**COMPETITION, FAIRNESS AND THE COURTS\***

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1. Much of our commercial law is now statutory. It fundamentally affects the way in which the economy functions and that, in turn, affects our daily lives. The policy underlying statutory law is determined by the Parliament. Usually that policy has been considered by the Executive Government before being submitted to the Parliament for its consideration.
2. It is not the function of a serving judge to enter too far into the arena of policy in commenting on existing or possible laws. There are in our system of government well recognised, though not often always observed, divisions of power between the Parliament, the Executive and the Judiciary.
3. Nonetheless, judges must have regard to the purpose of legislation in order to give it a coherent interpretation. In addition, the experience of the Courts in administering the law contained in statutes can give a judge insight into areas in which reform or legislative attention are desirable.
4. This is the 40th anniversary year of the enactment of the ground breaking *Trade Practices Act 1974* (Cth) now confusingly renamed as the *Competition and Consumer Act 2010* (Cth). The rebranding of the legislation gave the Parliament the opportunity to introduce Div 1 of Pt 4 of the Act commencing with a particularly telling example of the Commonwealth drafting technique. Section 44ZZRA commences a twenty page long labyrinth with the disarming words: “The following is a simplified outline of this Division.” I will say a little more later about the byzantine complexity of the cartel conduct provisions. They are illustrative of what I think is a fundamental issue that profoundly affects the way in which our lives are regulated and the burdens for those who must obey the law in coming to grips with the constraints imposed by such drafting.
5. I also propose to discuss the real difficulties that the complexities of modern life throw up for legislative drafting and the striking of the balance between ensuring that the object of policy which the Parliament wishes to have reflected in its laws are observed rather than evaded.
6. Complexity in legislation has costs and benefits. One significant area of costs that I will discuss includes compliance with “red tape” – in substance the cost to citizens and businesses of complying with the legislation and dealing with it in any legal context, including carrying on business, the drafting of contracts, the structuring of transactions or dealings and court proceedings. Each of these is affected by the need to ensure that one is complying with the letter – or telephone book – of the law as well as its purpose, in all of the very many aspects of that the legislation has sought to cover.
7. One significant impact of this that has emerged in the last 30 years is the exponential growth in the time it takes for litigation to be conducted and the difficulty that ordinary people, as well as businesses big and small, face from the prospect of and then, if worst comes to worst, the conduct of litigation.

**Competition**

1. Competition policy has to balance antipathetic values – the ruthless Darwinism of free or unconstrained competition, on the one hand, and the more solicitous concern to protect certain of the market participants from that competition in order, as it were, to preserve variety and some players in that cauldron, on the other hand. Legislation that attempts to reflect this juggling act will not be easy to express simply or clearly.
2. Like many things in life, competition has its own strengths and weaknesses. The first American astronaut, John Glenn, explained this neatly when he said:

“As I hurtled through space, one thought kept crossing my mind – every part of this rocket was supplied by the lowest bidder.”

1. That reflected the “efficiency” of the market and its potential weaknesses.
2. Two enquiries that are currently under way are the “root and branch” Competition Policy Review and the Productivity Commission’s enquiry into “Access to Justice Arrangements”. The former produced an issues paper of 53 pages on 14 April 2014. On 8 April 2014, the Productivity Commission released its draft report on Access to Justice Arrangements. Because the latter report is about 900 pages long, it is only available online. I want to say something about each of these as well.
3. The Competition Policy Review’s terms of reference include the following:
4. admonitions to be mindful of removing, wherever possible, regulatory burdens on business when assessing the costs and benefits of competition regulation[[1]](#footnote-1);
5. consideration of whether the *Competition and Consumer Act* is operating effectively having regard to, among other matters, increasing globalisation and developments in international markets, changing market and social structures and the need to minimise business compliance costs, including:

* considering whether “Australia’s highly codified competition law is responsive, effective and certain in its support of its economic policy objectives”;
* ensuring that the Act appropriately protects the competitive process and facilitates competition, including whether, in substance, the current legislation is working as intended and could be better worded[[2]](#footnote-2);

1. advising on appropriate changes to legislation, including “reducing complexity”[[3]](#footnote-3);
2. recommending appropriate ways to enhance competition by, among other things, removing regulation[[4]](#footnote-4).
3. These are by no means all of the matters to be reviewed, but they raise issues that need to be addressed and, I hope, do not trespass into the realm of political controversy when I touch on some of these below.

