged to test this belief or bring those responsible to account (Rakoff 2013). No cases relating to the initial crisis have been mounted in the United Kingdom, a decision justified on the basis that there was no credible expectation of securing a guilty verdict (FSA 2011). In Australia, however, one significant and revealing case has been litigated to a judicial determination. The case, *Wingecarribee v Lehman Brothers Australia*, and its implications are discussed in detail below. First, however, it is necessary to evaluate the extent to which continued public unease has contributed to an acute legitimacy crisis for both the capital markets and the disclosure paradigm itself.

### 2. Reclaiming Disclosure’s Normative Underpinnings
Political intervention in financial regulation tends to be most effective when anchored to sources of legitimacy and authority. Notwithstanding the corrosive and deeply disturbing abuse scandals that have weakened, with cause, the standing of the Catholic Church, the reputation of Pope Francis remains untarnished. An advocate for the poor and the dispossessed, every step of his reign to date has been marked by the astute exercise of the power of symbolic voice. His intervention in the debate on the regulation of global finance is no different. Pope Francis (2013) warned that ‘certain pathologies are increasing, with their psychological consequences; fear and desperation grip the hearts of many people, even in the so-called rich countries; the joy of life is diminishing; indecency and violence are on rise; poverty is becoming more and more evident’. In identifying as a causal mechanism ‘our relationship with money, and our acceptance of its power over ourselves and society’ the speech had clear echoes of Franklin Delano Roosevelt’s inaugural presidential address in the midst of the Great Depression. Although separated by eighty years, the danger of the elevation of ‘false idols’ remains an exceptionally potent and eerily apposite message for the regulation of capital markets.

Roosevelt (1933) anchored the New Deal architecture that underpins the disclosure paradigm on the need to put ‘an end to a conduct in banking and in business, which too often has given to a sacred trust the likeness of callous and selfish wrongdoing. … Restoration calls, however, not for changes in ethics alone. This Nation asks for action, and action now’. Pope Francis (2013) elevated the pitch to a global level, noting that the ‘worship of the golden calf of old (cf. Exodus 32:15-34) has found a new and heartless image in the cult of money and the dictatorship of an economy which is faceless and lacking any truly humane goal’. This privileging of monetary value over values did not happen by accident. It is the result of conscious ordering. For the pontiff this state of affairs has practical ideational roots. It derives from corruption, fiscal tax evasion and ‘ideologies which uphold the absolute autonomy of markets and financial speculation, and thus deny the right of control to States, which are themselves charged with providing for the common good. A new, invisible and at times virtual, tyranny is established, one which unilaterally and irremediably imposes its own laws and rules’ (Francis 2013).

Critically, these battles over mandates tend to be fought at the crucial implementation stage of regulation. This is largely but erroneously conducted on a technical basis. The complexities contribute to opacity rather than transparency and as a consequence a reduction in public confidence and trust. Nowhere is this more apparent than in the United States, a point made with great erudition by Paul Volcker, the legendary former chairman of the Federal Reserve. For Volcker (2013), the regulatory architecture in the United States is a ‘recipe for indecision, neglect and stalemate, adding up to ineffectiveness. The time has come for change’. What is needed is a process of ethical and political renewal. Both Pope Francis and Paul Volcker identify fundamental flaws in conceiving of regulatory purpose, which must be addressed if confidence in capital market conduct is to be warranted. This necessitates conceptual as well as practical reform. As could be expected, Pope Francis (2013) stressed the normative dimension:

There is a need for financial reform along ethical lines that would produce in its turn an economic reform to benefit everyone. This would nevertheless require a courageous change of attitude on the part of political leaders. I urge them to face this challenge with determination and farsightedness, taking account, naturally, of their particular situations. Money has to serve, not to rule … In this way, a new political and economic mindset would arise that would help to transform the absolute dichotomy between the economic and social spheres into a healthy symbiosis.

This is far from an exercise in handwringing. It is a deliberate and cautious attempt to change the
narrative governing the purpose of regulation. Pope Francis is rescuing from history the claim that ‘the principle of freedom to contract … is … merely the expression of an ingrained prejudice in favor of a definite kind of interference, namely such as would destroy non-contractual relations’ (Polanyi 1944, 171). Change of this magnitude necessitates recognition by the financial services sector itself that the bifurcation between the economic and the political and social spheres has been disastrous to societal cohesion and, indeed, its own self-interest. Not for the first time, understanding what could be the future of financial regulation necessitates reclaiming and stating its rationale. This core fact informed the calculation of its initial framers. None speaks more directly to the problems facing the industry and society today than James M Landis, its key architect. An inaugural member of the Securities and Exchange Commission who became its chairman in 1935, Landis was an outstanding practitioner and theoretician of regulatory design.

