SPEAKING REMARKS
MODERN ADVOCATE LECTURE SERIES 2018
WEDNESDAY, 25 JULY 2018

1. Ladies and gentlemen, first let me begin by saying how delighted I am to have been invited to speak in the Modern Advocate Lecture Series organised by the Queensland Law Society. The invitation is very much appreciated because in so many ways it feels like coming home. It is hard to believe that I left the solicitors profession in August 2005. The last 13 years seem to have evaporated very rapidly.

2. I was in no hurry to leave life as a litigation partner at Minter Ellison. I enjoyed it very much but the opportunity to exercise the judicial power of the Commonwealth and discharge the responsibilities of a Judge within our society was a responsibility I could not refuse. It has been and remains a great privilege.

3. So I am very pleased to be here amongst the solicitors of Brisbane and Queensland.

4. I am conscious, of course, that not all invitations, historically viewed, are so much appreciated. Many years ago, the famous playwright, George Bernard Shaw, delivered an invitation to his old adversary, Winston Churchill, in the following terms:

> "Come to the opening night of my new play, and bring a friend – if you have one."
>
> Churchill replied: "I will come to the **second night** – if there is one."

5. Tonight I want to talk to you about some practical aspects of solicitors acting as advocates. My remarks are really focused upon solicitors acting as advocates in superior courts and, in particular of course, the Supreme Court of Queensland and the Federal Court of Australia but these observations apply equally to appearances before the District Court. They also apply to appearances before the Magistrates Courts and the Federal

Circuit Court of Australia although the dynamics at play in those courts are different. They are high volume, long list courts and the pressure upon lawyers appearing before those courts is to "cut to the chase" as rapidly as possible because of the pressure of the lists. That, of course, is not such a bad thing but the need to be disciplined, focused and efficient plays out differently in the other courts I mentioned. These remarks also apply to appearances before the Family Court of Australia which, as we know, is in transition.

6. In the 13 years I have been a Judge of the Federal Court of Australia I have only presided in two trials in which a solicitor acted as an advocate in the entire conduct of the trial. Both cases involved interstate solicitors. The conduct of one case left a lot to be desired. The other case was conducted very well.

7. I have had many solicitors from Queensland appear before me in a very wide-range of interlocutory applications both contested and uncontested. Quite often solicitors will appear on ex parte urgent applications for interim injunctions and related relief. However, solicitors very often appear in contested interlocutory applications in relation to such things as challenges to the pleadings and discovery and all manner of interlocutory applications within a proceeding but also in relation to *originating applications* for a wide-range of orders under the *Corporations Act 2001* (Cth) and other legislation. Solicitors often appear in very important large scale insolvencies and significant bankruptcy applications.

8. As you would expect, the quality of the conduct of those applications varies but I have to say that, in the main, the solicitors are doing a very good job especially having regard to the things Judges look for in the conduct of applications (and a hearing, for that matter) about which I will speak in a moment.

9. The first thing to say, however, is that the migration of solicitors into the role of advocates presents a real opportunity for the profession to focus upon an area of practice which calls for judgment, discipline, integrity and critical thinking. That's not to say that other areas of practice don't call for one or more or **all** of those qualities but the litigation *environment* is a very particular application of those skills. It calls for a very particular relationship between the solicitor and the client. Litigation is an environment in which clients present the solicitor with a problem not a transaction. Generally, they are stressed and tense because they need to pursue a claim against someone or they are responding to a claim against them. They are on the *cusp* of or *in* adversarial proceedings. The one thing clients in those circumstances want, is to put the matter into the hands of a "safe house". Every problem has a solution and the solicitor undertaking the conduct of litigation, and ultimately the advocacy in that litigation, needs to be able to convey a sense of confidence to the client that their matter is in safe hands. I used to say to people (other than those involved in large public companies and general counsel of such companies) that they should try to have a good night's sleep because the matters in issue can be dealt with **but** I would remind them that they would need to work it through to a solution.

10. That is definitely not to say that the solicitor should fall into the trap of allowing the *client's problem* to become the *solicitor's problem*. The solicitor is a professional adviser who gives advice and takes instructions and makes forensic judgements about factual questions, the legal issues and, ultimately, in the context of *advocacy*, the focus and emphasis to be adopted in the case. The advocacy part of that equation presents great opportunities for solicitors to expand the role they play. It's very exciting.

11. It does not matter whether, in reaching this point in your life, you have come to it from Gryffindor, Ravenclaw, Hufflepuff or Slytherin. The

conduct of litigation and particularly *advocacy* in *litigation* is where the real *magic* happens.

