

THE HON T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
LPAB DIPLOMA IN LAW GRADUATION
OCCASIONAL ADDRESS
UNIVERSITY OF SYDNEY
12 JULY 2013

- 1 Thank you for inviting me to participate in tonight's ceremony. This great hall holds many memories from my own time as a student at Sydney University - mostly terrifying ones, because this is where we sat our law exams. No amount of years, it seems, will make me forget the cold sweat of opening a blank exam book and thinking, wow I wish I'd studied more. So it is a great pleasure to be here under more relaxed circumstances to witness you receive your Diplomas-in-Law. If your exam technique was anything like mine, no doubt you are equally relieved those days are behind you.

- 2 Today marks an important milestone in your journey to becoming legal practitioners. There is a myth in some quarters that the course you have just completed offers an easier ride into the legal profession than a formal University degree. Oddly enough that myth goes hand in hand with the myth that corporate slavery has never existed in Australia. Let me debunk both. This course, which used to be known as the Solicitors' Admission Board Course, has always been intensive and

demanding and generally carried out by people in part time employment. In the old days, that employment was a genteel form of slavery. Students nervously went to the prothonotary's office, where they signed a roll promising they would serve their *master* – I emphasise that term – solicitor faithfully for a period of up to five years. For that privilege they were paid something in the order of five dollars a week, or whatever lesser amount would enable them to catch public transport to and from their home to their master's place of employment.

3 This slavery, you'll be relieved to hear, was abolished in NSW some thirty three years ago - although not before it had produced such eminent lawyers as former High Court Justice Michael McHugh, who studied law through the NSW Barristers' Admission Board. I know however, that the rigour of the course remains. My sincerest congratulations on surviving.

4 Each of your paths to this day has been different. You come from different homes, backgrounds and, in some cases, countries. Some of you will have come to study law after a previous degree or career. Many will have balanced legal studies with other work and family commitments. You have each brought different experiences, knowledge and perspectives to the study of law, as you will to its practice. That diversity greatly enriches the legal profession.

- 5 What you all have in common is the intelligence, dedication and perseverance that have gotten you here today. You should be very proud of yourselves, as I am sure your family and friends are of you. In fact they are probably not only proud, but relieved that at least this initial part of your study is over. Over the years, many of them will have no doubt felt that they were doing the LPAB course with you.
- 6 Now, you may have noticed that I said the initial part of your study. Let me be the one to break to you - your time as a student has not ended. You are graduating today with an excellent grounding in legal doctrine and with the benefit of a legal education that has placed a particular emphasis on the law's practical application. That is something that is invaluable in today's legal marketplace, as the professional skills of young lawyers – their ability to *do* as distinct from simply *know* – are increasingly recognised as essential qualities.
- 7 At the same time, you are joining a learned profession and as such, you have a continuing obligation to do exactly that – learn. The law is complicated and continuously evolving. As law graduates, you inherit a body of legal doctrine and theory that has been honed through careful thought and debate over hundreds of generations. You will also be responsible for its continuing development. In addition you will become the guardians of our legal system. You will be responsible for protecting and upholding its fundamental tenets and for ensuring that it

is responsive to changing social conditions. Each of these duties requires that you continue learning.

8 In particular I would like to use this occasion to say a few words about the importance of continuing to develop and deepen your understanding, not only of legal rules, but of the policy underlying them.

9 By the study of policy, I mean the study of the underlying logic, theory, social justifications and aims of particular doctrinal rules of law – *why* they are as they are and what *impact* they have. Understanding these matters requires having an appreciation of the role of lawyers in society and of the human impact of legal rules. It also means understanding the fundamental values and political theories of the Australian legal system, including the separation of powers, due process and the rule of law.

10 Now, you may well be asking, why is this grinch trying to ruin my evening of celebration by telling me about all the learning I still have to do? And, what do all these abstract notions have to with actually being a lawyer? I'm afraid I don't have a good comeback to the first question, but there are at least three answers to the second.

11 The first answer is that no matter what path you pursue in the law, your practice will always be enhanced by understanding the underlying basis of the rules with which you are working. In fact there are many

areas of law that are impossible to truly understand without reference to policy.

- 12 Take the principle of legality in statutory interpretation, which establishes that Parliament can only override fundamental common law rights through clear and unambiguous words. An awareness of the liberal democratic ideals on which that principle is founded is essential to understanding its application and in turn to the interpretation of statutes that affect so-called common law rights.