From the beginning Landis stressed purpose over regulatory form, cooperation over coercion. Critically, he saw the role of administrative agencies to not only police but also guide industry to understand, accept and work cooperatively in providing socially beneficial outcomes. Within this framework, disclosure was designed to inform the investing public of actual practice, thereby incrementally changing the boundaries of what could be constituted as acceptable. Extending far beyond the narrow realm of banking and securities regulation, the New Deal was designed to recalibrate society itself through the guidance of neutral experts. Experience, experiment and avowed faith in the rule of experts to solve the complexity of modern society underpinned a powerful interdisciplinary intellectual movement. It provided the opportunity to simultaneously translate theory into practice and generate theory from practice. It was to be in the financial sector, however, where the New Deal had the most pronounced influence. The result was a profound recalibration. Private interests were rendered subservient—if only temporarily—to societal obligation. Moreover, it was to be the progressive erosion of that compact, with the explicit support of political agency, which has, in large part, brought us to the current crisis. Seen in this context, the GFC is what happens when the needs and cultural framing of specific communities of practice gain ideational support for what purports to be communal virtues but more accurately reflects unsustainable (and ultimately failed) commercial virtues.

The cult of money has many acolytes. Credible reform necessitates that the ethos of responsibility percolates much deeper than bankers and their regulators. This is because many other actors are involved within the creation and legitimation of a given regulatory regime (Fligstein and Dauter 2007; Hood, Rothstein and Baldwin 2001). Sustainable reform requires understanding and challenging the assumptions that delimit the range of options governing the worldview of finance. We also need much more granular definitions of what constitutes integrity and the responsibilities and duties of the professions, as critical purveyors of advice to market participants. Through ideological privileging, neglect or willful blindness they failed to either identify or safeguard market integrity and societal welfare. In so doing they brought into doubt both the utility and legitimacy of their function. If capital markets are to restore the faded lustre of respectability, attention must focus on the moral principles of the professions. These are the ‘gatekeepers’ of market integrity (Coffee 2006; Loughrey 2011). They derive prestige and standing from identification with professional obligation. They appear, however, to have misunderstood its true meaning.

3. Guarding the Guardians: Evidence From Australia

The placing of legal permissibility over ethical judgement relied upon professional guidance from audit and legal communities. Such guidance was possible only because responsibility was
conceived on a narrow technical rather than normative basis. It is this broader question of potential complicity that remains the least developed in the aftermath of the Global Financial Crisis. Before ascertaining how that process can be reversed, it is essential to evaluate how it occurred. It is in this context that evaluation of the Australian experience of the GFC and its aftermath is of particular relevance. Australia escaped the calamity of a major institutional collapse. Malpractice was, however, evident. Two case studies detailed below raise very real concerns about the manner in which the professions operated: (a) the marketing and sale of complex financial products; and (b) a gradual but pronounced deterioration in audit quality, which has resulted in the revocation of professional liability caps for the Institute of Chartered Accountants.

Complex Financial Products

‘How was it that relatively unsophisticated Council officers came to invest many millions of ratepayers’ funds in these specialised financial instruments? That is the fundamental question at the heart of these proceedings’, reflected an Australian judge before pronouncing judgment in a case that has far-reaching implications for the regulation of financial services. ¹ Wingecarribee Shire Council v Lehman Brothers Australia directly addresses a critical issue: what specific duty of care does a financial services provider owe to its clients and can these be voided by contractual terms or legislative exceptions? The Rares judgment provides the first definitive affirmative answer to the former and a negative to the latter. It holds that a critical bifurcation in the Australian financial services legislation between sophisticated or professional and unsophisticated investors cannot be used to evade responsibility of financial services providers to act in the best interest of clients. It finds that Grange Securities, a wholly owned subsidiary of Lehman Brothers Australia, breached its fiduciary duty in facilitating individual transactions for complex products to sophisticated clients without explaining the risks. Of potentially greater significance, in what is a robust indictment of financial engineering and the methods used by its leading practitioners, it holds that the placing of highly complex collateralised debt obligations in the investment portfolios of councils represented misleading and deceptive conduct.

