Brave New World

Blackburn Lecture

Delivered by Deputy Chief Justice John Faulks

17 May 2016
Thank you very much for inviting me to deliver this year’s Blackburn Lecture. His Honour Sir Richard Blackburn, OBE, was a judge of great erudition and compassion. He was a distinguished academic, a soldier and a judge. He was a gentle man and a gentleman and it was a pleasure to appear before him. It is an honour to be part of the lecture series named after him.

In the first of the Blackburn Lectures delivered by the Honourable Sir Richard Blackburn, OBE himself twenty-nine years and three hundred and sixty days ago, the ex-Chief Justice said:

“ I am unrepentant as a supporter of the old-fashioned lecture. … What a lecture has in common with a performance such as those of Mr Robertson is that if it is any good at all, it must stimulate thought [emphasis in the original]: a lecture which fails to do this is worthless. A lecture is not a means of imparting information; it is, or should be, a means of stimulating the minds of those who already have enough information to make the lecture worthwhile.”

The views I express today are my views based on my experiences in the law over some forty-seven years. I do not necessarily express the views of my colleague judges and I am not in expressing them a spokesperson for my court. I do not claim any specific originality for my observations, predictions and suggestions. Like all good lawyers I look to precedent and listen to arguments advanced by others. As his Honour the
former Chief Justice (the first Chief Justice of the Australian Capital Territory) suggested now so long ago, my thoughts to you today are not intended to impart information. They are designed to stimulate thought and hopefully discussion, and possibly, some action. If they achieve in some way, at least the first two objectives, I will be more than content.

I began working as an articled clerk in November 1968 and since that time I have worked as a solicitor-advocate in large and small firms, as a barrister and as a judge. I have had the opportunity to look at the practice of law in its many different facets and I want to share with you this day some of my thoughts about the challenges the legal profession faces and to suggest to you some points of consideration about how we can secure a future for the legal profession and for lawyers – a cause in which, I hope, we share a common purpose.

It has been a particular feature of the relationship between clients and their lawyers that clients have trusted their lawyers. They have not necessarily trusted other lawyers or lawyers in general; but almost invariably they felt they could trust their lawyers.

Lawyers have never really had a good press. Shakespeare in Henry VI (Part 2 Act 4 Scene 2) uses the lines most of our detractors love to quote:

Dick:
The first thing we do, let’s kill all the lawyers.

Cade:
Nay, that I mean to do.

There is a respectable body of opinion that this was not a call to the equivalent of pest extermination but rather expressing the view that while lawyers remained, justice and the administration of justice would be preserved. If you wanted those things out of the
way, it was necessary to get rid of the lawyers. Needless to say I favour that interpretation. But perhaps now is not the time to debate the issue.

Lawyer jokes are almost as popular as Irish jokes or blonde jokes. A classic is:

*What’s the difference between a lawyer and a catfish?*

*One is a scum-sucking bottom feeder, and the other is a catfish.*

It is reasonable to say that lawyers and undertakers have some things in common. They both have a monopoly over the unpleasant business that they are fundamentally engaged in. In the case of lawyers this is resolving legal problems. But that does not make people love them or more importantly appreciate them.

What I would like to do in this lecture is to examine some significant changes which have already occurred in the practice of law, some of which persist (I believe to our detriment) and to pose some questions and I hope provide some direction about how we might meet and utilize some changes to our world to ensure that the profession is relevant, responsible, reliable and well-remunerated. To those four “r’s” might I add a fifth - rewarding both personally and professionally to those who choose the law as a profession.

It is worthwhile noting at the start that lawyers have never had proper recognition in my opinion, for the *pro bono* work they have undertaken - whether informal or formal. Plumbers and electricians so far as I am able to ascertain, rarely carry out work except for a fee. That is not a criticism of them. It is merely a comment and in contrast to the legal profession which regards it as an *obligation* to do work from time to time, either at a significant discount or for no fee.
However, we do not help ourselves with some of the words we use to signify a discount. For example, we say “but say” on a bill signifying a reduction in the amount being charged. In these cynical days, it is likely that, that concession would be derisively greeted with “How about saying - but say x” which curiously always seems to be a lower figure than the one quoted by the lawyer.