**Legislative drafting**

1. The recognition in the Competition Policy Review’s terms of reference of the highly codified nature of our competition law is insightful. The Commonwealth Office of Parliamentary Counsel is responsible for the drafting of most legislation at the federal level. In August 2010, Parliamentary Counsel wrote a paper entitled *Reducing Complexity in Legislation*, which is on the Office’s website. As at that time, the paper identified 26 Acts that had over 500 pages of substantive text. The longest, coming in at 3,769 pages, was the *Income Tax Assessment Act 1997* (Cth), easily trumping its fourth placed, older, but still current, predecessor, the 1,815 page long *Income Tax Assessment Act 1936* (Cth). Second place was held by the *Corporations Act 2001* (Cth) with 2,134 pages (now 2,860) and number 8 was the then *Trade Practices Act 1974* (Cth) with “only” 1,041 pages. That compares to its 88 page length when enacted in 1974 and, according to Comlaw, the 3 volumes of the rebranded *Competition and Consumer Act 2010* (Cth) that comes in at 1,509 pages as at 17 September 2013. Last place, with 504 pages, was taken by the *Bankruptcy Act 1966* (Cth).
2. Now, these Acts are very important in our nation’s commercial life. They affect the nature, shape and operation of markets, competition and those who can participate in the commercial world. They are, individually, almost intellectually impenetrable. A judge must construe a provision in an Act having regard to the Act as a whole.
3. The paper showed the constraints under which Parliamentary Counsel work. It observed that there was a widely held view that:

“length can be a barrier to an Act’s accessibility. The fact that an Act must be considered as a whole means that a 500-page Act is inherently more complex than a 5-page Act”.

And, it rightly noted that overall length can make understanding the law very difficult for lawyers and “other users of legislation”[[5]](#footnote-5). The 2014 Dalloz edition of the *Code Civil* of the Republic of France is 3,136 pages long. That gives pause for thought.

1. In my opinion, the policy choice of using prescriptive drafting that most Commonwealth legislation has reflected over the last two or three decades needs urgent reconsideration. It has really significant impacts on the whole community in terms of comprehensibility, compliance costs and, to use a political catch cry, access to justice.
2. Why is this so? Several reasons spring to mind that I will discuss in turn. *First*, attempts at codification involving many permutations on a theme are inevitably complex and likely to miss something, *secondly*, complexity can, and often is, a handmaiden of incomprehensibility, *thirdly*, the unravelling of complexity requires time and effort, *fourthly*, the more detailed and complex that legislation is, the harder it is for the ordinary person, including the scions of the business community, to grasp the point and comply, *fifthly*, complexity makes litigation more complex, lengthy and expensive for the parties and, *sixthly*, those factors create the need for the Courts to deal with more and more in judgments or summings up to juries leading to delay, the greater likelihood of appellate challenges and, of course, error. This last aspect has affected the conduct of litigation profoundly. Let me now discuss each of the above six matters.
3. *First*, legislation that is drafted to cover every possible permutation of human, including business, action must inevitably miss something. There is a stark contrast between the complexity of the 20 pages specifying the cartel provisions in the *Competition and Consumer Act* and the apparent simplicity of the *Sherman Act* (15 USC §1). That was passed by the Congress in 1890 and is as follows:

“**§ 1. Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

1. The precise circumstances in which that section operates are not spelt out; rather the Congress left that for the Courts. No-one can say that competition in the United States of America has been unduly inhibited in the last 120 years by that enactment. As is well-known, many convictions have occurred and many anti-trust suits have succeeded in that country. Put simply, the section worked. You can explain its concept to a jury of 12 citizens who are not endowed with the reasoning power or intellect of Ludwig Wittgenstein. He apparently once said that: “A serious and good philosophical work could be written entirely of jokes.” Perhaps, that is why there is not much humour or philosophy in statutes.
2. The framers of the Australian *Constitution* conceived that the new nation’s trade and commerce was of fundamental importance to its future. Luckily, they had clarity of expression when they drafted the *Constitution*, hence, the breadth and simplicity of the powers given to the Parliament in ss 51(i) and 98 to make laws with respect to trade and commerce with other countries and among the States including shipping, navigation and State owned railways. These heads of legislative power, together with the taxation power in s 51(ii), underpin the key legislation governing our economy’s functioning, although they require some referral of State legislative powers.
3. Early in the history of the Commonwealth, the Parliament passed the *Australian Industries Preservation Act 1906* (Cth). That Act used some concepts from the *Sherman Act* but added others. The additions caused trouble for the local Act as I will explain. The key sections were ss 4 and 10, the former providing:

“PART II – REPRESSION OF MONOPOLIES

4. – (1) Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States –

(a) with intent to restrain trade or commerce to the detriment of the public; or

(b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers,

is guilty of an offence.

Penalty: Five hundred pounds.

(2) Every contract made or entered into in contravention of this section shall be absolutely illegal and void.”