The litigation’s significance focuses on the interplay between three factors. First, the judgment revealed a serious and unresolved conflict over policy implementation of legislative intention in determining how complex securities instruments can and should be marketed. As will be explored more fully below, this has been only partially addressed by the Future of Financial Advice reform agenda, precisely because the Department of Treasury (2011) has not released the outcome of a consultation process on whether the bifurcation between sophisticated and retail investors should be repealed. Second, the litigation derives from rather than spawns a class action. The testing of obligation was left to commercial funders, listed on the Australian Stock Exchange for profit, rather than the regulator funded by the taxpayer to uphold the public interest. This is rendered even more surprising given that the entities represented in that action are themselves an arm of government. This opens the question of why the market conduct regulator, the Australian Securities and Investments Commission did not risk litigating a case that the judge himself found to be of acute public importance. In part the answer lies in a policy decision not to intervene when a class action has been initiated. Third, as Lehman Brothers Australia is in liquidation it is unlikely to appeal. The legal advisers to the litigation funders, IMF, have already signaled intention to file suit against other solvent providers of complex financial products. The ruling is, therefore, likely to herald future litigation.

The United States investment bank Lehman Brothers had entered the Australian market through

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¹ Wingecarribee Shire Council v Lehman Brothers Australia (in liq) [2012] FCA 1028, [14].
its acquisition of Grange Securities and Grange Asset Management in March 2007. In so doing, it took responsibility for the management of ongoing and prior relationships. These included the provision of transactional services and asset management for a number of local councils, each governed by a specific Individual Management Protocol (IMP). The Australian Federal Court found that ‘the improvidence, and commercial naivety, of Grange’s Council clients in entering into these transactions that were highly advantageous to Grange’ (para. 266) could only have occurred because the financial services firm was dealing with individual officials variously described as ‘financially quite unsophisticated and completely out of his depth’ (para. 483), ‘uninformed’ (para. 491) and ‘careless’ (para. 462). Notwithstanding the carelessness, the Federal Court did not find grounds to reduce liability through contributory negligence. It did so because the court held that the financial services firm had used a deliberate strategy to take advantage of its asymmetrical knowledge of product and regulatory complexity. That it could do so indicated a capacity to circumvent the legal rules and a failure of the audit process to ascertain the material risks of such a strategy for the financial services provider.

‘The contrast between the actual, and patent, lack of financial acumen of the various Council officers at each of Swan, Parkes and Wingecarribee [the local councils representing the class action] and the intelligent, shrewd and financially astute persons at Grange was striking’ (para 752). ‘Generally, risk-averse people do not take bets with substantial assets held for public purposes’ the judge concluded (para. 895). That they did so could be explained by the fact that they were victims of an elaborate deception. ‘Grange financed itself when it required cash by borrowing from its Council clients at a rate of interest or on terms as to security that Grange was not likely to achieve in an informed, arms length transaction with a commercial financier’ (para. 264). The clients had no ‘real appreciation of the true risks of SCDOS [Synthetic Collateralised Debt Obligations] or the financial wisdom of its [i.e. Grange’s] recommendation’ (para. 265). The judge is disarmingly forthright as to how and why this could happen:

The nature and risks of a SCDO are concepts that are beyond the grasp of most people. Indeed, after the benefit of expert reports, concurrent expert evidence and the addresses of counsel, I am not sure that I understand fully how SCDOs work or their risks. Nonetheless, Grange portrayed itself as an expert in these investments. Most certainly, none of the seven Council officers who gave evidence had any expertise in these financial products. And, Grange knew and preyed on that lack of expertise and the trust the Councils placed in its expert advice (para. 410).

The 445-page judgment highlights again and again how Grange actively circumvented the stated objection of its clients to investing in illiquid instruments through a combination of deception and obfuscation. This is made manifest in the evaluation of specific dealings with Wingecarribee Council, a rural shire in New South Wales. ‘Grange tested the water’ and when the official ‘bit’ he was ‘reeled in’ by ‘words of comfort’ (para. 662). According to the Court, the council believed that it ‘had the best of both worlds: principal protection and increased interest. For Grange, this manner of allaying risk averse, financially unsophisticated council officers’ fears of CDOs, was as easy as shooting fish in a barrel’ (para. 662).

