THE HON T F BATHURST

CHIEF JUSTICE OF NEW SOUTH WALES

'THE TRIALS AND TRIBULATIONS OF BEING A LAWYER'

NEWCASTLE UNIVERSITY

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1. I would like to begin by respectfully acknowledging the traditional owners of the land on which we meet and pay my respects to their elders, past and present. Can I also express my thanks to Professor Gopalan and the Newcastle Law School for inviting me to speak to you this afternoon. The Newcastle law faculty has been providing innovative legal education for more than two decades. This is particularly the case through the integration of practical legal experience at the University of Newcastle Legal Centre as part of the LLB Practice Program. For those students here this afternoon, let me say that you are very privileged to study at such a well-regarded law school and in a region that has a vibrant and supportive legal community.

2. It is indeed a pleasure to once again be in Newcastle. I had also planned during my visit to inspect progress at the construction site of Newcastle's new court complex. This impressive facility will house ten courts and two tribunal rooms in a seven-storey building that will, I hope, meet the growing needs of the broader Hunter community. However, if I'm being completely honest, I didn't just want to inspect the site. A little secret is that because judges are not politicians, we generally get very excited about any chance to don a fluoro vest and a hard-hat. I can tell you that these opportunities are few and far between. Unfortunately I was informed that the builders were in the process of pouring concrete for the first floor, which they said is about as

* I express my thanks to my Research Director, Haydn Flack, for his assistance in the preparation of this address.

exciting as watching paint dry. However, I'm guessing they didn't want the hassle and work health and safety issues of having a Chief Justice on site.

3. Rather than letting me have my fun, I was told that I could instead view the building's progress online. This I understand is by way of a web cam that has been installed on a building opposite the worksite. My Associate tried to lift my spirits by telling me the technology would allow me to keep track of construction from the comfort of my own Chambers. While she wouldn't admit it, I think the builders might be trying to keep me away for my own safety. The assumption that I need constant supervision is certainly one of the trials of being a judge. This brings me to my topic for this afternoon.

4. I probably should begin by apologising in advance for having chosen the subject "The Trials and Tribulations of Being a Lawyer". Although I can't recall the exact moment, I must have selected the topic in one of my very rare gloomy moods. I know that the subject sounds a bit grim, but please hear me out. For the more youthful members of the audience, and I've been told that there are mostly law students present, describing some of the trials that I faced as a legal practitioner and in my first years as a newly appointed judge may help you to prepare for what lies ahead. For those here who are quite a bit older – perhaps it's easier to categorise us as lawyers who can remember Rumpole – it will hopefully allow us to reflect on our early years of practice, and consider the advice that we think might be useful to those who are just starting out in the law.

I NATURE OF THE LAW

5. I wanted to say something first about the nature of the law and the difficulties that young students may be experiencing in their first few years of study. The very basic point that I want to make is this: entering the law requires a different mindset, or certainly a shift in the way that we would normally think. The law is far more complicated than Elle's cross-

examination in *Legally Blonde*, or Cleaver Greene's antics in *Rake*. For instance, many legal concepts are likely to be far removed from any of your previous life experiences. A few examples that spring to mind are the finer points of constructive trusts, the process of statutory interpretation, the sheer size and intricacy of legislation regarding taxation, and, dare I say it, the complexities of sentencing, which include the various aggravating and mitigating factors that judges are required to take into account, along with the often contradictory purposes that underpin the sentencing process. These are just a few examples of areas of the law that are by no means easy to understand, either for young students or us Rumpoles in the room.

6. Many of you who are in your first years of study may be finding some aspects of the law impossibly formalistic and unnecessary. I know that when I was a student I certainly did. When I started my legal studies I believed that the criminal law was simple: first, find the criminal; second, prove the case beyond reasonable doubt; and third, lock him or her up. I am continuing to learn just how wrong that illusion – which seems to still be shared by some members of the community – actually is. In relation to legislation, I can also attempt to recite the following tongue-twisting section which reads:

> "*Subject to subsection (4) of this section, subsections (3) and (4) of section twenty-five of this Act shall apply where the provisions of section twenty-three of this Act have effect as applied by subsection (1) of this section…*"[1]

And it goes on, and on. Thankfully the provision is from the United Kingdom and has since been amended.

