THE HON T F BATHURST AC

CHIEF JUSTICE OF NEW SOUTH WALES

LAW SOCIETY OF NEW SOUTH WALES 'FUTURE OF LAW AND INNOVATION IN THE LEGAL PROFESSION' STREAM SEMINAR

OPENING REMARKS

WEDNESDAY 10 APRIL 2019

1.   Good afternoon, everyone. I would like to warmly welcome you to the Supreme Court of New South Wales for the FLIP Stream Seminar, organised jointly by the Law Society of New South Wales and the University of New South Wales.

2.   I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. They have cared for this land for many generations, long prior to settlement by Europeans. We must always remember and respect the unique connection which they have with this land under their ancient laws and customs, which, after a long struggle, are now recognised by our system of law in Australia.

3.   The events which led to recognition might well appear to have been legally unthinkable at one point in time. But the law eventually changed to reflect the shift which had occurred over the course of the 20th century in the perception of the relationship between the original inhabitants of this land and later settlers. Often, the changes which were required were difficult to accommodate within the existing framework of the law. New legal remedies had to be developed, debated and implemented. In short, the law had to innovate.

4.   I mention this because there is sometimes a perception that law and innovation are strange bedfellows, with irreconcilable differences. The public tends to perceive law as having a plain, dour and conservative

image while innovation is cool, exciting and energetic; an opposition which somewhat resembles the famous "I'm a Mac, and I'm a PC" advertising campaign. These stereotypes are enduring, and do have an element of truth. When the law changes, it does so slowly and deliberately, and sometimes in the face of widespread resistance. And yet, these changes can still be important innovations in how our legal system operates. One need only think of trade practices legislation, compulsory superannuation, and of course, native title as examples.

5.   I think that we would be wise to take the same approach in responding to new and emerging digital technologies in the law, including those under the banner of "artificial intelligence". The last few years have seen an incredible amount of hype surrounding these technologies in the legal world, and it has become somewhat difficult to separate fact from fiction, and more often than not, heavy-handed marketing. Capturing the attention and enthusiasm of the legal market can no doubt be very advantageous to marketers, since its leaders and decision-makers often lack the knowledge and experience to verify the truth of the claims being made.

6.   As someone who comes from an era where "artificial intelligence" was the stuff of science-fiction, I am no stranger to this problem. Many of the concepts involved in these technologies are unfamiliar and difficult to get your mind around without the proper education and training. A slow and deliberate response to these technologies therefore makes a great deal of sense, since our legal system forms the bedrock of our society, and these technologies have the potential to introduce significant changes in how it operates. It is therefore incumbent upon us to understand how these technologies work and how they will affect our legal system.

7.   It is for this reason that seminars and conferences like this one are important. They allow experts who work at the intersection of these fields to discuss how these technologies work and how they might be incorporated into the practise of law. They also focus the attention of educators and those in leadership positions within the profession on the need to consider how these technologies will affect the practise of law

and how they can assist practitioners in their work, while, I emphasise, maintaining the high standards and integrity expected of them as professional lawyers.

8.   In doing so, we must also remember that blame for the difficulties and problems in incorporating new technologies into our profession cannot always be placed on the other side, which, I know, can often be a difficult fact for some lawyers to deal with. The law and the legal system can themselves appear arcane and obscure to the outsider, and this can be another obstacle to change. Thus, it is just as important for us to make sure that the IT professionals who work on designing these new technologies are able to understand and interface with both the law itself and the way in which we practice it.

9.   I will take a simple and almost trite example. Technology such as machine learning needs some way to access data and process it in order to function. If a program is designed to learn trivia, or to recognise images, then the digital information already available on the internet is easily accessible and is generally in a form which lends itself to the type of processing required for machine learning.[1] However, the same cannot be said for much legal information. The materials which form the bread and butter of legal analysis are not available online in any centralised database which could easily be used to train an algorithm, and considerable investment would probably be required to develop such a database[2]. Resources like AustLII, while excellent for analysing the decisions of courts, cannot really be used to train the skills required of a transactional lawyer in their everyday practice.