There can be no doubting the level of judicial disquiet at corporate interpretation of the bifurcation between sophisticated and unsophisticated investors ‘given the subject matter involved, the prudent investment of public money’ (para. 790). The severity of the misconduct and the robustness of the judgment calls into question the sufficiency of the options canvassed by the Australian Department of Treasury (2011: 8-10) on how complex financial products are systematically sold to mid-market participants (i.e. those that were deemed sophisticated or professional in legal terms but were, arguably, nothing of the sort).
The ability to contract out of investor protection mechanisms is central to the rationale behind the bifurcation between sophisticated (i.e. wholesale or professional) and unsophisticated (i.e. retail) investors. In many developed markets much greater disclosure is required when products or financial advice are offered to retail clients. Traditionally, the restraints on the retail side are designed to protect the naïve and the unwary from unscrupulous action by those with asymmetrical advantage. Sophisticated or professional investors, by contrast, have traditionally been assumed to have the resources to make informed decisions.

The Department of Treasury (2011) outlined four primary options: (a) retain and update the current system, including the introduction of extra requirements for specific complex financial products; (b) remove the distinction between wholesale and retail clients, making disclosure obligations consistent across the investment universe; (c) introduce a new sophisticated investor test based on the actual financial literacy of the specific investor; or (d) do nothing. The final option, which despite having the advantage of compliance costs that are not increasing, is effectively ruled out. The review notes inaction does not ‘address the problems with the current system…and would be inconsistent with what comparable jurisdictions are doing’. The ruling in Wingecaribee Shire Council v Lehman Brothers Australia casts significant doubt on the sustainability of each of the others, with the exception of option (b). It is now incoherent from a legal and policy perspective to limit the demand for greater integrity to one component of the marketplace. Can we seriously suggest that product A, when offered to customer B is ethical, unethical when offered to customer C but that entity D, if offering both simultaneously, has a cohesive integrated operating framework and a warranted (as opposed to stated) reputation for integrity? As with pregnancy, it is impossible to be semi-ethical.

Given the propensity for pension funds to include a proportion of alternative assets within their portfolios, it is essential that asset managers given authority to invest mandatory defined contributions understand the risks involved. This suggests that much greater emphasis needs to be placed on articulating and delineating more precisely where responsibility and accountability lies in financial product design. It is in this context that the lawyer, in particular, has the capacity to play an important role. If the lawyer’s obligation is to the institution rather than the individual executive involved in the design and authorisation of a specific project, it is necessary to take into account the broader risk externalities and report, where necessary those risks to the board of directors. As with the litany of scandals in the United States, no evidence was provided in the Lehman case in Australia that this was done.

The financial regulator has signaled that this will not be tolerated: ‘My position on this is clear—those selling complex products to unsuspecting investors need to wise up and do the right thing. They might get away with it for a while, but government and courts will inevitably rule in favour of investors’ (Medcraft 2013). Removing the distinction and relying on disclosure alone is not, however, going to change practice—unless cultural change within the financial sector.

Emasculated conceptions of responsibility have not, however, been solely the preserve of financial product designers and transactional lawyers. Similar lack of judgement has also informed the operation of the audit.

Deterioration in Audit Quality

On 4 December 2012 the Australian Securities and Investments Commission (2012a) released a review of audit performance that raised distinctly uncomfortable questions for the profession. The ASIC Chairman, Greg Medcraft, described as ‘disappointing’ the results, which showed an

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2 In this regard it is interesting to note the expansive definition of ‘consumer’ by the Director of Markets at the Financial Conduct Authority in the United Kingdom, which suggests past bifurcation has limited prior regulatory capacity to restrain activity that may contribute to an erosion of market integrity (Lawton 2013).

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increase in failure to provide reasonable assurance that financial reports were not materially misstated from 14% to 18% over an eighteen-month period (ASIC 2012b). This was mild compared to oral evidence presented the previous day at the Joint Parliamentary Committee investigating the governance and operation of ASIC. Then he was characteristically blunt: ‘I consider what we are seeing now as [a] second strike for the audit sector and it is clearly one I think the profession should consider itself on notice: it needs to lift its game’ (Medcraft 2012). While it is very much open to question whether the severity of the criticism was designed to offset broader criticism of the agency before parliament, there was no doubting its effectiveness in reframing the debate on the parameters of professional obligation within the audit community.