12. Before turning to some of the practical considerations, could I say something about the Federal Court of Australia.

13. I suspect that most of the solicitors in this room when they think about litigation, they think about the State courts. When I speak about federal jurisdiction at the University of Queensland and at the Bar Practice Course it is surprising to me the extent to which people think that the Federal Court spends most of its time addressing *discrimination* cases, *human rights* cases and *native title* cases. These are all very important areas of jurisdiction but the truth of the matter is that because of the amendments to the *Judiciary Act 1903* (Cth) in 1997 which conferred jurisdiction in any matter arising under any laws made by the Commonwealth Parliament, the Federal Court has a very broad general commercial jurisdiction.

14. So, to briefly give you an idea of the range of matters I have been involved in personally, in the last three years or so, they are these sorts of matters:

(a) 13 schemes of arrangement which are the modern day takeovers;

(b) major large scale insolvencies such as the motorway failures, toll roads etc;

(c) giving directions to administrators and liquidators in the conduct of administrations;

(d) ASIC regulatory proceedings of many kinds;

(e) class actions such as Wickham Securities and Storm/Centro;

(f) failed managed investment schemes – Aquaculture/Polonia trees etc;

(g) ACCC regulatory proceedings of many kinds;

(h) joint venture disputes especially in the mining industry;

(i) tax proceedings of every conceivable kind;

(j) judicial review proceedings of every kind including jurisdictional error challenges;

(k) the regulation of financial service providers;

(l) bankruptcy;

(m) arresting bulk tankers at Dalrymple Bay and Hay Point;

(n) claims by the Commonwealth against a PRC corporation for the cost of remedial work to the reef as a result of a ship running aground on the Douglas Reef;

(o) cross-border insolvency;

(p) intellectual property claims of every conceivable kind;

(q) references under the *International Arbitration Act*; and

(r) constitutional challenges to Commonwealth legislation.

15. In matters in *all* of these areas of the Court's jurisdiction, I have had solicitors appearing before me in interlocutory applications and originating applications (and, as I have said, in two trials) and this will give you some idea of the enormous scope and opportunity for the *profession* in engaging with our citizens in their legal affairs in this area of work.

16. Importantly, this is an area of work which is not likely to easily be invaded by developments in artificial intelligence.

17. Let us now turn to some of the practical considerations.

18. The first thing to remember about the role of solicitors as advocates relates to an aspect of the historical role of the Bar. The great virtue of the Bar over time has been that the solicitors have been able to turn to the Bar to obtain an independent view of the rights and entitlements of the client and take advantage of the specialisation in advocacy and the conduct of the trial, by barristers. Historically, solicitors had the close relationship with the client. Members of the independent Bar were just that, independent and at arms-length. Of course, they acted for the client but, generally

speaking, they had no enduring relationship with the particular client but merely a transactional engagement in the particular case. That is not so much the case today as large commercial clients tend to want to retain the same counsel in commercial litigation. Solicitors who *conduct* advocacy might be doing so as specialist advocates within a firm but they are much more likely to be lawyers with the responsibility for the case generally and who *also* appear in the matter.

19. The first practical thing to think about is making sure that you continually try to bring fresh eyes and an independent mind to the proceeding and thus the representation of the client.

20. Solicitors who conduct the advocacy in the matter need to keep that idea firmly in mind.

21. Independence is an important notion.

22. You all know, of course, that a solicitor representing a client in a matter before the court must not act as the *mere mouthpiece* of the client or of the solicitor instructing the solicitor advocate, and must exercise the forensic judgments called for during the case *independently*, after the appropriate consideration of the client's and where relevant, the instructing solicitor's instructions. A solicitor advocate will not breach a duty to a client and will not fail to give consideration to the client's instructions or those of the instructing solicitor (where that occurs) *simply by choosing* to exercise particular forensic judgments called for during the case, contrary to the instructions, where those decisions are designed to confine any hearing to those issues which the solicitor advocate believes to be the "real issues"; or where the solicitor advocate seeks to present the client's case as quickly and simply as possible consistent with the robust advancement of the issues; or where the solicitor advocate informs the court of any "persuasive authority" against the client's case. As to authorities and legislation, it is important to remember that at some point in the hearing, if the court has

not already been informed of the relevant matters, the solicitor advocate needs to inform the court of any binding authority known to the solicitor advocate which he or she has reasonable grounds to believe to be directly on point but which is nevertheless against the client's case. Similarly, any decisions of an Australian intermediate court of appeal should be brought to the attention of the Judge together with the relevant legislation.

