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CHIEF JUSTICE OF NEW SOUTH WALES

LAW COUNCIL OF AUSTRALIA INTERNATIONAL LAW SECTION: CHIEF JUSTICES PAST AND PRESENT: DISPUTE RESOLUTION SERIES

'21ST CENTURY LEGAL PRACTICE – INTERNATIONAL AND DOMESTIC'

TUESDAY 9 NOVEMBER 2021[*]

INTRODUCTION

1. Good evening. I would like to begin by acknowledging the traditional custodians of the lands on we meet, although remotely. Today I am speaking from the Supreme Court of NSW, on the land of the Gadigal people of the Eora Nation. I pay my respects to Elders past, present and emerging and extend that respect to any First Nations people watching today.

2. Let me also thank Mary Walker and the International Law Section of the Law Council of Australia for inviting me to speak to you this evening.

3. It is somewhat fitting that I am presenting to you via webinar, given my topic, which is '21st Century Legal Practice – International and Domestic'. When you think of this, I wonder if, like me, your mind immediately turns to themes of technology and our interconnected, internationalised world. While I don't know who is watching, or from where, it is remarkable to think that this online format opens up the scope of possibilities for how that could be answered.

4. Legal practice has undergone great change over the past decades and this trajectory will continue exponentially. I've seen many changes since I've been in practice. Having regard to how long that's been, you may think it is somewhat unremarkable. But what I think is extraordinary are the changes in the ten and a half years since I've been Chief Justice. As well as an increasingly sophisticated use of technology, there's been increasing recognition by courts of the need to use technological aids to manage cases, and importantly, increasing utilisation of Alternative Dispute Resolution by practitioners and courts alike.

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[*] I express my thanks to my Research Director, Ms Rosie Davidson, for her assistance in the preparation of this address.

5. My aim for this evening is to discuss what I see as the trajectory for legal practice in the next decades, and what this will mean for lawyers and how they work. While I left my career as a lawyer behind in the 20th and early 21st centuries, not the 19th as some of you might have thought, many of you listening today may be at the pointy end of these issues and will have to grapple with these changes now and in the years to come.

THE INTERNATIONALISATION OF LEGAL PRACTICE

6. It will be no surprise to anyone that we live in an increasingly globalised world. The COP26 climate change conference currently being held in Glasgow reminds us of our mutual reliance and need for countries to work together on issues of international importance. The speed at which COVID-19 travelled around the world and the frustration many of us have suffered from the lack of face to face contact with international colleagues also reminds us of our interconnectedness.

7. Similarly, legal practice is increasingly internationalised. Irrespective of whether you work at an international law firm with 30 trans-continental offices, as a barrister, in-house counsel or in a boutique practice, chances are you will engage with international elements. International considerations are more than ever becoming a part of Australian law, even for lawyers who don't strictly practice 'international law'. As such, there is no excuse for the 21st century lawyer to remain domestically blinkered.

8. To start at the very beginning of the lawyer's entry into law – the opinion of law schools. The Council of Australian Law Deans has recognised that the role of law schools 'is to prepare law graduates for both domestic and international legal practice.'[1] The Council says that the Australian legal services market is becoming an integral part of the international legal services market and therefore, 'preparing lawyers to practise domestic law' should be viewed as 'preparing lawyers to practise domestic law in an international legal services market'.[2] Even in a purely domestic setting, the influence of international approaches on our own laws and practices are becoming increasingly pervasive.

9. So, how has legal practice become internationalised? From my perspective, there are three key factors. The first is economic drivers and increasing involvement in

[1] Council of Australian Law Deans, 'Law School's Role', *Internationalising the Law Curriculum* (Web Page) <https://cald.asn.au/itlc/conclusions/law-schools-role/>.

[2] Ibid.

international trade and commerce. The second is the proliferation of international treaties and conventions and their application into domestic law. The third is the presence of international law firms, which are all acutely aware of different and perhaps better legal practices and procedures in other countries.