The ASIC review found three critical areas that highlighted dissonance between public expectations and actual practice: the sufficiency and appropriateness of the evidence on which judgement was exercised; the level, or more accurately the lack of, professional scepticism; and, concomitantly, the unwarranted reliance on the work of others, in particular in the compliance programs of managed investment schemes. The evidence produced in the report is somewhat alarming. It is rendered more so because the deficiencies correspond to what the regulator sees as a global trend (ASIC 2012a: 5). For ASIC the importance of the evaluation lies not in whether the results were, in fact, misleading. The concern is more fundamental. Has the profession even the competence to gather the evidence on which to make a considered judgement? ASIC believes not. Crucially the lack of sufficient control was prevalent across the spectrum. Size of audit firm is not a precondition of quality (ASIC 2012a: 6).

The review process generated what ASIC (2012a: 9) termed ‘a high level of concerns about the sufficiency and appropriateness of evidence obtained by auditors to support their conclusions on significant areas of the audit’. These included basic criteria such as external evaluation of impairment testing, fair value measurement and assessment of the capacity of the audited entity to establish its viability as a going concern. Unquestioning use of data when deploying substantive analytical procedures, as well as the failure to ascertain directly from executives the material risk of fraud, compromised audit quality. The unquestioning use of data was most pronounced in the audit of financial institutions, arguably the most systemically important in a domestic, regional and global context (ASIC 2012: 11).

ASIC (2012a: 17) accepts that ‘leaders remain committed to an appropriate “tone at the top” that emphasises the importance of audit independence’. However, it finds reliance on such pronouncements alone an implausible guarantee of probity. It is far from a ringing endorsement of expertise and judgement, the cornerstone of professional standing and legitimacy, that ASIC feels obliged to spell out what constitutes scepticism:

> Professional scepticism must be maintained and exercised throughout the planning and performance of an audit. Engagement partners and staff should have questioning minds, obtain a full understanding of all relevant facts, not be over reliant on management’s explanations and representations, and not just seek to obtain audit evidence that corroborates rather than challenges management’s judgment. Partners and staff must have a sound knowledge of the accounting standards and framework to conduct an effective audit. When considering accounting treatments, partners and staff should consider the substance of arrangements, alternative views and the principles and intent of accounting standards in making their judgments (ASIC 2012a: 21).

Not surprisingly, the content and tone of the report prompted an ongoing public relations battle, waged through the parliament and subsequently the media. The head of the CPA, Alex Malley, condemned what he termed a persistent ‘propensity [on the part of ASIC] to make statements in
a range of public forums that are sensationalised and driven by a media grab mentality rather than seeking constructive outcomes and working collaboratively with the profession’ (Parliamentary Joint Committee 2013: 13). Rather than awaiting the outcome of the parliamentary inquiry, Malley (2013) then repeated his concerns to The Australian. If the approach was to influence the final findings of the Joint Committee, he was to be mistaken. In adjudicating on this debate, the Committee did little more than note but then disregard industry concern, largely and ironically enough, on the basis of scepticism. Critical in this regard is the overarching conclusion of the parliamentary investigation: ‘The committee acknowledges the evidence provided by industry and professional bodies about what an audit actually encompasses, but it remains concerned about the gap that exists between what the public expects and what the public gets with regard to an audit’ (Parliamentary Joint Committee 2013: 23). The Big Four auditing firms responded to the ‘nudging’ of ASIC by setting up action plans to improve the quality of auditing. ASIC (2013) notes that the ‘firms responded to encouragement from ASIC for the action plans to particularly focus on: the culture of the firm, including messages from firm leadership focusing on audit quality and consultation on complex audit issues’ and that the plans should be regarded as ‘living documents’. This action, however, was insufficient to prevent the auditing firms falling foul of another key Australian regulatory body, the Professional Standards Council (PSC).