[1] *Land Compensation Act 1961* (UK), s 26(3) (as enacted), extracted in The Hon. Sir R Megarry, *A New Miscellany-At-Law* (Oxford and Portland, 2005) at 190.

7. There is little doubt that the law can at times be extremely complicated. A survey conducted several years ago in relation to the Australian legal system found that nearly 90 percent of respondents agreed with the proposition that the legal system is too complicated to understand properly.[2] We should aim to simplify the law where possible and explain it in such a way that makes it readily understandable and approachable. However, the formalistic nature of the law, and sometimes even its complexity, are vital.

8. The formality of the law is essential in a number of respects. First, and most significantly, it provides certainty. As a consequence, formality is an essential step in achieving equal treatment before the law; it establishes a proper criteria for considering the reasoning of a court, and allows people to assess whether a judge has reached the right conclusion by applying correct legal principle. As a corollary of certainty, the formality of the law also avoids arbitrariness. It enables legal practitioners to give advice to clients based on principles that are available and known. Of course it may be, and often is the case, that there are conflicting lines of authority, or legislation where the scope and application of certain provisions is unclear. However, it is the formality and rigidity of the law that allows practitioners to provide advice, even in circumstances where there is no definitive answer.

9. Certainty, and the related absence of arbitrariness, are essential features of the rule of law,[3] which itself is not a simple concept. Former High Court Justice and Governor-General Sir Ninian Stephen has described the rule of law as a phrase which "has a splendid ring to it", but a concept the precise meaning of which is far from uniform.[4] Sir Ninian identified a series of principles that are fundamental to the rule of law, including that the law, and

[2] R Dennis, J Fear and E Millane, "Justice for all: Giving Australians greater access to the legal system", *The Australia Institute* (Institute Paper No. 8, March 2012) at 2.
[3] See, for instance, "Rule of Law Principles", Law Council of Australia (March 2011) at 2.
[4] Sir N Stephen, "The Rule of Law", St James Ethics Centre Lawyers' Lecture (November 1999) at 3. See also The Hon. K Mason "The Rule of Law" in P D Finn (ed) *Essays on Law and Government* (Law Book Company, 1995) at 115.

I quote, “should be general in its application, equal in its operation and certain in its meaning.”[5] This is essential from the level of the Local Court, right through to the Court of Appeal in this State and the High Court.

10. As a young student you may be finding the formality of the law a bit frustrating. It might seem unnecessarily arcane and not very welcoming. However, I’ll tell you what happens as you go along. You become immersed in the law and begin to start thinking through the spectre of legal analysis through which you have been trained. Over time you will come to appreciate the historical foundations that underpin many of the principles that we continue to apply today. You will also come to appreciate the ways in which your skills can be applied to identify legal issues, formulate solutions, and advocate for legal reforms where they are necessary. Importantly, it is only through a thorough understanding of legal doctrine and an appreciation of the formal structures which underpin the law, that you can accurately recognise limits in particular laws and agitate for change.

11. The expertise that you will develop in legal reasoning and analysis can, unfortunately, make for some awfully boring dinner conversation. My wife often says that one lawyer is okay, two are bearable, and three or more are a nightmare. She only says that two are bearable because one of my daughters is also a lawyer. I get the impression that her aversion to lawyers is a common condition. Perhaps this is why lawyers tend to socialise together. Some cynics would probably say that there is safety in numbers.

12. I can assure you that through your legal studies you will sometimes assume that everyone knows what you know, analyses legal issues in the same way that you can, and understands the complexities of legal doctrine as you have come to appreciate through your years of legal training and

[5] Sir N Stephen, above n 4, at 7. See also *PGA v The Queen* [2012] HCA 21; (2012) 245 CLR 355 at [125] in which Heydon J, albeit in dissent, observed that “Those who seek to foster the rule of law prize certainty.”

experience. It is important at whatever level you are practicing, that you remember that others are not in the same position as you are. You must also have sufficient knowledge of legal principles so you are able to explain to non-lawyers areas of the law and how they may apply to their circumstances. It is unsatisfactory that more than half of the respondents to the study that I referred to earlier agreed that the courts are no place for an ordinary person.[6] Each practitioner, along with the judiciary, has a responsibility to explain both the law and its application in a clear and concise manner.