23. That is not to say, of course, that points of distinction and differentiation ought not to be vigorously developed. Invariably, very real questions arise about whether a particular authority is binding or persuasive *at all* in the circumstances of the case.

24. However, distinctions *without a difference* must be avoided.

25. The obligation to tell the court of the matters just mentioned does not arise, of course, if the opponent tells the court that the opponent's case will be withdrawn or the opponent proposes to consent to final judgment in favour of the client.

26. A solicitor advocate might become aware of matters of the kind earlier mentioned after judgment or after a decision has been reserved for further consideration and while the decision remains pending. Whether the *case* in question or the *relevant legislation* came into existence before or after the *argument* was *concluded*, the solicitor advocate must inform the court of the relevant matter by a letter to the court copied to the opponent and limited to the relevant reference. Alternatively, the solicitor advocate might request the court to re-list the matter for further argument at a convenient date.

27. The second thing to remember is that, in order to be a good advocate, it is important to be a good lawyer. By that I don't just mean talented or able or clever. I mean disciplined and focused upon critical thinking in the sense of making sure that you understand very clearly the legal principles

which are engaged by the dispute or area of controversy in which the client's problem lies. Put simply, this is the *absolute foundation* of *everything*. As the former Chief Justice of the High Court, Murray Gleeson, has observed, not all good lawyers are good advocates but to be a good advocate it is *necessary* to be a good lawyer.

28. You might think that it goes without saying but it is terribly important to take the trouble to *master* the principles of law relevant to the contest.

29. This, of course, it is also a fundamental duty of the lawyer to the client.

30. It brings me to the third thing to keep in mind.

31. When you are acting for a party who is bringing a claim, the first important discipline is drawing a statement of claim. I am a great believer in the Chicago University view that writing is thinking whether the writing is undertaken physically or electronically. The discipline of having to reduce something to a sequence of sentences forces the author to refine his or her thinking. When a statement of claim is being drawn, not only must the lawyer have marshalled all of the relevant facts but the lawyer must then isolate the material facts which, if made good by the evidence, will make out the cause of action and the right to the remedy sought.

32. I mention this threshold matter because the litigation lawyer that appears before the court in the conduct of the advocacy is the person who will have to support the statement of claim and in drafting the statement of claim, the solicitor needs to have a *horizon* to the *way* in which the case will be *presented* and *run*.

33. The solicitor who is acting for the defendant or respondent will also need to have marshalled the facts and form a view about the scope of the defences. That involves thinking about the legal answers to the claim and the factual foundation for the legal answers and whether the facts give rise to equitable defences, estoppels etc. It also involves thinking about

whether the answer to the claim is an equitable set-off or gives rise to some other cross-claim.

34. Again, the litigation lawyer who will be involved in advocacy either in interlocutory applications in the proceeding or possibly in running the trial, needs to think from the very outset about the facts and the legal issues to be agitated throughout the proceeding.

35. So often we find that the statement of claim is amended and amended and amended. The record in a proceeding which I took over was an eleventh amended statement of claim.

36. As a function of advocacy, you will immediately realise that when a pleading is amended many times, an opportunity is presented to cross-examine the principal party giving the instructions to test why it was that the essential material facts were changing.

37. Like anything, if a piece of litigation starts in the wrong place it is very likely to end up in the wrong place.

38. These matters are particularly important threshold considerations for the solicitor who has the conduct of the litigation and does so on the footing that he or she will be engaging in the advocacy as well.

39. The solicitor needs to have a clear-minded view of precisely how the proceeding is framed, especially if that individual is going to walk into court and address any aspect of a challenge to the pleadings or matters related to the structure and progression of the litigation.

40. The fourth consideration is that the first appearance before the court is almost certainly going to be a case management conference at which directions will be made. However, the case management conference in the modern world is much more than simply a matter of settling directions. Sometimes it can still be like that but quite often the presiding Judge will want to understand with some precision the nature of the issues that are

really in contest between the parties. This is especially true in the Federal Court which operates a docket system and it is true for matters on the Commercial List in the Supreme Court.

41. The fifth consideration is this.

42. The thing that most irritates Judges is a failure to prepare properly for either a case management conference or any form of interlocutory application before the court. It goes without saying that the advocate appearing at the *trial* needs to have undertaken intensive trial preparation so as to be entirely familiar with the record. In the absence of that, the cross-examination is not likely to be very effective.