10. Australia is a significant trading nation. We import and export both goods and services. Indeed, our economic prosperity is tied to our trading with other nations. This trading often takes place in the context of multilateral trade treaties which provide an overall framework whilst generally leaving the choice of law to the contracting parties. However, that framework demonstrates not only the need to regulate such trading activities[3] but also the need for lawyers to be across the law, whether domestic, foreign or multinational as the case may be. Rosa Kim makes the point that 'the legal services market is globalizing due to increased economic activity among nations, businesses, financial institutions, individuals, governments, and non-governmental organisations.'[4] It seems self-evident to me that as economic activity increases, so too does legal need.

11. Practicing commercial lawyers within arm's reach of a contract could readily tell me of the inclusion of a jurisdiction and governing law clause in that document. And anyone within reach of a smartphone or with a social media account – which I suspect is everyone listening today – will have accepted Apple, Google, or Facebook's provisions as to jurisdiction and governing law for any disputes, by agreeing to their terms of service.[5] It becomes readily apparent that international elements can be found in all manner of transactions, without having to look hard, or far.

12. Further, disputes may have both domestic and international facets arising from the same factual matrix. One slightly older but helpful example is when in 2012 the global tobacco giant Philip Morris challenged the Australian government's cigarette plain packaging legislation. This was done both in domestic courts, and also in investor-state arbitration under a bilateral investment treaty between Australia and Hong Kong.[6] Australia is a

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[3] To quote former Solicitor-General Justin Gleeson, '[w]ith increased international trade and commerce comes an increased need to regulate that trade and commerce and resolve related disputes.' Justin Gleeson, 'The Increasing Internationalisation of Australian Law' (2017) 28(1) *Public Law Review* 25, 32.

[4] Rosa Kim, 'Globalizing the Law Curriculum for Twenty-First-Century Lawyering' (2018) 67(4) *Journal of Legal Education* 905, 908.

[5] Michael Douglas, 'Integrating Private International Law into the Australian Law Curriculum' (2020) 44(1) *Melbourne University Law Review* 98, 116-7.

[6] Basil C Bitas, 'Comparative Law and 21st Century Legal Practice – An Evolving Nexus' (2012) 24(2) *Singapore Academy of Law Journal* 319, 323.

party to ten free trade agreements with investor-state arbitration provisions.[7] A lawyer advising an investor contracting with a foreign state needs to be familiar with such provisions.

13. At the very least, lawyers must have the knowledge of choice of law principles at their fingertips, unless they resolve to limit themselves to purely domestic activities.[8] Choice of law issues can arise in practically every contract with an international element. Let me give you an example. In the case of *Qantas Airways Ltd v Rohrlach*,[9] Mr Rohrlach was a senior executive at Qantas, based in Singapore. His employment contract included a six-month restraint of trade provision if he terminated his employment, and also a clause submitting to the law and exclusive jurisdiction of the Courts of Singapore. Thereafter he was relocated to Japan, pursuant to a further contract but with the original contract continuing in effect. To complicate matters further, Mr Rohrlach was also subject to a deed poll containing another post-employment restraint provision which was governed by Japanese law. He then took a job at Virgin Australia. Qantas then sued him in New South Wales to enforce the restraints contained in the deed poll. Mr Rohrlach had since commenced proceedings in Singapore. The main issue was whether the NSW proceedings had to be stayed because they were captured by the exclusive jurisdiction clause designating Singapore in the original contract. If it sounds complex, that's because it was. And if you think that's complex, Qantas also sought in NSW an anti-suit injunction against Mr Rohrlach continuing the Singapore proceedings, and an anti-anti-suit injunction seeking to stop him seeking an anti-suit injunction in Singapore against the NSW proceedings. Some other New South Wales Court of Appeal decisions which illustrate this point include *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*[10] and *Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd*.[11]

14. It's apparent that often problems in litigation of this nature arise because lawyers responsible for drafting the agreements are either not fully familiar with or have not given adequate attention to these issues.

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[7] Department of Foreign Affairs and Trade, 'Investor-State Dispute Settlement (ISDS)', *About Foreign Investment* (Web Page) <https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement>.