I want to suggest to you that since I became a lawyer so many years ago, there have been two massively influential changes in the practice of law. Those are: time costing and computers. I want to look at each of these and to suggest to you that time costing does not fit into the future of lawyers and the practice of law and that with some qualifications, computers are a crucial part of that future.

Part of that examination must necessarily incorporate a wider look at our society. I want to look at how we regard work and what has somewhat annoyingly become known as “work-life balance”.

In his thought provoking book, *Tomorrow’s Lawyers –An Introduction to Your Future* Richard Susskind, postulates that many lawyers see themselves as *whole-of-task* people when what they are retained to do may only require specialist lawyer input for *part only* of task.

His thesis is that lawyers should charge for the skilled component of their work accordingly and that the non-specialised parts of the overall tasks should be charged for

1 Oxford University Press 2013
differentially or out-sourced either to the client or to a satisfactory alternative. He includes computer assistance as part of that delegation.

Without losing control or responsibility, we can, apply our considerable skills to the legal part of the problem and utilise whatever technical assistance may be necessary to do much of the mechanical part of the task. Lawyers already do this with the standardised, but adaptable, forms and precedents either in old-fashioned hard copy or electronically. But we have not yet scratched the surface of what we can do electronically. We should do this not just to increase our profit but to ensure our survival.

We are rapidly approaching the point where no one, (or at least very few people) can afford us and we are at risk of pricing ourselves out of the market. If you believe (as I do) that lawyers have an important part to play in the administration of justice and the Rule of Law, this will be a disaster. As I see it, this does not mean that lawyers should take a drastic cut in their incomes. (This may be attractive to some of our detractors but not to us.) Rather we should ensure that we charge appropriately and well for what we alone do best, and that we ensure that the clients realise exactly what is happening and why it is happening. The focus should be on solving the problem not on how many hours or time units it has taken or will take. We are by training, experience and practice excellent problem solvers. That should be our primary and most important goal.

In particular, it seems to me that charging for time (as a sole criterion) is a flawed system which devalues what lawyers do. Of course, how long it will take to do something or how long it takes to do something, must influence the value of the task so far as the lawyer is concerned. However, to our clients, that is about as relevant as it
would be for them to know how many brush strokes it would take for a painter to paint
a wall – or a house.

I want to suggest to you that we (and I definitely include myself in this) were seduced
by the simplicity of billing by time. In addition we grasped eagerly the management
tool we thought it represented. We saw it as a way of leveraging our time and income
by having minimum time units of 3, 5 or 6 minutes.

We share the practice of time-costing with accountants.

An accountant dies and goes to heaven St Peter, of course, is there, looking through the
files and asking a few quick questions. "What sort of accountant were you?" "Oh, I was a
CPA", was the reply. "Name?" asks St. Peter. The accountant gives his name and St. Peter
finds his file. "Oh yes, we’ve been expecting you. You’ve reached your allotted time span." The
accountant says, "I don’t get it. How can that be? I’m only 48 years old." Pete looks again at the
file and says, "Well, that’s impossible." "Why do you say that?" asks the accountant. "Well,"
says St. Peter, "we’ve been looking over your time sheets and the hours you’ve charged your
clients. By our reckoning, you must be at least 93 years old!"

In my opinion none of the justifications mentioned above stands up to scrutiny. But let
me take simplicity first. If lawyer “A” is skilled and experienced and endowed with
native sense (that may be cunning), he or she may well solve a client’s problem in a
short time. Lawyer “B”, whether because he or she is new to the job, or unorganised, or
perhaps not too bright may take a lot longer to do the same thing. Arguably the value
to the client of the task is the same in each case but the time charge would not be the
same.
Moreover, if time is the only relevant criterion, clients frequently misconceive that the lawyer is stringing things out to increase the lawyer’s fees. In most cases this is a misconception but there have been enough instances where the suspicion is reality to cause concern for all of us.