The unexpected decision by the PSC to not approve a scheme capping the professional indemnity insurance put forward by the Institute of Chartered Accountants Australia (ICAA) reflects ongoing regulatory concern about audit quality and professional standards more generally within the audit and accounting profession. The decision is a major blow to the chartered accountants and, by extension, the other associations representing the profession. The PSC operates its licensing arrangement on a five-year basis, with the possibility of one-year extensions. Put simply, the framework governing the accountancy profession is now up for complete review. Secondly, that review is conducted by the PSC, which has the power not to recommend the renewal or approval of a scheme if it believes it deficient. The question for the PSC was whether the ICAA accounted for the deleterious decline in audit standards and quality identified by ASIC and endorsed by the Joint Parliamentary Committee. The PSC appears to have believed not. As of 30 June 2013 on a rolling basis the cap on professional liability will be revoked across all states and territories. With remarkable understatement the ICAA advised that ‘members may wish to consider their risk profile in relation to the structure of their existing professional indemnity insurance levels’. As the statutory authority responsible for encouraging regulated professional communities to improve standards, the PSC is well placed to evaluate how the conflict between commercial imperatives and the public interest is navigated. It is essential that those standards are effective if the efficacy of self-regulation or the meta-regulatory framework underpinning the PSC is to be demonstrated and legitimated. Failure to close the gap between perceived obligation and actual practice risks undermining the authority of the professional model itself. Armed with national and international evidence, perhaps this was a risk the PSC were not prepared to countenance. It was also a risk that animated the British Parliamentary Commission on Banking Standards’ discussion on professional values but against which the British Government appears sanguine (Treasury 2013). Whether this represents caution or capture remains very much an open question. What is also clear, however, is that reliance on self-policing codes of conduct is both myopic and a dangerous rejection of evidence.

4. Codes Of Conduct: Design, Efficacy And Evaluation

Any successful proposal to extend responsibility and accountability to those involved in product design rather than clarifying the enabling conditions governing marketing and sale would
constitute a major shift in the structure of the financial services industry. The integration of more interventionist normative objectives such as societal welfare with enabling ones may also significantly change the ethical boundaries of global finance. It is essential to move efficiency (i.e. lower transaction costs). Three additional distinct but overlapping normative dimensions must be applied. First, permissibility (i.e. whether a particular product can be sold and if so to whom and on what basis); second, responsibility (i.e. who carries the risk if the investment sours and on what terms); and third, legitimacy (i.e. does the product serve a legitimate purpose). As John Kay (2012: 9) has persuasively argued, sustainable reform must be predicated on capability to ‘restore relationships of trust and confidence in the investment chain, underpinned by the application of fiduciary standards of care by all those who manage or advise on the investments of others’.

The Kay formulation builds on an insight first advanced by the former managing director of the United Kingdom Financial Services Authority, Hector Sants (2009; 2010). Sants had famously complained that it was impossible for principles-based regulation to work when those charged with informal authority to maintain the integrity of the system had no principles. This was not simply a particularly memorable aside. It recognised the importance of what Oliver Williamson (2000: 597) has termed the ‘non-calculative social contract’. In the aftermath of the GFC, public trust in technical expertise is understandably unforthcoming. What is, therefore, required for regulator and regulated alike is an articulation of a renewed ‘non-calculative social contract’ capable of embedding ethical restraint of the kind identified by the leading British philosopher Derek Parfit (2007: 25): ‘an act is wrong just when such acts are disallowed by the principles that are optimific, uniquely universally willable, and not reasonably rejectable’. Paradoxically it is this very imperative that underpinned the initial (but lost) normative basis of the disclosure paradigm. As one of its key architects pointed out eighty years ago the disclosure paradigm was:

informed by a moral idea, a realization that our ills have been due also to the weakening of our moral fibre, leading to easy temporizing with traditional and tried standards of right and wrong. The only act that is founded upon a moral background, that has been passed in the past twenty years, is the Securities Act. The permeating character of such forces was slow to be comprehended, but with its discovery came a grim determination to restore to a numbed national conscience some semblance of sensitivity. It was of a spirit such as this that the Securities Act was born, free of vindictiveness that might easily have been attached to it, reasonable in its demands and built upon tried experience in their formulation. It would be idle to pretend that it does not ask something of the security world, but it also promises much in return—the opportunity of creating a true and honorable profession by the assumption and adequate discharge of public responsibilities (Bane 1933).