13. Quite apart from being able to perform your duties, this is why an ongoing knowledge of the law is so important. The structure of the law may be a trial and a tribulation in your first few years of study; that is certainly my memory of how it seemed. However, the formality and procedures of the law are essential to the overarching objective that the law should provide certainty, avoid arbitrariness and apply equally to all.

II RESPONSIBILITY TO ENGAGE

14. So, let's assume that in several years' time you will have managed, like I did, to persevere through your studies so that you have acquired a knowledge of the law and related skills. Sadly, I have to tell you that this brings with it a range of responsibilities. Kevin Lindgren, a former justice of the Federal Court and a distinguished Novocastrian, made reference to the need for an understanding of legal issues in the wider community when he accepted an honoury Doctor of Laws from this University at the Law Faculty's first graduation ceremony in 1997. In the context of emphasising the importance of legal studies for people who are not professional lawyers,

[6] R Dennis, J Fear and E Millane, above n 2, at 2.

he said that comments made by public figures which touch on significant legal questions "often betray an alarming ignorance".[7]

15. I want to take those comments further by discussing the obligation placed on lawyers to contribute to public discussion and, where appropriate, to correct ignorance in public debate. This can at times seem like one of the trials of being a lawyer. However, let me assure you it is an exceptional privilege. The skills you acquire through your studies and practice will place you in an enviable position. You will have a sound grasp of legal principles, knowledge of reasoning processes and, importantly, a direct understanding of how the law applies in practice. In my view this knowledge imposes a corresponding duty on lawyers to contribute to debates regarding the law.[8]

16. This obligation to engage can of course take many forms. It could be formal and time consuming; an example might perhaps be preparing a submission to a parliamentary inquiry or a law reform body. However, it can also be far simpler. It could easily be a matter of engaging with your friends when they are discussing an issue that relates to the law or has legal consequences. It could also be writing a journal article or participating in a legal education or outreach project. In fact, I'm sure many of you are already doing these sorts of activities, particularly through your work at the Newcastle Legal Centre.

17. There is a range of government organisations and non-government entities that also produce information to better inform the community about legal issues. For instance, many community legal centres do excellent work compiling handouts and information booklets that educate the general public about their rights and responsibilities in relation to particular legal issues.

[7] The Hon. K E Lindgren, "Address on the occasion of the conferring of the honorary degree of Doctor of Laws by the University of Newcastle" (2 May 1997) at 6.
[8] See, for instance, the comments of Sir Leslie Scarman extracted in R D Nicholson, "Law Reform and the Legal Profession", (1977) 51 *The Australian Law Journal* 408 at 410.

18. In this respect, I believe there is a similar obligation on the courts to do more to communicate with the public in relation to the work that we do. In my view, the attitude that judges should speak solely through their decisions is probably now outdated. I spoke at some length last month about the role of courts in stimulating public debate in a speech to mark the opening of the new law term; you will be pleased to know that I don't plan on repeating myself now.[9] However, I will briefly mention that the Supreme Court is now on Twitter, and judges of the Court are beginning to produce judgment summaries that are intended to clearly explain the outcome in a case and judge's reasoning. These are just a few steps that the Court has taken to try to more actively explain our work. So, let me encourage you to follow us at NSWSupCt (*NSW S-u-p C-t*). However, in deference to your lecturers, I suppose I should urge you not to treat the judgment summaries as a substitute for reading the judgment; much less for the commentary on the decision that will inevitably be contained in the prescribed text.

19. Each of us who practice law on a day-to-day basis have a duty to engage with issues and participate in public debate about matters that are important to the law and the administration of justice. This obligation applies to young law students, all the way through to the Supreme Court of New South Wales.