[8] Douglas has argued that private international law 'provides the tools for the bread-and-butter work of Australian lawyers.' Douglas (n 5) 103.

[9] [2021] NSWCA 48, on appeal from *Qantas Airways Ltd v Rohrlach* [2021] NSWSC 260.

[10] [2018] NSWCA 81.

[11] (2019) 99 NSWLR 419.

15. Similarly, legal issues with foreign elements are not just for the big law firms with offices in every time zone. A small firm or a sole practitioner will increasingly need to be prepared to deal with these things. This could include family law practitioners who have cross-border custody or adoption matters, or commercial lawyer who may draft contracts or complaints against a foreign manufacturer,[12] among others.

16. From the 20th century and into the 21st, our domestic law has also become increasingly internationally connected through Australia's accession to numerous international treaties, conventions and the like.[13] I want to briefly talk about some examples in the fields of arbitration, mediation and litigation.

17. To begin with arbitration, the UNCITRAL Model Law[14] and the New York Convention[15] have been part of Australia's laws for decades, as incorporated in the *International Arbitration Act 1974* (Cth). This has 'provided Australia with an excellent framework for ensuring certainty in the processes and outcomes of international arbitration'.[16] Globally, legislation based on the Model Law has been adopted in 85 States and 118 jurisdictions,[17] and the New York Convention has 168 contracting states.[18] What's more, in Australia the Model Law has even been incorporated into legislation for purely domestic arbitral disputes. In New South Wales, this is in the *Commercial Arbitration Act 2010* (NSW). Any arbitration in Australia is therefore caught by a law with international origins.

18. Once it's accepted that the domestic Commercial Arbitration Acts reflect, to a significant extent, considerations relevant to international arbitration, it becomes necessary to have at least a general familiarity with development of law in the latter area. Thus for example, an important judgment by the UK Supreme Court given only two weeks ago, *Kabab-Ji*

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[12] Kim (n 4) 910.

[13] Gleeson (n 3) 29.

[14] UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

[15] United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[16] Fiona McLeod, 'The Future of Lawyers: Blue sky or dark clouds ahead?' (2016) 90(6) *Australian Law Journal* 408, 409.

[17] 'Status: UNCITRAL Model Law on International Commercial Arbitration (1985), With Amendments as Adopted in 2006', *United Nations Commission on International Trade Law* (Web Page, as at 9 November 2021) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[18] 'Contracting States', *New York Arbitration Convention* (Web Page, as at 9 November 2021) <https://www.newyorkconvention.org/countries>.

SAL (Lebanon) v Kout Food Group (Kuwait),[19] will be of importance in considering the validity and scope of arbitration clauses and their enforcement.

19. Australia has also, just recently on 30 September this year, become a signatory to the Singapore Convention on Mediation[20], joining 54 other signatories.[21] This is yet to be incorporated into domestic legislation. The Singapore Convention ensures that international, commercial mediation agreements can be recognised and enforced in the Court of a signatory State.[22] Minister for Foreign Affairs Marise Payne has said that the Singapore Convention will facilitate international trade and promote mediation in cross-border disputes.[23]

20. Lastly, and significantly, is the Hague Convention on Choice of Court Agreements,[24] which concerns litigation. In 2016, the Joint Standing Committee on Treaties recommended that Australia accede to the Choice of Court Convention and take binding treaty action.[25] Australia has not yet signed up, but I am confident it is only a matter of time.

21. As the name suggests, the Choice of Court Convention applies to exclusive jurisdiction agreements between parties in civil and commercial disputes, where the case has an international element.[26] The Convention has three key obligations.[27] First, the court chosen by the parties must hear the dispute.[28] Second, a non-chosen court must

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[19] [2021] UKSC 48.

[20] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 20 December 2018).

[21] 'Singapore Convention on Mediation' (Web Page, as at 9 November 2021) <https://www.singaporeconvention.org/>; 'Australia signs the Singapore Convention on Mediation', *Attorney-General for Australia and Minister for Industrial Relations* (Media Release, 30 September 2021) <https://www.attorneygeneral.gov.au/media/media-releases/australia-signs-singapore-convention-mediation-30-september-2021>.