What also becomes clear from a recently released archive of James M Landis’ personal paper at Harvard Law School is that across a whole swathe of industries, there was early recognition at the Federal Trade Commission (FTC), which initially had carriage of securities regulation, that far from weakening power, the early reliance of the Roosevelt Administration on the development of codes of conduct provided industry with an opportunity to retain it (see O’Brien 2013c). This history must be taken into consideration given the fact that the British Banking Association canvassed the idea of developing a code of conduct underpinned with statutory authority to the Parliamentary Banking Standards Commission as evidence of good faith. History tells us that self-policing and self-referential determination of obligation can be exceptionally problematic.

An example of how codes could militate against change comes from the Code of Fair Competition for Investment Bankers (1933). The code had ensured that power to determine the extent of compliance would remain with the banks themselves. It mandated that the management committee would contain twenty-one voting members: fifteen appointed by the
President of the Investment Banking Association of America; six through a ‘fair method to represent employers not members of the IBA; and a representative appointed without vote by the President of the United States of America’. Landis, by then heavily embroiled in disputes over the operation of the Securities Act, was horrified by the way in which industry was behaving. ‘How truly despicable some of their tactics are. I really thought they were essentially decent though somewhat misguided people, but I have my doubts now’, he wrote to Felix Frankfurter on 13 December 1933 (O’Brien 2013c). Those doubts were, in part, informed by unease about the willingness of industry to engage in meaningful partnership.

This unease was captured by an internal report prepared for Landis and the other members of the FTC on the workings of the National Recovery Administration (NRA), which was charged with oversight of the codes. Assigned the chief legal liaison to the NRA, Millard Hudson (1933a) was flabbergasted by what he termed the ‘chaotic conditions’ at the agency. ‘There is hardly an important form of monopolistic practices which the Federal Trade Commission and the courts have endeavored to prevent in the past, that is not authorized and more or less explicitly provided for in these codes; not of course by individuals, but what is a great deal worse, by the cooperative activities of whole industries. It would be an exaggeration to say that any remonstrances against these things have resulted in any substantial improvement’ (Hudson 1933a). Two weeks later, Hudson provided a more in-depth account of regulatory failure. ‘The industries, having got the bit in their teeth, are running amok, and are bent upon destroying the good work accomplished by the Commission in the past and to prevent its doing any more in the future’ (Hudson 1933b). Four principal reasons were attributed. First, no representative of the Commission had power to draw up and enforce a model code. Second, legal representatives were ‘practically all young, inexperienced men, many of whom knew nothing whatever about the Commission’s work. It was easy for the industries to put things over on them’. Third, ‘having given the industries in the early codes practically everything they asked for, it was difficult to refuse those which came later. But the most alarming development is the unwillingness of the Administrator to set up any effective form of control over the administration of the codes. He is leaving it, by his own statement, as far as possible to the boards set up within the industries themselves. This means that matters in which they are interested will receive attention and probably little else will’ (Hudson 1933b). Such an approach was diametrically opposed to the form and substance of Landis’ regulatory design.

For Landis, ‘the art of regulating an industry requires knowledge of the details of its operations [and the] ability to shift requirements as the condition of the industry may dictate’ (Seligman 2002: 62). The power of the disclosure model, first set out in the Securities Act (1933) and reinforced by the Securities Exchange Act the following year, was the capacity to set, evolve and frame broader discourse. The aim was not to mandate organisational change as some early commentators advocated (e.g. Douglas and Bates 1932). Instead, disclosure was presented as a necessary response to systemic failure and a manifestation of societal obligation. On his retirement from the SEC, Landis told the New York Times (1937) somewhat optimistically, that brokers ‘are beginning to realize more clearly that their interest is tied up with the public interest. They are beginning more often to subordinate their own interest to the larger interest. People are beginning also to look upon the exchanges not so much as private institutions as public utilities’. The real tragedy here is not the misplaced optimism of Landis but the misplaced trust in financial services sector statements that, through their disclosures, they had recognised their obligations. The banking industry proved incapable of rising to the level of a profession. The result was a draining of legitimacy and authority. The exceptionally critical report by the Parliamentary Banking Standards Commission (2013) in the United Kingdom has laid bare the extent of that legitimacy crisis.
Throughout the report there is evidence of continued suspicion of both banks and their regulators. In a critical passage, the Commission warns against the myth that the problem in British banking is the result of individual failure or that banking has indeed learnt from its mistakes, thus requiring no further action. ‘If the arguments for complacency and inaction are heeded now, when the crisis in banking standards has been laid bare, they are yet more certain to be heeded when memories have faded. If politicians allow the necessary reforms to fall at one of the first hurdles, then the next crisis in banking standards and culture may come sooner, and be more severe’ (para. 273). The Commission is exceptionally cautious about the stated ambition of the banking industry to develop a professional standards body. While seeing potential value, it is exceptionally concerned that this too could become an exercise in regulatory gaming. ‘There are also very substantial risks of duplication between the powers and role of a professional standards body and those of regulators as well as risk that the creation of such a body could become a focus of public policy, diverting attention from the changes that are urgently needed within the existing regulatory framework’ (para. 598). It is a risk that the Commission is not prepared to countenance. ‘On the basis of our assessment of the nature of the banking industry, we believe that the creation of an effective professional body is a long way off and may take at least a generation’, it concludes (para. 601). The official response by the Government is, however, much more accepting of the opportunity for responsibility to be transferred in due course (Treasury 2013: para 2.21). As with the rejection of the proposed appointment to the Financial Policy Committee of someone with historical knowledge of past crises and regulatory responses (Treasury 2013: para 5.32), it is a shortsighted response. The reform of British banking remains a work in progress, conducted within terms of reference that remain undisturbed by history or experience.