Second, there is no doubt that it is easier to manage a law firm, both as to total income and as to the individual lawyers’ performances by what a former partner of mine (Peter Hollingdale) described as “horsepower charts”.

“What you want for income? What are your overheads? How many billable hours can be achieved? What then should be the hourly rate for each contributor? And finally will the market bear that cost or charge?

The trouble with that system is that it puts a premium on generating billable hours rather than on resolving problems. It is reasonable to say of course that our business is resolving problems and that the distinction I make about time and resolving the problems is artificial. But the goal is important. We should not be distracted from it.

There can be no doubt that it is far easier to manage a firm by the template generated by billable hours in the same way that it is easier to manage a Court by reference to the number of judgments produced or the number of hours spent in Court or some other “countable” technology. It is true, as some of the business analysists say, that what you count, counts. Statistics can provide an illusion of work rates, of work done and the value of work done. At best it is an indicative tool. At worst it is a dictatorial master.

It requires more skill to manage individual lawyers (or judges for that matter) by reference to their individual strengths and weaknesses. It is harder to provide, as a
manager, support for weaknesses and the reinforcement for strengths necessary to maximize the performance of each person in the system. Those skills require more time, more observation, more communication, more empathy and more knowledge of what makes human beings tick. They require an ability to build teams and team-work and to be part of the solution rather than a critic of the process of achieving it.

As I moved through various forms of legal practice it was customary in management to refer to “finders, minders and grinders” to acknowledge that some people were better at generating work; some were better at ensuring that work was properly carried out; and there were some who were better qualified to simply do the work without necessarily having human involvement.

Identifying who is which is a vital part of management. This can rarely be accomplished by studying time-sheets.

I suggest to you that the application of billable hours, as the primary criterion for the charge for the work done, is both an under-valuing of the work carried out by the lawyer and frequently an over-valuing of the task from the point of view of the client.

I am not so naïve as to suggest that in some magical way every lawyer can accurately predict what the matter will cost the client. It is a commonplace that the path of litigation, in particular, is never predictable. It is also the case that in all forms of litigation there are always others involved and, others with a contrary interest. This means that a lawyer can never predict to his or her client precisely what the other side will do. He or she cannot indicate how many interlocutory steps might be provoked or initiated by the other side. The lawyer cannot predict with certainty that the other side will necessarily stick to the issues as they may properly be perceived to be.
No matter what care is taken in obtaining instructions from a client either in a commercial or a litigious matter or for any other matter, the instructions will rarely adequately cover all the contingencies which might arise in the course of the problem. Even taking instructions for the most straight-forward of Wills may prove to be a task beyond the capacious capabilities of the lawyer to adequately anticipate the problems which may arise.

In my book, that does not mean that the lawyers should always bear the loss of an under-quotation. What it does mean, in my opinion is that there should be a continuous and continual dialogue between lawyer and client about fees. This should not be in the nature of persuading the client that all the lawyer is interested in is what he or she is charging. But it should be the case that it indicates to the client that the lawyer has a continuing and deep-seated regard for the cost to the client and a dedication to the proposition that the primary task is resolving the problem not the furtherance of the dispute. There should be a continuous mutual assessment of the proportionality of the likely fees of the desired outcome. A lawyer should never incite litigation or be perceived to do so. Ultimately, we have to be courageous enough to say to a client, hell-bent on litigious hara-kiri, that we will not represent him or her when the client will not accept reasoned and reasonable advice.