[22] See generally, Sala Sihombing, 'UNCITRAL Convention – Mediation's Big Bang: Can Mediation Challenge Arbitration's Dominance?' (2019) 30(1) *Australasian Dispute Resolution Journal* 51.

[23] 'Australia signs the Singapore Convention on Mediation' (n 21).

[24] Convention on Choice of Court Agreements (The Hague, 30 June 2005) ('Choice of Court Convention').

[25] Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness-USA; Convention on Choice of Courts-accession; GATT Schedule of Concessions-amendment; Radio Regulations-partial Revision* (Report No 166, November 2026) 17-23 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024013/toc_pdf/Report166.pdf>.

[26] Ibid 20-1 [3.11]; see also James O'Hara, 'Strategies for Avoiding a Jurisdiction Clause in International Litigation' (2020) 94(4) *Australian Law Journal* 267, 269-70.

[27] Hague Conference on Private International Law (HCCH), 'Outline: HCCH 2005 Choice of Court Convention' <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>.

[28] Choice of Court Convention (n 24) art 5.

suspend or dismiss proceedings in favour of the chosen court.[29] Third, judgments given by the chosen court must be recognised and enforced in other Contracting Parties.[30]

22. We know that the benefit of arbitration is its enforceability. The Choice of Court Convention is significant as it increases certainty in the enforcement of foreign judgments, in a similar manner to the New York Convention, but in a public rather than private forum.

23. Naturally, the conditions for litigation vary between jurisdictions. This may include the speed of proceedings, procedural law, laws around costs and substantive law.[31] Parties and their lawyers therefore have a real opportunity to consider the forum in which they wish to conduct their disputes, particularly because recognition and enforcement of any foreign judgment has greater certainty. Lawyers will increasingly need to internationalise to take account of these choices.

24. Once in force in Australia, the Choice of Courts Convention will make Australia an even more attractive destination for litigation. Fiona McLeod has said that the benefits of promoting Australia as such a destination are 'obvious'. She says:

> 'We have a strong system for litigation with efficient commercial courts underpinned by an independent, well-educated, mobile, highly ethical and skilled legal profession. We are also proximate to the rest of Asia and in many cases are able to undercut European lawyers on cost and accessibility. … Ultimately, clients will prefer to do business in jurisdictions with a proven track record for adherence to the rule of law, confidence in legal processes and the durability or enforceability of judgments.'[32]

25. Therefore, we see that arbitrations, mediations and litigations with international elements have or will be accounted for in Australian law. Lawyers need to be aware of these things in their practice.

26. These are, of course, many, many more international instruments with significance for Australian law. But I hope this quick look at a few has illustrated how domestic law is imbued with global influences.

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[29] Ibid art 6.

[30] Ibid art 8.

[31] O'Hara (n 26) 272-3.

[32] McLeod (n 16) 410.

THE TECHNOLOGISATION OF LEGAL PRACTICE

27. As well as international influences, it is impossible to escape from the reality that we also live in an increasingly technologised world. One only has to look at Facebook's recent rebranding as 'Meta', being a reference to the 'Metaverse',[33] to see how pervasive this is. For someone as old as I, the changes which have occurred throughout my lifetime are truly astounding. Although it is something I have had to accommodate as best I could, the upcoming generations are 'digital natives'[34] who have been immersed in technology since birth and for whom the use of technology is second nature.

28. Just as legal practice is increasingly internationalised, so too is it increasingly reliant on technology. Elements of traditional legal work have become automated, and dispute resolution is taking on electronic forms not previously seen. This is breaking down even more international barriers.