43. But at the level where we see solicitors appearing as advocates, it is very important that the solicitor is very familiar with the material. For my own part, I read all the material before going into court on interlocutory applications and case management conferences. As you probably know, under the Federal Court docket system each docket Judge lists applications in the matter before him or her. There is no separate applications list because all of us are doing applications all the time. Generally, in these various applications, I have a view about the matters I want to ask about, having read the material. The Judges expect the person appearing to be able to address those concerns. When a barrister appears, and has to turn to the instructing solicitor, that is a problem. Sometimes a solicitor will appear instructed by another solicitor. The advocate solicitor ought not to have to turn to the instructing solicitor. My experience in this area has been that solicitor advocates have demonstrated a capacity to be on top of the facts and the legal issues arising out of those facts.

44. As you know, in the Supreme Court the Commercial List is run something along the lines of a docket system but otherwise there are application weeks allocated. Judges hearing applications in those weeks will not have read

any of the material and you will need to be in a position to explain the nature of the application and the critical facts clearly and succinctly.

45. The short point is that I *cannot over-estimate* the importance of preparation both as to the facts and the body of law raised by the questions in issue.

46. This goes back to the fundamental point of making sure that you are entirely familiar with the applicable law especially recent cases.

47. An aspect of this is making sure that you are aware of the decisions of the High Court which have a bearing on the questions in issue. Decisions of single Judges and intermediate courts of appeal are, of course, important but the Judges must apply the law as determined by the High Court of Australia. This year, I have had the experience in two matters of counsel (not solicitor advocates) not being aware of admittedly very recent decisions of the High Court on the very topic in issue.

48. I accept, of course, that that can happen but, the truth of the matter is, it should not happen.

49. The next matter to think about is this.

50. When you are asked a question by a Judge it is very important to try and answer the question as directly as possible. Don't obfuscate or beat around the bush. There will generally be an answer. The Judges don't often throw up philosophical questions about the relativity of time and space or like matters. If you don't know the answer to the question because it raises a need to look at a document, simply say you need to look at an affidavit or a document to answer the question. If it involves taking instructions about a matter, simply say that. If the question involves responding to a legal proposition, try to be as focused and direct about that as you can.

51. It is a good thing to develop a reputation for being direct.

52. The next consideration is, in my view, a very important one.

53. If you are asked questions about aspects of the factual matrix thrown up by your own material, it is very important to be accurate about your responses to the question. Try to be as precise as possible about the answers. If you are not immediately comfortable about the precise boundaries of the evidence, take the opportunity (which every Judge will give you) to check and be confident about your response. It is a very *undesirable thing* to innocently overstate the evidence and it is an entirely *unacceptable thing*, of course, to *consciously* overstate the evidence. It is always important to remember that you can't give evidence from the Bar Table to fill in any gaps. Similarly, don't fall into the trap of misstating the evidence put on by another party. No doubt, the representatives for the other party will be prompt in correcting any misimpression. However, remember that some parties are self-represented.

54. On this topic, you should know that Judges regularly talk about who has appeared before them and you do not want to develop a reputation for being unreliable either by misadventure or lack of preparation or, heaven forbid, because of any deliberateness.

55. One of the things that solicitor advocates must aspire to is a sense of respect from the Judges in the conduct of the matters in *exactly* the same way that barristers must aspire to winning and holding the respect of the Judges in the conduct of cases. Sadly, it does not take much to make people wary. You do not want a Judge looking at you with one eye closed wondering whether the affidavits really say that or not or whether the cases really say that or not.

56. In a case called *Re Davis* (1947) 75 CLR 409 at 420, Dixon J said that "the duties and privileges of advocacy are such that for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the Bar and of judges". That proposition has been described as a "basic

principle" which is said to apply "equally to solicitors who appear as advocates before the Court as they do to Counsel": *Elkin v Wearne (No 2)* (2015) 298 FLR 22 [25]. An *element* of that confidence can be found in the observations of Kitto J in *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 298 in these terms:

> "… a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as his [or her] fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship and it carries exceptional privileges and exceptional obligations."

57. Leaving aside the question of *exceptional privileges* for the moment, there is no doubt that solicitors, assuming the role of advocates, also assume the *exceptional obligations* Kitto J was speaking about.