20. I should say that this duty does of course remain subject to the professional obligations that lawyers owe to both the court and their clients. This for instance includes the recently introduced rule that prohibits a solicitor from publishing material in relation to current proceedings that may prejudice a fair trial or the administration of justice.[10] I do plan on saying something further about legal ethics and the new Solicitors' Rules in a few minutes.

[9] The Hon. T F Bathurst, "Community confidence in the justice system: the role of public opinion", Opening of Law Term Address (3 February 2014).
[10] New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), r 28.

III DIVERSITY OF THE PROFESSION

21. Before doing so, I would like to briefly discuss diversity in the legal profession. Diversity has historically been an area in which the law has not excelled, and it remains an issue that demands both our attention and vigilance. It is undoubtedly a topic on which others are more qualified to speak than I am. However, it is important that I acknowledge the milestones and steps that have been taken to improve diversity within the profession, while recognising areas where we must continue to focus our attention.

22. It is worth taking a moment to reflect on several of the early pioneers of the Australian legal profession and the challenges that they faced. The first woman to graduate with a law degree was Ada Evans; she managed to enrol at Sydney University in 1898 while the Dean was away overseas.[11] Despite this, she was prevented from practising until 1921, when she was admitted to the bar after the passage of the *Women's Legal Status Act 1918* (NSW). The first woman to practice in Australia was Grata Flos Greig, who was admitted in Victoria as a result of the *Women's Disabilities Removal Act 1903*. It was reported that on the occasion of her admission in 1905, Chief Justice Sir John Madden referred to the "graceful incoming of a revolution".[12] Of course overt discrimination like that faced by Ada Evans has continued for many years. For instance, regulations prevented married women from working in the Commonwealth public service up until 1966.[13]

23. It is important to recognise that over time there has been much progress, albeit far too slowly. In 1961 when Mary Gaudron, the first female justice of

[11] See M Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) at 47-56 for a detailed account of early women in the legal profession. See also The Hon. Justice S Kenny, "Outsiders on the inside: different guys, new voices and the making of the Australia judiciary", Marjorie Smart Lecture (April 2001) at 1-2; The Hon. M Gaudron, Address to the Women Lawyers Association of New South Wales 50th Anniversary Gala Dinner (13 June 2002); The Hon. K Mason, *Lawyers Then and Now* (Federation Press, 2012) at 131-133.
[12] "Australian Lady Barrister", *The Sydney Morning Herald* (2 August 1905) at 7.
[13] Discussed in The Hon. M Gaudron, "Occasional address", Conferral of Degrees Ceremony, Sydney University School of Law (29 October 1999).

the High Court, attended Sydney University Law School, only 7.6% of students were women.[14] A few years after that, I remember my dismay at having to migrate from the pleasures of studying an Arts degree on campus, to the dingy area of the Law School on Phillip Street. At that time, it seemed the only women in the vicinity were those who worked in the surrounding bars and restaurants. Thankfully things have changed significantly.

24. Today, the majority of law graduates are women; there are now three women justices of the High Court and also three women chief justices of state and territory supreme courts and the Family Court. Across Australia female representation in the judiciary has increased from 8% in 1995, to over 33% last year.[15] I have no doubt that the ranks of women on the bench, at the senior bar and in other influential positions in the profession will continue to increase in the coming years. In fact it was only last week that I had the pleasure of attending a function in Sydney to celebrate the recent appointments of women to various courts in New South Wales.

25. While there is much advancement that should be celebrated, we must ensure that there are appropriate policies and procedures in place that will continue to encourage greater diversity in the legal profession, and particularly with respect to senior leadership roles. As Mary Gaudron once crisply said, "The skills of lawyering are not found on the Y chromosome."[16] It is undeniable that problems remain in the legal profession as they do in many other industries and professions.[17] That is why it is essential that we actively call for greater diversity and support programs which promote that objective. To this end, I understand that the Women Lawyers Association of New South Wales is in the process of launching a Women Lawyers Network

[14] P Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, 2010) at 46 (footnote 15).
[15] Australian Women Lawyers, "Gender in the Australian Judiciary 2013 v 1995" (July 2013) available at http://www.australianwomenlawyers.com.au/uploads/publications/F_-_4_July_2013_AWL_Media_Release_Gender_in_the_Australian_Judiciary.pdf.
[16] P Burton, above n 14, at 58.
[17] See, for instance, senior partnership levels discussed in C Merritt, "Survey prompts call for 'real equality'", *The Australian* (20 December 2013).

to further support women in the profession. I am encouraged that the number of women being admitted to practice and the increasing number being appointed senior counsel will further demonstrate that the legal profession can be a flexible workplace environment which supports all practitioners to aspire to the top ranks of the profession.