29. Let me start with a brief overview of the legal technology which is becoming ubiquitous in practice.

30. The first thing that comes to mind is technology which automates repetitive, lower-skilled tasks. Document discovery programs can read and analyse the potentially millions of pages produced in discovery tranches, and can indicate what may be relevant in timeframes astronomically faster than a human can.[35] As well as time efficiency, computer programs are more cost effective than humans, and they don't need to take breaks or sleep.[36] Although, I am told that some top tier firms already treat their junior lawyers like this. I jest – in part.

31. But in fact, the scope of legal tech programs already available in the market is extraordinary. Tools exist in a wide range of categories. As well as those I have already mentioned, these include for legal research, with more powerful search engines; outcome prediction, including for risk mitigation or risk assessment; legal analytics;

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[33] The "metaverse" being a virtual world that people can interact in. 'Why is Facebook changing its name, and what does meta mean?' *ABC News* (online, 29 October 2021) <https://www.abc.net.au/news/2021-10-29/why-facebook-changes-name-to-meta-meaning/100579882>.

[34] Although I also note that some have argued that 'digital natives are a myth'. See Adelle King, 'Digital Natives are a Myth', *RMIT Australia* <https://www.rmit.edu.au/news/c4de/digital-natives-are-a-myth>. Whether or not that is the case, the concept highlights the fact that the younger generations, generally speaking, have had technology integrated into their lives from a young age.

[35] Tania Sourdin, 'Judge v Robot? Artificial Intelligence and Judicial Decision-Making' (2018) 41(4) *UNSW Law Journal* 1114, 1119.

[36] Ibid.

document generation; brief generation; practice management; contract management and analysis; DIY dispute resolution; and online legal advice.[37]

32. Outside of the traditional law firm context, I have also been interested in how the internet can be used to increase the resources available to members of the public to find legal answers. Of course, such online answers may be generalised, or the source of the information may not be clear, or may be out of date. Nonetheless, such resources may help to empower non lawyers, particularly in seeking preliminary information about the legal options available to them. There are also examples of artificial intelligence (AI) programs which are used to guide people through small claims, eliminating the need for a lawyer.[38] It has been said, 'if it was not for lawyers, we would not need them.'[39] I'm sure we all disagree with these sentiments; however, technologies mean that lawyers may not be essential in some instances. Dr Google, it would seem, may soon become Google SC.

33. As I have just briefly touched upon, legal practice is also increasingly taking place online.

34. Australia has historically suffered from a 'tyranny of distance'. However, technology has, to some extent, caused this antipodean struggle to become practically irrelevant. Lawyers and clients, no matter where they are in the world, can communicate with ease over email, teleconference and the like. In fact, one of the bigger potential issues is time zones, but this is of course less significant for Australia's interactions with Asian jurisdictions. In 1996, Richard Susskind predicted that email would become the dominant form of communication between lawyers and clients. For this, he was labelled 'dangerous' and 'possibly insane'.[40] History has vindicated him, of course, and technology has gone far further in the past decades than most could have anticipated.

35. Communication between lawyers and clients is one thing, but perhaps more remarkable is the increasing scope for virtual and online dispute resolution.

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[37] David Freeman Engstrom and Jonah B Gelbach, 'Legal Tech, Civil Procedure, and the Future of Adversarialism' (2021) 169(4) *University of Pennsylvania Law Review* 1001, 1011-2; Don Farrands, 'Artificial Intelligence and Litigation – Future Possibilities' (2020) 9(1) *Journal of Civil Litigation and Practice* 7, 33; Sari Graben, 'Law and Technology in Legal Education: A Systemic Approach at Ryerson' (2021) 58(1) *Osgoode Hall Law Journal* 139, 143. See also Sourdin (n 35) 1119.

[38] Farrands (n 37) 25-6.

[39] Stan Ross, *The Joke's On… Lawyers* (Federation Press, 1996) 100.

[40] Daniel Goldsworthy, 'The Future of Legal Education in the 21st Century' (2020) 41(1) *Adelaide Law Review* 243, 244.