When I began practice, time costing did not exist and it was common for lawyers to talk about swings and roundabouts. This meant that there were some matters where, for a variety of reasons, lawyers did rather better financially then they had expected to do, and there were some matters where lawyers, contrary to all reasonable predictions and expectations, finished up making less profit or perhaps no profit at all for a particular task. One of the skills of being a lawyer in those days was the ability to maximise the
advantage of this glorious unpredictability and to minimise the occasions on which the lawyer had to expend far more effort in solving the client’s problem than the quotation had included.

The arrival of time costing substantially changed this entire system. No longer was it necessary to give any sort of binding quotation. The commitment from the lawyer was to do the job as efficiently as the lawyer could and the task of the client was to pay for the number of hours that the lawyer expended on accomplishing that task. The lawyer, properly, would give an estimate as to the number of hours that the lawyer thought would be appropriate but it was always coupled with a caveat that one could never be certain what the other side would do or what a Court might (unreasonably) require or what the exigencies of the matter itself would render necessary. Most of us would not accept such an arrangement in relation to almost any other matter in which we are engaged outside the law. We want and need some certainty about our commitments.

One of the victims of the current system of charging is the concept of proportionality. How can it be reasonable that a matter involving subject matter of a few hundred thousand dollars would involve the expenditure of several hundred thousand dollars of legal fees? This is not to equate legal fees with the dollars involved in the problem because the complexity of the legal problem may bear no reference whatsoever to the amount involved. It is the case however, that at any point in the resolution of any legal problem the client must have a choice about whether or not it is more effective financially to prosecute the matter, or to abandon it - or to find some middle ground by way of settlement. The value to the client of the work to be undertaken must be the primary focus not simply a subsidiary element, dependent upon the goodwill and the efficiency of the lawyer.
If we can break the mind-set that the only way to quote a job is by estimating the time it will take to do it, we will rebuild our commercial and competitive skills and create a genuine market. That is not easy but we need to start –now.

The other major influence on the practice of law has been the involvement of computers. When I began practice, written communications were type-written rather than hand-written but they were in the form of what is now referred to as ‘snail mail’. This in turn, provided a gradualness and a more contemplative approach to practice somewhat missing in this age of instant communications by e-mails, texts and voice messages. This is not a case of how much better it was in the “good old days”. The good old days necessarily involved longer time frames to resolve problems. The human communication was important if not crucial and trust, common sense and persuasion were the general tools of lawyers.

Those of you who know me will appreciate that I regard the advent of technology as being one of the major tools towards the improvement of the administration of justice. This is not the time to talk about electronic trial books, the use of computers in court, electronic aids to practice and research and the efficiencies associated with modern word-processing programs. I know that I preach to the converted in large measure about most of these matters and that almost every practice is perpetually searching for ways in which electronic tools can be used to enhance the quality and the efficiency of practice. Most of you can give me a very strong lesson about many matters which will improve the efficiency of the practice of law.

What the computer has done however is to make us almost perpetually accessible. This is both an advantage and a disadvantage. It is an advantage in that it means that we are no longer tied to a particular place to carry out a task. This means that there are better
opportunities for people to undertake legal work, not at their desk in an office, or not in a traditional closed office. It means that people should be able to undertake a number of facets of their employment as a lawyer from their home or from some distant location. It means that lawyers can more appropriately in many cases visit their clients rather than requiring their clients to come to them. It means that lawyers who are working remotely such as lawyer embedded in an institution to carry out a particular project, can still be connected in every way appropriately with those in the firm who are dealing with other tasks or who are assisting as a team in the task that the embedded lawyer is engaged in. These are massive advantages which we must do everything in our power to adopt and to use to ensure greater efficiencies in our practices.

From a purely selfish point of view, our clients know and use such techniques in their own businesses and if their lawyer is not capable of matching them electronically, then it is more likely than not that the client will have no trust or regard for the lawyer. Claiming to be a luddite in relation to electronic things is inappropriate, inadequate and with respect to those of you, who have used this phrase to me from time to time “infantile”.

We are intelligent adaptable human beings who need to use (or invent) the best tools available to ensure our survival.