26. With that said, it is not only gender diversity that we should be fostering in the legal profession and among the ranks of the judiciary. Former High Court Justice Michael McHugh has previously observed that "when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution".[18] This is true, both for the judiciary and also for the broader legal community. I believe that confidence in the courts and of the legal profession more generally, will no doubt continue to strengthen as the breadth of those practising in the law increasingly reflects the diverse make-up of our communities.

27. It would be impossible to deny that diversity has been, and continues to be, an ongoing trial for the legal profession. I have always believed that success in the law should depend on merit, and not gender or background. However, we must continue to support important programs that encourage greater diversity. It is through such initiatives that we will increasingly see individuals from all corners of our communities at the top of the profession. This can only improve general attitudes toward both the law and lawyers.

IV LEGAL ETHICS

28. This leads me to the unfortunate issue of the perception of lawyers. Throughout your careers I can guarantee that you will have to endure many lawyer jokes. I'm sure the practitioners and academics in the room will

[18] The Hon. M McHugh, "Women Justices for the High Court", High Court Dinner, Western Australia Law Society (27 October 2004).

attest to that. I'm also fairly certain that in deciding to study law, each of you probably had a close friend or relative who was more than happy to recite their favourite pun made at the expense of lawyers. Thankfully it clearly wasn't enough to affect your choice of degree. There are many species of lawyer jokes, but one very common theme is that lawyers are greedy, unethical and should not be trusted.[19] An obvious (and clean) example is Thomas Jefferson's cutting statement that the trade of lawyers is to "question everything, yield nothing, and talk by the hour".[20]

29. Ethics are certainly not a trial or tribulation of legal practice, but they can pose challenges, particularly for graduates and young practising lawyers. That said, putting up with a lifetime of jokes that mock legal ethics is very much one of the unpleasant trials of being a lawyer. Unfortunately, I can tell you from my experience that it is an ordeal which does not lessen over time.

30. It was my fortune, or perhaps misfortune, to have to advise people of their prospects of success in the course of litigation. It was often the case that if I advised them that they should sue, the client would say, "You just want the fees". If I said that they should settle, they would often reply, "You must have another brief worth more". Sometimes it seems like you just can't win.

31. I have a few words of advice for young lawyers in relation to ethics and legal practice. First, make sure that you know and are always conscious of your professional obligations – both to your clients and to the court. Be aware that there are likely to be occasions in which clients will place a great deal of pressure on you to achieve a certain result. It is at those times that you must be especially mindful of your professional obligations. Second, as a

[19] See, for example, S Ross, *The Joke's on…Lawyers* (Federation Press, 1996), which provides a lengthy series of lawyer jokes and commentary regarding the origin and proliferation of jokes about lawyers.
[20] T Jefferson (ed. J Foley) *The Jeffersonian cyclopedia : a comprehensive collection of the views of Thomas Jefferson classified and arranged in alphabetical order under nine thousand titles relating to government, politics, law, education, political economy, finance, science, art, literature, religious freedom, morals, etc.* (Funk & Wagnalls, 1900) at 226, referred to in S Ross, above n 19, at 14.

young lawyer, try to find a senior practitioner – either at your workplace or another member of the bar – with whom you feel comfortable discussing these types of issues. It is often the case that there will be a simple solution to a situation that may be making you very stressed. Finally, keep in mind that both the Bar Association and the Law Society have confidential services with which you can discuss any ethical concerns.