36. In the court system, use of virtual hearings and Audio Visual Link (AVL) technologies have increased due to COVID-19, although they have been around for a while. This is true both domestically and internationally. AVL links mean that parties, expert witnesses and lawyers are not constrained by distance to 'appear' in court. Outside the courts, virtual international arbitration hearings have boomed during the pandemic, which are 'notionally seated in a particular jurisdiction but with parties and lawyers sitting in living rooms around the world'.[41] Monichino and Fawke have identified that a possible effect is that '[t]he scepticism which parties occasionally express about arbitrating "in" Australia might lessen, and the focus might shift from Australia's geography to the substance and quality of its arbitration law.'[42] As well as making Australia a more desirable forum for the resolution of international disputes, Australian lawyers may become more internationally employable as physical barriers are broken down.

37. Online courts are another 21st century phenomenon with increasing global utilisation. What an 'online court' actually is can differ depending on the jurisdiction. However, they are unlike 'virtual courts', which tend to be an overlay of traditional courtroom processes. Online courts, on the other hand, 'essentially involve replacing a physical court and litigation process with an online alternative that encourages the resolution of a dispute but retains the stature and powers of a physical court of law'.[43] These have already been used for the resolution of small claims in places including British Columbia, Utah and the UK.[44]

38. Courts and arbitration aside, technology, improved access to the internet and the liberalisation of trade have given rise to innovative dispute resolution models which avoid traditional processes,[45] as I touched upon earlier. Naturally, this impacts what legal practice looks like.

39. Online dispute resolution, or ODR, has some of the same advantages as virtual courts. In particular, since the process happens online and can be asynchronous, the physical

[41] Albert Monichino and Alex Fawke, 'International Arbitration in Australia: 2019/2020 in Review' (2021) 31(1) *Australasian Dispute Resolution Journal* 12, 12.

[42] Ibid.

[43] Sourdin (n 35) 1120.

[44] Brian M Barry, *How Judges Judge: Empirical Insights into Judicial Decision-Making* (Informa Law from Routledge, 2021) 274-5; Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) 166-76.

[45] McLeod (n 16) 408.

location of parties assumes less significance. Some forms of ODR use AI, including to make decisions on the basis of information inputs from parties.[46]

40. Private online dispute resolution occurs globally on a huge scale, assisted by algorithms which help churn out result after result. Key examples include ODR systems used by eBay and PayPal.[47] A phenomenal statistic is that it 'has been estimated that three times as many disagreements each year among eBay traders are resolved using "online dispute resolution" than there are lawsuits filed in the entire United States (US) court system.'[48]

41. Technology has irrevocably permeated legal practice around the world. It has led to increasing automation of the work of lawyers, and a radical shift in the way legal disputes are dealt with. Online resolution may not yet be the dominant paradigm, but it is becoming more pervasive. As each year passes, so technology will improve and become ever-important to the practice of law in our world.

CHANGES TO THE LEGAL PROFESSION

42. I think there are a number of ways that legal practice will or should change in the years to come in response to these things. In particular, I think that lawyers will need to have a greater client focus, do work which is more specialised and analytical, and that there will be a fusion of sorts of the profession.

43. First, lawyers must bring a greater client focus to practice.

44. The reality is that the legal landscape is changing as practice becomes even more internationalised and technology integrated. What was once acceptable for lawyers will no longer be as we move deeper into the 21st century. Clients will expect more.

45. The breaking down of international and technological barriers means that clients will have greater freedom to choose their own lawyers. Australian clients who may have historically hired Australian lawyers may no longer feel so constrained, especially if someone is offering a more attractive service elsewhere. They may be more savvy

[46] Sourdin (n 35) 1121.

[47] See, eg, Zbynek Loebl, *Designing Online Courts: The Future of Justice is Open to All* (Wolters Kluwer, 2019) 4.

[48] Farrands (n 37) 26.

about questioning the service or what they are being charged for.[49] What's more, '[o]ffshore services offer cheap fast diagnosis, legal research and drafting of documents.'[50] Tools for instantaneous communication anywhere in the world may reduce the appeal of remaining domestic where disputes are international anyway. Of course, this works the other way too. International clients might also be drawn to use Australian legal services if the incentives and convenience are there, particularly as the 'tyranny of distance' is less and less dictatorial.