1. The Attorney-General had power, under s 10, to apply for an injunction against any combination that was “in restraint of trade or commerce to the detriment of the public” or “destructive or injurious, by means of unfair competition, to any Australian industry the preservation of which is advantageous to the Commonwealth having due regard to the interests of producers, workers, and consumers”.
2. However, that Act was effectively emasculated after the reversal of Isaacs J’s decision in the *Coal Vend* case[[6]](#footnote-6) by the High Court[[7]](#footnote-7) was affirmed by the Privy Council[[8]](#footnote-8). Their Lordships held that there was a critical distinction between a contract that was void, at common law, as a restraint of trade because it fell into a particular class of contracts whose enforcement the law considered to be contrary to public policy on the one hand, and an inference of fact, drawn by the Court in accordance with the Australian Act, that the parties to such a contract had an intention to injure the public. In giving the opinion of the Judicial Committee, Lord Parker of Waddington said of a restraint in an employment contract against an employee carrying on a similar business in a particular area after ceasing employment[[9]](#footnote-9):

“In such cases both parties have as a rule bargained with a single view to their own interests, though in the opinion of the Court they have been mistaken as to the area of the restraint required in their own interest, **but it would be wrong to infer from this that they had any intention of injuring the public. It would be equally wrong to infer that such a sinister intention must have existed in cases of trade combinations**, such as that which was the subject of the decision in *Hilton v. Eckersley*[[10]](#footnote-10). If this were the true effect of the Act, no trade union would be free from the risk of proceedings under s. 4.” (emphasis added)

1. Their Lordships found that an agreement made by coal producers had intended to raise and maintain the price of coal won from their coal mines by precluding competition by any of the cartel’s members underselling any of the others. They found that the cartel agreement had been made when prices “were disastrously low owing to ‘cut throat’ competition which had prevailed for some years”, and said[[11]](#footnote-11):

“**It can never**, in their Lordships' opinion, **be of real benefit to the consumers of coal that colliery proprietors****should carry on their business at a loss**, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. **The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public. The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public.**” (emphasis added)

1. Following this decision, the 1906 Act appears to have fallen into desuetude. The Parliament did not consider amending it to bring it into line with the simpler United States counterpart. Lord Parker had distinguished the decision of the Supreme Court of the United States in the great case of *Standard Oil Co of New Jersey v United States*[[12]](#footnote-12). He said that the *Sherman Act*, as construed by the Supreme Court, impliedly exempted restraints of trade that were enforceable at common law so that the enforceability of the contract became the test of its legality. Their Lordships held that the 1906 Act, in contrast, dealt with a different subject-matter, namely contracts, combinations or actual or attempted monopolies that involved both detriment to the public interest and a requirement of “a sinister intention”[[13]](#footnote-13).
2. Once a final court of appeal has given an authoritative interpretation to a statute or to a general law principle, the legislature has a choice of either accepting the consequences of the Court’s decision as reflecting its own view of what the law should be or changing that result. The immediate lesson given by the Privy Council was that the criteria for the conduct proscribed by the 1906 Act created a significant impediment to controlling behaviour that, viewed with modern eyes, was plainly anti-competitive. Of course, the language chosen for statutory regulation of activities will be carefully scrutinised by the Courts. A central principle in that judicial scrutiny is the principle of legality that governs the relations between Parliament, the Executive and the Courts.
3. The Courts presume that Parliament does not intend to abrogate or suspend a fundamental freedom, unless its statute makes such an intention “unmistakably clear”[[14]](#footnote-14), as eloquently explained by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers Union*[[15]](#footnote-15). Drawing on observations of Lord Steyn in *R v Home Secretary;  Ex parte Pierson*[[16]](#footnote-16), Gleeson CJ said[[17]](#footnote-17):

“The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.”

1. The thoughtful consideration of such a dialogue between the three arms of government can be of significant benefit to each. The Courts will have regard to the purpose of legislation in arriving at their construction of it.
2. Over the last 30 years, the process and judicial approach to statutory construction have undergone a good deal of thought. There are at present some perceived differences between the strictly textual and purposive approaches. In *Zheng v Cei*[[18]](#footnote-18), French CJ, Gummow, Crennan, Kiefel and Bell JJ said:

“It has been said that to attribute an intention to the legislature is to apply something of a fiction[[19]](#footnote-19). However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor[[20]](#footnote-20). Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[[21]](#footnote-21), the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.”

1. The purpose or object of an Act, as an essential element of ascertaining its meaning, is emphasised in s 15AA of the *Acts Interpretation Act 1901* (Cth), which provides:

“**15AA Interpretation best achieving Act’s purpose or object**

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.”