32. In fact, rather than droning on about the trials of being a lawyer, I thought I would take this opportunity to discuss a number of developments in relation to legal ethics. In particular, I want to mention several changes that have come about through the introduction of the *New South Wales Professional Conduct and Practice Rules*. These rules, which commenced on 1 January this year, combine a number of the previous solicitors' rules with the model Australian Solicitors' Conduct Rules developed by the Law Council of Australia. Now for those who might be starting to fidget in their seats, there is no need to worry; I only want to refer in passing to a few of the new rules. In particular, I want to mention several that say something about the nature of the legal profession.

33. First, there is a new requirement that a solicitor not take advantage of another person's error, and also a rule regarding the handling of confidential material that has been inadvertently disclosed by another person.[21] The latter of the two follows on the heels of the High Court's decision late last year in *Expense Reduction Analysts v Armstrong Strategic Management*, in which the Court held that the mistaken disclosure of privileged documents could have been resolved by making directions under the *Civil Procedure Act* to correct the mistake.[22] Importantly, the Court emphasised that the *Civil Procedure Act* imposes a positive duty to facilitate the purposes of the Act, including aiding the just, quick and cheap resolution of proceedings. In

[21] New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), rr 30-31.
[22] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 303 ALR 199.

the circumstances of the case, requiring a court to consider if privilege had been waived was inconsistent with that duty. The Court then made an important observation regarding the new rule. They said, and I quote:

> "*Such a rule should not be necessary. In the not too distant past it was understood that acting in this way* [that is, in a manner consistent with the new rule] *obviates unnecessary and costly interlocutory applications… It is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice.*"[23]

34. A similar comment could also be made in relation to a new rule that concerns unfounded allegations. The rule provides that a solicitor must not make an allegation of unsatisfactory professional conduct or professional misconduct against a legal practitioner, unless the allegation is made bona fide and the solicitor believes that there is material available to support the claim.[24] Sadly, there are instances where practitioners have been sanctioned for making unsubstantiated complaints against other lawyers.[25]

35. At a number of levels a rule prohibiting lawyers from making unfounded allegations should not be necessary. First, the Solicitors' Rules set out a series of fundamental ethical duties, including that a solicitor must be "honest and courteous in all dealings in the course of legal practice".[26] Second, and perhaps more significantly, the way that lawyers behave and interact with one another is closely related to the proper administration of justice and also the paramount duty that legal practitioners owe to the court. In the case of *Garrard v Email Furniture*, Michael Kirby, then Acting Chief

[23] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46; (2013) 303 ALR 199 at [66]-[67].
[24] New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), r 32.
[25] See, for example, *Riley Solicitor Manual* (Butterworths) at [28,010.15] and [35,115.25] referring to case law including *McLaren v Legal Practitioners Disciplinary Tribunal* [2010] NTSC 2; (2010) 26 NTLR 45.
[26] New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), r 4.1.2.

Justice of the Supreme Court, made the observation that members of the profession who do not respect the proper courtesies

> "…*run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community*."[27]

36. It is unfortunate there was a need for the new rules to address these issues. I would have hoped that the overarching duties owed by lawyers would have provided sufficient guidance in relation to when advantage can be taken of another person's mistake, how to deal with an inadvertent disclosure of material, and when it is appropriate to make allegations against a fellow practitioner.

37. On a lighter note, I did want to briefly mention that the new Solicitors' Rules now also contain a rule in relation to advertising. It requires solicitors and principals to ensure that advertising and related materials are not, among other things, false or misleading or deceptive.[28] Before the restrictions on advertising were relaxed, there were concerns that allowing lawyers to advertise would lead to excessive commercialism and could result in practitioners ignoring their duties to the court.[29] However, a quick Google search reveals that things could be far worse. There are countless advertisements in the United States where attorneys make outrageous claims about their services. My personal favourite is the attorney who markets himself as "The Hammer", and promises to not "stop hammering until the size of your cheque satisfies you". Another standout commercial features a firm that claims it will, and I quote, "change your pain into rain". It