10.   It is this kind of problem which has led to difficulties in applying machine learning to "real world" situations. A good example is IBM's "Watson".

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[1]   See Micha Grupp, '25 Facts About AI & Law You Always Wanted To Know (But Were Afraid To Ask)' (Medium, 7 April 2019) <https://medium.com/@Grupp/25-facts-about-ai-law-you-always-wanted-to-know-but-were-afraid-to-ask-a43fd9568d6d> (points 16 and 17).

[2]   Law Society of New South Wales, *flip: The Future of Law and Innovation in the Profession* (Report, 2017) 41 <https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf>.

Despite, or perhaps because of, the aggressive marketing strategy pursued by IBM, there are reports that the program has fallen short of expectations when used as an aid to diagnosing patients in the health services industry due to issues which have arisen in training the software to understand and interpret the required sources of information.[3] These issues are by no means insurmountable, and are, to some extent, inherent features of the machine learning process. Nevertheless, they are obstacles which we should be cognisant of when considering how the legal system will interact with new and emerging technologies.

11.   The example I have chosen might seem rather technical, and with sufficient investment, could conceivably be overcome. Firms might simply find it economical to reorganise the way they store and process information in order to take advantage of the benefits provided by machine learning. But this is the point which I think needs to be made. We cannot only consider what technology can do for us, but we must also consider how we might have to change our practices and ways of working in order to share in these rewards. Sometimes, this might be to overcome a technical problem like I have outlined. Other times, the change might have to be more significant.

12.   It is here that we find some limit on how far it is desirable to go in the pursuit of legal innovation. Whatever changes we might wish to make, we must always ensure that they do not compromise the fundamental values and principles which underpin our legal system. I touched on this theme last year in the inaugural Supreme Court ADR Address,[4] when I discussed how the claimed benefits of new and emerging digital

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[3]   Martin U Müller, 'Playing Doctor with Watson: Medical Applications Expose Current Limits of AI', *Spiegel* (online, 3 August 2018) <http://www.spiegel.de/international/world/playing-doctor-with-watson-medical-applications-expose-current-limits-of-ai-a-1221543.html>.

[4]   Chief Justice T F Bathurst, 'ADR, ODR and AI-DR, or Do We Even Need Courts Anymore?' (Speech, Supreme Court ADR Address, 20 September 2018) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180920.pdf>.

technologies in dispute resolution needed to be assessed against the impact which they had on the "fundamental characteristics of a Court", and other values and principles such as "access to justice".

13. This is important in thinking not only about the "big picture" impact that these technologies will have on courts, and thus on the structure of our legal system as a whole, but also the impact that it has on the role of the practising lawyer within that system. How will new technologies affect how lawyers prepare and give legal advice to clients? How will they affect compliance with their professional obligations? How will they impact on their mental health and well-being in a fast-paced and highly competitive legal marketplace? Ultimately, our answers to these questions must depend in part on the values and principles which we believe our legal system is designed to uphold just as much as they depend on what those technologies are capable of doing.

14. I am pleased that these issues, having been raised in the Law Society's FLIP Report in 2017, continue to be the focus of discussion in today's seminar. A public debate and discussion about these issues within the legal profession, as well as in society more broadly, is essential if we are going to be prepared to face the challenges posed by new and emerging digital technologies. In light of the questions which I have raised in these remarks, I will be particularly interested to hear what Dr Bell and Dr Rogers have to say on the impact of these technologies on the well-being of legal practitioners, as well as Professor Legg's discussion of the response of international civil courts to the disruption which can be caused by these technologies.

15. Now, with that being said, I once again welcome you to the Supreme Court of New South Wales, and I hope that you enjoy today's seminar.

16. I will now hand you over to Ms Elizabeth Espinosa, the President of the Law Society of New South Wales, who will outline the schedule for today.