- 13 Indeed, understanding policy is essential to all statutory interpretation - something each of you will have to do in advising clients, as more and more areas of the common law are codified in legislation. While the words of a statute are always paramount, to understand what the actual words mean, the policy behind the legislation will often be essential. It is common that two or more interpretations of a given section are linguistically open. In those circumstances, correctly interpreting the law for a client, or convincing a court of your interpretation, may well depend on your ability to ground your construction in the context and aims of the given legislation.

- 14 Statutory interpretation provides an obvious example, but policy is equally significant in the common law. The influence of competing policy considerations is obvious in the law of negligence for instance. Some negligence cases are easily resolved – for example, I recently

read of a US Court that disposed of a case in the following way: “We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless”.¹ Fair enough. Other cases require much deeper analysis. It would be difficult for you to confidently advise whether a claim for damages is likely to fail due to issues of remoteness or vulnerability for example, without understanding the policy considerations underlying those doctrines.

15 Throughout the law this holds true. From crime to conveyancing to commercial litigation, awareness of the underlying basis of a particular rule will improve your understanding of substantive legal principles, assisting you to determine the remedies and legal avenues open to your clients and to provide effective advice and advocacy. In other words, understanding policy is part and parcel of developing a sophisticated understanding of the law that will make you an excellent practitioner.

16 The second reason why policy is important relates to your professional role and obligations. The legal system plays an essential role in our society, touching almost all aspects of human life. Already, your studies have equipped you with a privileged understanding of how society functions and of the guiding principles around which it is organised. Continuing to develop your understanding of the underlying

¹ *Pillars v RJ Reynolds Tobacco Co* 78 SO 365, 366 (Miss. 1918) cited in Sir Robert Megarry, *A New Miscellany at Law* (2005) p 358.

policies of the law and, equally critically, the real world impact of particular rules, will ensure that you are able to use your legal knowledge to make a valuable social contribution.

- 17 An understanding of policy will, for example, allow you to critically evaluate legal doctrines and institutions and to recognise when the law needs amendment or improvement. In this way you will be able to take part in legal reform, whether through public policy work, professional associations or other avenues.

- 18 Even if you pursue careers completely outside the law, understanding the principles and policies of the legal system will prepare you to contribute effectively to many other spheres of public life, including commerce, the media, and government.

- 19 For those of you who do go on to practice, there is an additional imperative. On becoming a legal practitioner, you will join a profession that owes a paramount obligation to the Court and that is responsible for ensuring that the fundamental tenets of the legal system are protected. This will require you to recognise and at times challenge abuses of power, and to guard against threats to vital principles, including the separation of powers and the rule of law. That is not a duty to which only lip service can be paid. It is a real obligation and it requires vigilance, continuous engagement and reflection as to the justification and social effect of both existing and proposed laws.

20 The last reason why policy is relevant to your ongoing careers is no less important. It is simply this. It is fascinating. It will allow you to get to the heart of the subject with which you are engaged. Even if it has no immediate application, it will develop your mind and offer new perspectives.

21 There are few more intellectually or socially rewarding ways to spend one's professional life than in the law. Of course, I would say that, seeing as I was a barrister for some 35 years, but in my case it has absolutely been true. Over my career I lost my fair share of cases – certainly far more than I think I should have – but the intricacies, quirks and logic of the law have never ceased to interest and entertain me. This, along with the friendship of my colleagues, has ensured my career has been both engaging and a lot of fun. I have no doubt this will also hold true in your own careers. The more you learn and reflect on what you are doing, including the why's and what for's, the truer it will be. Continuous learning is not just an obligation. It is a privilege. Enjoy it.

22 I have said something about your future careers. Let me leave you by simply congratulating you once again for all that you have already achieved, and your family and friends for surviving all they have been subjected to during your studies. I know it has not been easy. Last but not least, on my own behalf and on behalf of the Court, I would like to

express my appreciation to all persons, both from this University and otherwise, who have been involved in teaching this course. I know how dedicated they are and thank them for it. I have heard that the experience of those who teach the law is that they often learn as much as they impart, which is a nice way of saying that their students teach them a lesson or two. In the case of everyone involved in this course, I very much hope that you have been enriched in some measure that is comparable to what you have given.

- 23 To all of you, my warmest wishes for the future. I look forward to welcoming many of you to the ranks of the legal professionals of NSW very soon. Thank you for having me.