[27] *Garrard (t/as Arthur Anderson & Co) v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 667 (note that Clarke JA agreed with the reasons of Mahoney AP). *Garrard* supra is cited and discussed in G E Dal Pont, *Lawyers' Professional Responsibility* (5th ed, 2013) at [21.145].
[28] New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules), r 36. Note, r 36 is consistent with requirements regarding advertising under the *Legal Profession Act 2004* (NSW), ss 84-85.
[29] See, for example, *Advertising and Specialisation*, New South Wales Law Reform Commission (DP 5, 1981) at 128-135.

probably isn't quite the same without the background footage, which leaves you in no doubt that the rain they promise will fall from the sky is cold, hard cash.[30]

38. I always resisted advertising because I couldn't think of anything good to say about myself. However, if you do decide to advertise your services, just remember that it can come back to bite you later on. I was retained at one stage in my career to appear for what was then a major accounting firm. They were being sued for participating in the preparation of accounts for a very significant public company whose demise was the major cause of the 1980s crash. The accountants adopted what was described as creative accounting, although other people had less euphemistic expressions for it.

39. When the proceedings commenced, to my horror my opponent opened his case by showing a promotional film that had been put out by the accounting firm. The film demonstrated how their creative accounting methods could assist their clients in preparing a satisfactory balance sheet. The only good thing about the footage was that it convinced my client to settle the case.

40. As an aside, any of my examples that might reflect on lawyers or the law humorously have been chosen very carefully. This is because in preparing for today, I came across an old legal ethics book that warns in the strongest terms against joking about the law. In fact, it goes so far as to say that

> "*When called upon to address a public gathering, and it becomes expedient to seek funny stories to keep the listeners good-natured, let them shake some other chestnut tree than that labelled 'rascality of lawyers'*."[31]

[30] See "From Machetes to Tanks", *Business Insider* (June 2012) available at http://www.businessinsider.com.au/some-of-these-lawyer-ads-are-just-outrageous-2012-5.
[31] G L Archer, *Ethical Obligations of the Lawyer* (Fred B. Rothman & Co, 1910) at 41.

Just to be clear, I wouldn't want you to think that my comments today are in any way meant to celebrate rascality or nudge the chestnut tree too far.

41. I am certain that just as the seasoned practitioners have done, each law student here this afternoon will endure the trial of being subjected to lawyer jokes on numerous occasions during the course of your legal careers. However, you each have a responsibility to uphold the reputation of the legal profession and to set an example in the community that reflects the contribution made by the profession to the maintenance of a stable society. It is unfortunate that the rules I have referred to are considered necessary. You should always keep in mind that the way in which you deal with the court, your clients and your fellow practitioners might well impact on broader community perceptions of the legal system and the administration of justice.

V SOME TRIALS AND TRIBULATIONS

42. In the few minutes that I have remaining I thought I should probably say something about the trials and tribulations of being a judge. The difficulty is that there are really very few things to complain about. It is a great privilege and honour to serve as Chief Justice of the Supreme Court of New South Wales. However, I will touch briefly on a couple of current challenges that are facing the judiciary.

43. The first concerns the increasingly personalised approach in recent years toward commenting on judicial decision making.[32] It is important to recognise that there is much for the courts to gain from informed criticism both from commentators and members of the community. However, criticism of the judiciary should be directed at a particular decision or the underlying legal principles, and not toward a judge personally. Considered

[32] See The Hon. T F Bathurst, "Community confidence in the justice system: the role of public opinion", Opening of Law Term Address (3 February 2014) at 12-16.

scrutiny and robust debate are essential to the maintenance of the rule of law. However, personalised and uninformed criticism is capable of eroding community confidence in the legal system and the proper administration of justice. That is why it is essential that members of the legal profession accept their personal responsibility to participate in public debate where it becomes necessary for them to do so.