46. Greater client focus may be in recognition of the fact that people increasingly look online for legal support and services.[51] Some law firms have embraced disruptive practices, offering online-only or subscription type services to best cater to the needs and wants of part of the market.[52] Such offerings won't suit every client's needs. However, I think they are a good example of outside-the-box thinking which considers the client's interests.

47. Greater client focus also pays attention to the increased sophistication of corporate clients in particular and the contexts in which they work. Basil Bitas has remarked that:

> '[O]ne of the most often heard criticisms or observations put forward by corporate leaders in respect of their lawyers both inside and outside of a company is that they fail to understand the business. More broadly, it is that they fail to appreciate the cross-border, increasingly intercultural context in which business is taking place and the related matrix in which "legal" issues are arising.'[53]

48. Focusing on the client is, quite frankly, good for business. Happy clients come back when they are in further need of your services. I'm not meant to say this because I'm a judge, but litigation is not always the best option when an ADR avenue could potentially work just as well or even better.

49. Second, lawyers will increasingly need to specialise and undertake more complex and analytical work. There's a bad joke going around that many lawyers are worried the computer revolution will make them redundant, but that in the end, a lawyer's job is secure – for who would build a robot that would do nothing beneficial for our society?

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[49] McLeod (n 16) 408.

[50] Ibid.

[51] Sourdin (n 35) 1117-8.

[52] See, eg, Lawyal (<https://www.lawyal.com.au/>) and LegalVision (<https://legalvision.com.au/>).

[53] Bitas (n 6) 326.

50. In fact, the future does not look bright for lawyers whose roles are based around repetition and pattern recognition, or administrative and process-based work, such as document review, due diligence, and basic drafting. Such lower-level cognitive tasks are becoming increasingly automated by artificial intelligence programs, including self-learning algorithms.[54]

51. All is not lost, however. As technology takes on those repetitive, data crunching roles, lawyers will need to take on work which requires them to have more specialised legal and technical knowledge, and to exercise creativity and devise complex strategy.[55] For example, Engstrom and Gelbach have identified that 'legal tech and human lawyering can… act as complements, increasing demand for, and thus the premium on, higher-order lawyer judgment, from parsing machine-distilled "hot docs" to crafting litigation strategy.' They further argue that '[t]hough some lawyers will be displaced, law practice for the remainders may be both more stimulating and more profitable.'[56] For the lawyers who dodge displacement, they may find that the work they do adds more real value.

52. Even if technology takes over a range of routine tasks, you will be comforted to hear that an Oxford University research report from 2013 predicted a mere 3.5% likelihood that lawyers would be replaced by AI. This may be because of the role of the lawyer as the 'trusted advisor'.[57] This idea recognises that a lawyer's role has an important relational dimension, in addition to the lawyer's ability to apply legal expertise to dynamic circumstances. On another note, the study also predicted a 40% likelihood that judges would be replaced by AI. While you probably think it predictable for me to quibble with this – judges do sometimes like to think they are quite important – I have previously spoken about some of the issues I think there are in considering whether machines can replace judges, and I don't intend to carry on like a broken record.

53. To touch again on the topic of relationships, in 2018, the Organisation for Economic Co-operation and Development (OECD) considered some of the bottlenecks to being able to fully automate the work of lawyers. These include 'social intelligence, such as the ability to effectively negotiate complex social relationships, including caring for others or recognizing cultural sensitivities; [and] cognitive intelligence, such as creativity and

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[54] Goldsworthy (n 40) 224-45; Farrands (n 37) 27.

[55] See Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2nd ed, 2017) 21, and also Susskind's predictions for some of the new jobs for lawyers, 133-43. See also Farrands (n 37) 27.

[56] Engstrom and Gelbach (n 37) 1031.

[57] Meena Hanna, '"Robo-Judge": Common Law Theory and the Artificially Intelligent Judiciary' (2019) 29(1) *Journal of Judicial Administration* 22, 26.

complex reasoning'.[58] Despite the cliché that lawyers possess neither of these qualities, they are actually a very important part of a lawyer's work, and will increasingly be so in the coming decades as the lawyer's role becomes more focused.