However there are always some drawbacks. Jessa Gamble in an article “Caught in the Net” (in issue 11 February-April 2016 of NewPhilosopher) suggests that “The trouble is, we now live in a wired world of interruption.” She suggests: “An American teenager exchanges around 100 text messages per day, and adults are no less distracted – an office worker will glance at her inbox between 30 and 40 times per hour.” She quotes Nicholas Carr who believes that the Internet is disrupting our ability to think deeply. She goes on to suggest that
our need for perpetual distraction and novelty may be having physiological effects on our brains.

I have neither the scientific knowledge nor the skills to evaluate that hypothesis but what is apparent to anyone on just a moment’s reflection is that we are the **victims** of instant communication and gratification. If we are not careful whether because of physical changes or merely from habit, we may begin to lose the power to concentrate and think. We should not delegate our power to think to a machine no matter how clever it is. The computer must remain our tool not our master.

It is for us to find better ways in which we can utilise external forces including the client in some cases and electronic means in most cases to minimise the overall input of lawyers’ legal skills to the resolution of a legal problem. The sort of reasoning that we acquire at university whether it is to be referred to as “branched reasoning” or as a “model of conflictual logic” or simply the ability to deconstruct complex problems and remake them having resolved the individual aspects of the problems involved, requires that our skills should be applied for **those** purposes not for the mechanical purposes or the comparatively unskilled tasks that may be involved in the periphery of the resolution of the matter.

That is not to abjure responsibility. The lawyer necessarily must have responsibility for what happens. But this in many cases is a matter of management - not personal activity and in my opinion we must stop thinking of ourselves as absorbing and taking on a task from a client and carrying it out completely by ourselves but rather look to the way in which we can maximise the input that we have for the things **that we alone can input** and to find the most efficient way for getting everything else done.
These matters to some extent tie-in with what I consider to be the interesting transition period that we are going through in relation to work in our society generally.

Over the course of history the model for families in society has been that of a male hunter, fighter, protector, a bread-winner. Females were seen as nurturers, carers, maintainers of the house or home or gatherers (perhaps that also means “bread-winner” when you think about it).

However, since the industrial revolution many jobs do not require strength or a particular male input. Again, as the number of office jobs increases the need for “maleness” decreases even further. In the debates in England about extending the voting rights to women in the beginning of the twentieth century it was seriously suggested that women had smaller brains then men and that they were emotionally unstable, even hysterical and unsuited intellectually, emotionally and physically to do important jobs or jobs which put them under any form of stress.

Fortunately that craziness has been debunked but what has not been solved is how women can be equal in the workforce. This ties in with what I have already said about the legal profession.

Women constitute 46% of all employees in Australia but as a proportion of all employees 24.7% are women working full-time and 21.3% are women working part-time. Women are 69.1% of all part time employees and 54.7% of all casual employees. This is not because of educational qualifications. Of all women aged 20-24, 90.1% have attained year 12 qualifications compared with 86.3% of men in the same age bracket. Of all women aged 25-29 39.6% have achieved a bachelor degree or above compared with 30.4% of men in the same age bracket. Women generally, have lower wages, less superannuation and are more likely to end up on the old-age pension.
Women hold 14.2% of Chair positions, 23.6% of directorships. They constitute 15.4% of CEOs and hold only 24.7% of key management positions in the Workplace Gender Equality Agency reporting organisations. One quarter of reporting organisations have no key management personnel who are women. ²

If women have children they will not attain true workplace equality until one of two things happens: either the mother has a lead parent as a partner or we change the nature of the workplace to acknowledge the importance to society of caring for families, older people or people with disabilities, and adjust our workplaces and practices accordingly.

This dichotomy is postulated by Anne-Marie Slaughter, a sometime senior bureaucrat in the US State Department, still a tenured professor at Princeton University and a wonderfully engaging speaker - most recently heard in Australia on International Women’s Day in Sydney. ³ In my opinion she is right.