**Conclusion**

The enormity of the Global Financial Crisis has demonstrated just how misplaced confidence in market ordering was. As such, it represents a fin de siècle moment. The material and ideational certainties associated with the privileging of financial capitalism have evaporated. The Wingecarribee Shire Council v Lehman Brothers Australia decision highlights the sub-optimal effect of a prior retreat to technicalities in dealing with substantive ethical considerations (i.e. the bifurcated protection offered to sophisticated or professional investors and their retail counterparts that remains embedded in the legislative framework). A point underscored by the successful civil proceedings taken against Fabrice Tourre, proceedings financed by Goldman Sachs notwithstanding the fact that it settled on similar charges. Moreover, as we have seen, structural problems in the audit process along with emasculated conceptions of responsibility to society have done much to weaken trust in the professions. In this context, the decision by the Professional Standards Commission in Australia to demand a higher standard of accountability from the audit community sends an unmistakable message that failure to act threatens not just the credibility of the professions but also the oversight mechanism itself. As the Goldman Sachs Business Standards Committee Impact Report has revealed, the norms governing finance’s conception of itself remain exceptionally powerful. To address them necessitates challenging the discourse that frame and legitimate its norms and its underpinning assumptions.

In this context it is particularly striking that the Securities and Exchange Commission chose not to litigate its case against the bank to a judicially determined conclusion. The agency’s timidity has been shown to be a costly mistake, a timidity that is also reflected across the Atlantic in the Parliamentary Commission on Banking Standards critique of regulatory capture. Sustainable
reform necessitates fashioning a different narrative in an agonistic dialogue and partnership. As we have seen, a command and control approach to regulation without industry recognising and accepting its rationale and purpose has profound limitations. Rules are too easily transacted around. Likewise, reliance on principles without ongoing external validation and oversight is difficult to enforce. The policy question is how to render an alternative framework operational in a systematic, dynamic and responsive way. To be successful, the alternative framework needs to balance specific economic efficiency (i.e. benefits to business) and professional rights to self-governance with explicit requirements that society should not be held responsible (or liable) for the failures of the former. At corporate, professional and regulatory levels the framework needs to be mutually reinforcing. It needs to be capable of evaluating the calculative, social and normative reasons for behaving in a more (or less) ethically responsible manner. It also requires reciprocal obligation from each institutional actor to maintaining (and certainly not contributing through omission or commission to the erosion of) the integrity of the governance arrangements. These must articulate common understandings of what constitutes the core ethical problem. Moreover, it must generate a framework in which disputes over interpretation can and should be resolved in a manner that is proportionate, targeted, and, ultimately, conducive to the building of warranted trust in the operation of the financial sector. What is also apparent, however, is that those rules and procedures cannot be vouchsafed by allowing the communities of practice themselves to set what constitutes best-practice and monitor effectiveness.

Tackling ethical deficiencies requires we pay much more attention to the moral dimension of market conduct, which I have argued is core rather than incidental to the disclosure paradigm. It is essential to once again stress the ethical component of corporate and professional obligation. In so doing we can rejuvenate the paradigm and provide a meaningful basis for trust. Without it we are destined to repeat past mistakes at precisely the point that society literally cannot afford to pay for them.

References