44. The second difficulty relates to the ever-increasing scale and complexity of litigation; it applies equally to judges and the legal profession at large. The advent of computers and particularly the rise of email and electronic document retention have significantly increased the complexity of modern litigation. To take one example, the *C7* proceedings that concluded in 2007 involved an electronic database that contained nearly 600,000 documents. Almost 13,000 documents were admitted into evidence and the trial took place over 120 days.[33] I should remember this because I appeared in the case. Today, while matters are still generally delivered to my chambers in traditional folders, some arrive on CD or sometimes even on a portable hard drive. As a result, courts have adopted strategies including an increase in case management and altering the time at which discovery is available.[34] However, emerging technologies and the exponential growth of documents will remain an area that requires cooperation between practitioners and the courts if we are to achieve the just, quick and cheap resolution of matters.

45. The third less serious tribulation is closely linked to the second: technology. The transition from barrister to judge has forced me to use all kinds of tablets and apps that I otherwise would never have touched. Ipads, online registries and now even social media. This is probably not a bad thing. However, it feels like my career has spanned typewriter to Twitter. When I

[33] *Seven Network Limited v News Limited* [2007] FCA 1062; (2007) ATPR (Digest) 42-274. See also The Hon. R Sackville, "Mega-litigation: Towards a New Approach", Supreme Court of New South Wales Annual Conference (17–19 August 2007).
[34] See, for example, *Practice Note* SC Eq 11.

started at the bar there was no such thing as Casebase or Austlii. We used to keep track of where cases had been considered in later decisions by gluing tiny stickers all over the pages of our CLRs. Times certainly have changed. As I mentioned earlier, in the past 6 months the Court has even embraced social media. I would never have imagined that hundreds of paragraphs of carefully considered judicial reasoning could be cut down to 140 characters. Technology will continue to develop and its use in the courtroom will only grow. I'm sure that the students here will be better equipped to deal with it than those of us who are more familiar with carefully pasting stickers in our authorised reports.

46. Finally, before you start to admire me for my ability to embrace the new age, I should tell you a little secret about being Chief Justice as compared to practising as a barrister. To put it simply, as a barrister I was on my own, while as Chief Justice I'm never allowed to be alone. Coming to the bench has meant that I am now surrounded by highly intelligent young people who certainly know far more about technology than I do. In fact, sometimes I even think they might also know more about the law. These people, along with my Associate, spend their days telling me what to do and instructing me about the best ways to avoid pitfalls. Judicial independence in court is a reality, but in chambers it is probably an illusion. Perhaps it is better it stays that way. I encourage each law student here to consider applying to work as a tipstaff or judicial clerk when you have completed your studies. You too might get an opportunity to keep a close eye on me.

VI CONCLUSION

47. To conclude, there are many challenges associated with the practice of law; its formality as a law student, adapting to practice as a junior lawyer, and grappling with increasingly complex cases as a seasoned practitioner. However, it is also a privileged profession that will present you with many

opportunities to be involved in and influence matters of public importance. Can I encourage you to always be mindful of your ethical obligations and, in the course of practice, reflect on the behaviour that is expected of legal practitioners in the way that you engage with the court, your clients and one another. As I mentioned, in my view lawyers are obliged to engage in public debate about matters of importance concerning the law. This requires each of us to be informed about current issues. In this respect, as Kevin Lindgren said in receiving his honorary Doctor of Laws, "Universities prepare people to be effective thinkers and learners" and success is to be measured "by your capacity to learn and adapt".[35] I am certain that the University of Newcastle and its Law School are preparing each of the students here today both for legal practice and to make a broader contribution to the law.

48. The Supreme Court has had a long and proud association with Newcastle. In fact, I understand the first Supreme Court sitting outside of Sydney took place in East Maitland in 1829. Justice Dowling, who was later the second Chief Justice of the Supreme Court, travelled from Sydney to Maitland on horseback. Presumably he would have camped along the way on a journey that must have taken several days, if not a week.[36] I am very pleased that my trip to speak with you this afternoon was more comfortable and didn't require a saddle; I am not particularly good at camping and horses have never much liked me.

49. Having said all that, I'm very happy to answer any questions you may have.

[35] The Hon. K E Lindgren, "Address on the occasion of the conferring of the honorary degree of Doctor of Laws by the University of Newcastle" (2 May 1997) at 10.
[36] G Graham, Address at the formal opening ceremony of the Supreme Court sitting at Newcastle (22 February 1999).