While ever we structure our workplaces with an emphasis on hours on the job, success will be measured at least in part on who works the most hours. While we as a society believe that those who care for others are engaged in an occupation which is necessarily inferior to those in occupations which manipulate stock and shares or which derive income from the ideas and hard work of others; while we value things over people and the acquisition of wealth to buy things over people, the workforce will favour men. Men will continue to be the second on the list call-out for sick children and the second

² All these statistics come from the Australian Government Workplace Gender equality Agency – February 2016
choice for caring activities which occur during what is regarded as normal working hours.

I am not calling for or advocating for utopia or for communism. I am merely commenting on society and more specifically the practice of law. I am not immune from the tyranny of things. I do not discount for a moment the near impossibility of running a modern business without reliable and consistently available workers. I acknowledge without hesitation that some jobs of their very nature, exclude flexibility. For example, it is difficult for advocates on their feet in court to respond primarily to a caring call out.

What I am concerned about however, is that the conversation about the nature of work, why we work and how we work, is not happening as it might, or in my opinion, as it should. We pretend it is impossible and that makes it so.

A workplace cannot be a casual drop-in centre where people turn up whenever they want to, however they want to, do whatever work they feel like doing and still make enough money to live a comfortable existence. Such a proposition is naive and stupid.

However, unless we as a society start to contemplate that there needs to be a proper combination in our lives of what human beings do competitively, within a work force, and as carers of our family, our friends, our children, our aging parents, our relatives, friends and even strangers who have disabilities, we will be an empty society echoing negative values and disregarding the importance of being human.

Worse, until we recognise that our society and our humanity in itself requires us to be involved in caring and not simply focused on the making of money, we are
condemning our future to be but poor imitations of the very computers that we have enlisted to provide us with the opportunities to do things that we could not previously find time to do.

The ability to care is what marks off humans from most other forms of animals. I do not for a moment suggest that there are not a whole variety of instincts and other more sentient qualities in the animal kingdom. It is however one of the primary features that distinguishes human beings from other species. Without the ability and without the commitment to caring for each other, humans would not have survived. We are not the strongest animals, we are not the animals with the greatest ability individually to defend ourselves or to protect ourselves from attack. Collectively, we have that ability and it is a sadness to me that we appear to be losing the importance of that in our present society.

This is demonstrated by the wages that we pay people engaged in caring. It is demonstrated by the fact that there is an automatic down-grading of a person who says that he or she is engaged in ‘home duties’. It is embarrassing for most people to admit that they do not have highly paid employment. Being highly paid is a mark of success and not being highly paid is almost universally regarded as a form of failure.

What this means in my opinion is that we need to broaden our concept of what constitutes success in life. It is necessary for us to recognise the importance of a role played by people in caring for others. It is crucially important to the survival of the administration of justice that we should recognise that those involved in that administration have a function which goes beyond the generation of income and includes the values from which the legal profession grew. We need to recognise the value of human-ness to our business and to us our lawyers.
We have always been one of the caring professions. We have always been a profession that prided itself on its ethics and its values. We commit to the cause of the client above our own interests. I do not doubt for a moment that we will continue to survive as an important part of society.

As a lawyer I would like to think we are arguably, the most important part of society. However, until we start to restore some balance in the way in which we practise; the way in which we regard success; the way in which we charge our clients and importantly the way in which we value what it is that we do both at work and within our families and society, we will not succeed.

In conclusion, I have suggested today that there are some things that we should not do in the practice of law and some things we should and that we should engage in looking at how our society might better accommodate those who wish to care for children and other people in our society in a way which hopefully will bring about a true equality of opportunity for men and women in the legal profession and in Australia.

It would be unreasonable for me to expect everyone who has been patient enough to listen today to agree with everything that I have said. I ask only that you begin the conversations. It is only in a considered discussion of the matters I have raised today that any change might be possible. In my opinion, it is only by adopting those suggestions that we will truly be the source of wonder to a modern day Miranda in a Brave New World.