54. I also think that lawyers will need to gain deeper legal expertise if they are to thrive in 21st century legal practice. With the proliferation of programs that can give simple legal advice, what will make a human lawyer better than an online program? Being able to provide advice on complex areas of law in a complex factual matrix is something that will set legal practitioners apart. As Susskind has said, 'there is no obvious alternative source for this genuinely bespoke work.'[59]

55. Third, I think there is a possibility that the division between barristers and solicitors will become less sharp, particularly to the extent that activity takes place in the international sphere where, apart from some common law countries, this division is unknown.

56. I think in the domestic sphere there are certainly going to continue to be room for barristers. I remain a firm believer in the benefits of specialised advocates, having been one myself, particularly in the common law adversarial system. However, when one moves outside that system, the need may not be so great, and the role of the bar must be considered in the context of the increasing use of ADR and ODR in resolving disputes in the future. This is particularly in what might be called, with all due respect, 'routine litigation', and especially as regards smaller matters.

57. I think Richard Susskind has put it well, so forgive me for quoting him at length. He says:

> 'I have little doubt, for the foreseeable future, that very high-value and very complex legal issues will continue to be argued before conventional courts in the traditional manner. When there is a life-threatening dispute, clients will continue to secure the talents of the finest legal gladiators who will fight on their behalf. However, it is less clear than instructing barristers or trial lawyers for lower value or less complex disagreements will continue to be regarded as commercially justifiable. Quite apart from a likely shift towards mediation, collaborative lawyering, and other forms of alternative dispute resolution, emerging techniques of dispute containment and dispute avoidance… are likely to reduce the number of cases that find final closure in courts of law or even on the steps of the courthouse. Moreover, courtroom

[58] Goldsworthy (n 40) 251-2, quoting Ljubica Nedelkoska and Glenda Quintini, *Automation, Skills Use and Training* (Working Paper No 202, Organisation for Economic Co-operation and Development, 14 March 2018) 6.

[59] Susskind (n 55) 66.

appearances themselves will diminish in number with greater uptake of virtual hearings, while online courts and online dispute resolution (ODR) will no doubt lead to the displacement of many conventional litigators.'[60]

58. Turning back to my own perspective, I think that the desirability for a clear distinction between barristers and solicitors may wane in future years. Already, in international arbitration we see that lots of advocates are not barristers, or that barristers are appearing with solicitors. There is more and more flexibility of where 'advocacy' is done – it is no longer simply in the courtroom, but may be in online courts where oral advocacy is not required, or in a physical or virtual ADR setting. Further, these changes are also inching us away from a strict adversarial system. Contexts like arbitration and mediation don't include traditional adversarial elements, such as strict rules of evidence and uniform rules of procedure. Rather, lawyers as advocates will no longer sit in neat boxes of solicitor and barrister.

59. As we progress through the 21st century into a different era of advocacy, what advocacy skills in fact are may change. For example, not too long ago, barristers had to work with juries far more often in civil matters and not just criminal. They also had to wrangle far less documentation. In a similar way to how the required skills for advocacy have shifted over the past decades, I think they will continue to shift. No longer will the advocacy be left to barristers alone, but all lawyers will need to possess these skills.

CONCLUSION

60. In conclusion, whilst it is impossible to predict the future, usually only attempted in this area by academics or brazen judges, I think it can be safely said that whilst routine work in traditional legal areas will continue, a considerable amount of that work will be done by the use of alternative systems or new technologies, which will limit the involvement of lawyers.

61. On the other hand, there will be increasing and exciting opportunities for lawyers, both in the domestic and international spheres. To best avail themselves of those opportunities, however, lawyers may have to consider whether the traditional approach to the mode of delivering legal services needs to change, perhaps radically. For my

[60] Ibid 65-6.

part, I will watch with interest whether what I've been bold enough to predict in this speech will come to pass.