58. A few years ago, I had someone appearing before me on an application which involved a question of statutory construction in which two possibilities were open. Due to the deadlines involving timeframes under the relevant Act, the matter was urgent and had to be decided then and there. I was told by counsel that in all of that counsel's research, no authority on the section had been found or identified. I extemporised a decision adopting a particular construction of the Act (which, to this day, I am sure is correct). After extemporising the decision, I took the trouble to have a look myself and found quite quickly two cases on the section adopting the alternative construction. So you can imagine that if that person tells me that particular research has failed to reveal any authorities on a relevant topic, I will be closing one eye and thinking, is that really

right? I do not suggest for one minute, however, that I was deliberately misled.

59. The next consideration involves ex parte applications.

60. I am sure you all know the rules about that. I will not labour them here but the critical matter is that you must tell the Judge those things that you know that would be likely to be said by the other side if they were there.

61. The next practical consideration is this: don't drown your best points in a sea of bad points.

62. If you are not going to win the application or, for that matter, the trial, on your best points, you will not win it on your weakest points. This is true universally. Not so long ago, I was presiding in an appeal where the notice of appeal raised 37 grounds. The first two were probably arguable although, ultimately, unmeritorious. Every other ground was a challenge to a finding of fact. The submissions put on also need to be focused and succinct to make a real impact and to be of utility to the Judge. Of course, another addressee for the submissions is any other party in the proceeding.

63. The next simple but practical thing to remember is to speak up. It's not a bad idea to try and speak calmly and slowly but certainly try to speak up so that you can be heard with some authority in the forum. That depends a bit on the court room but it does make a difference if the Judge can clearly hear what you want to say. Some court rooms can be a little cavernous and the acoustics are not great in some buildings.

64. Another important matter is to be sure where the critical material lies. If you are going to take the court to exhibits to affidavits, be clear where they are and the sequence in which you want to take the court to them. It's also good to have a list which accurately reflects the filing dates of affidavits especially if there are a sequence of affidavits from the one deponent filed around similar dates.

65. Ultimately, it is important to stand back from the proceeding and ask yourself what you are trying to do. The essential thing you are trying to do is to *persuade* the court to your view of the matter. That will be a view about the material *findings of fact* and a view about the essential elements of the *legal framework* within which the question arises.

66. Advocacy is the art of persuasion.

67. As Murray Gleeson has observed, the two qualities which are of real value in seeking to persuade a court to your point of view are the qualities of *objectivity* and *selectivity*. A calm and detached appreciation of the strengths and weaknesses of the advocate's own case is essential to the ability to present that case to its best advantage. Clients are usually ill-served by those advocates whose passionate commitment to the cause makes them blind to weaknesses in their own case or perhaps even the strengths of their own case. I agree with Murray Gleeson's observation that *selectivity* is an essential quality if an advocate is to gain the respect of the Judges. As I mentioned earlier, a barrister who presents to the court every possible argument that can be conceived of, does nothing but *harm* to the client. Good points are deprived of their impact by being presented "in the middle of a tangle of confused and aberrant argumentation". *Sensitivity* (in the sense of an awareness of the considerations likely to influence the Judge hearing the application) and *tact* are important qualities. Sir Owen Dixon, in an address on 7 May 1952, described the art of advocacy as "tact in action". Courtesy is also a very important element in the art of persuasion.

68. Sometimes, a solicitor advocate appears in circumstances where he or she has been asked to go up to court on a particular application where that solicitor does not have the carriage of the matter. If you find yourself in that situation, it is important to become as familiar as you can with the documents and the material relevant to the application. If you need

instructions you must seek them before coming up to court and that will, of course, mean becoming familiar with the matters about which instructions might be needed. This often occurs in the context of case management conferences and you will need to be in a position to answer questions from the Bench about the matter.

69. It is also important to look at the rules of court governing procedure in whatever court you might be appearing in. I know that goes without saying but it is important to understand the rule under which the application is brought or the statutory provisions of an Act conferring power on the court as you will have to demonstrate that the relevant integers under the rule or statute have been made good. All of this is simply a function of proper preparation. You should be familiar with the *Evidence Act 1977* (Qld) and if you are in the Federal Court, the *Evidence Act 1995* (Cth).

70. The discipline of language is also important. That is not to say that anything other than plain language should be used but that does not mean that you should descend into coffee table conversation or slang. There is a formal way to use language and a very casual informal way. Sometimes casual phrases can be very effective but you should not descend into that way of speech in presenting a synopsis of the facts or an expression of the legal principle to be applied.

71. Thank you for your attendance. I have kept you too long. All the very best in your endeavours.

The Honourable Justice Andrew Greenwood
FEDERAL COURT OF AUSTRALIA