1. Extrinsic materials have a role in arriving at the construction of an Act, as French CJ, Hayne, Crennan, Bell and Gageler JJ explained in *Commissioner of Taxation v Consolidated Media Holdings Ltd*[[22]](#footnote-22), namely:

“‘This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text’[[23]](#footnote-23). So must the task of statutory construction end. **The statutory text must be considered in its context.** **That context includes legislative history and extrinsic materials.** Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.”  (emphasis added)

1. To return to the regulation of cartel behaviour, one can understand why the Parliament would not want the Courts to construe legislation in a way that would make the law a dead letter. There was and remains a choice between a differently worded, but principles-based, draft amending the 1906 Act along the lines of s 1 of the *Sherman Act* that had already been tested and found to work in the United States or a highly prescriptive draft such as is found in the current cartel provisions in the *Competition and Consumer Act*.
2. Regrettably, the latter choice is one of befuddling complexity. It is about 20 pages long and comprises 22 sections, most with multiple subsections or permutations. In the nearly five years of its operation, not one prosecution has been commenced. Pollyanna might think that this is because of the business community’s profound respect for, and the marvellous effect of, Div 1 of Pt 4 in the context of Australian trade and commerce.
3. Anyone who attempts to grapple with the myriad of possible applications of these cartel provisions will recognise that there is not much chance of articulating a charge in an indictment that will be able to be established by proof beyond reasonable doubt and about which a judge could give directions to a jury that would survive an appeal. In one sense, the two offence provisions, in ss 44ZZRF and 44ZZRG, are simple enough. The first creates an offence if a corporation makes an agreement or arrangement or arrives at an understanding and it knows or believes, within the meaning of those concepts in Ch 2 of the *Criminal Code* (in the *Criminal Code Act 1995* (Cth)), that it contains a cartel provision. The second creates an offence if the corporation gives effect to such a cartel provision.
4. Part of the rub is found in the four page definition of “cartel provision” in s 44ZZRD. A cartel provision is one that satisfies the two criteria in s 44ZZRD(1), namely that it satisfies, *first*, one or other of the purpose/effect condition in subsection (2) or the purpose condition in subsection (3), and, *secondly*, the competition condition in subsection (4). Simple really, until one gets to those subsections. Here, one must bear in mind that “likely” is defined in s 44ZZRB as including “a possibility that is not remote” when the word is used in relation to a supply or acquisition of goods or services, the production of goods or the capacity to supply services. Of course, if “likely” is not used in that relation, it has its ordinary meaning of “probably”. The word “likely” is peppered throughout the definitions of the purpose/effect, purpose and competition conditions.
5. Thus, to take a simple example of one set of permutations, the purpose/effect condition is satisfied if the provision has, or is *likely* to have, the effect of directly or indirectly fixing the price of goods supplied or *likely* to be supplied by any or all of the parties to the contract arrangement or understanding[[24]](#footnote-24). The second component, the competition condition, is satisfied if, at least, two parties to the contract, arrangement or understanding, but for any contract, arrangement or understanding, would be or would be *likely* to be in competition with each other in relation to the supply or *likely* supply of those goods[[25]](#footnote-25).
6. All of this is directed to making illegal a deal by persons in trade or commerce to fix prices. Of course, the ways in which markets operate and human ingenuity must make the Parliament cautious about how to define what it wishes to proscribe. But, over complexity can be like Swiss cheese – a little dense but with holes in it.
7. Aside from the cartel provisions, another real problem wrought by drafting complexity is the variety of places in Commonwealth Acts that proscribe corporations, or others, from engaging in misleading or deceptive conduct and then define criteria limiting the field in which the proscription operates.
8. The Parliament gave the quietus to the elegantly simple s 52(1) of the *Trade Practices Act 1974* (Cth) that prohibited a corporation from engaging in conduct, in trade or commerce, that was misleading or deceptive or likely to mislead or deceive. One is now confronted with several Acts prohibiting such conduct, in relatively general but defined fields (such as s 18 of Sch 2 of the *Competition and Consumer Act 2010* (Cth) and see s 131A of that Act itself) and also in particular defined fields, such as s 1041H(1) of the *Corporations Act 2001* (Cth) and s 12DA(1) of the *ASIC Act*. The latter two provisions state:

“1041H(1) A person must not, in this jurisdiction, engage in conduct, in relation to **a financial product or a financial service**, that is    misleading or deceptive or is likely to mislead or deceive.

12DA(1) A person must not, in trade or commerce, engage in conduct in relation to **financial services** that is misleading or deceptive or is likely to mislead or deceive.” (emphasis added)

1. Each of these Acts has its own myriad of complex definitions of what is a financial product or a financial service or are financial services. Each Act gives a person, who suffers loss or damage by conduct of another in contravention of the prohibition, the right to seek compensation (e.g. s 1041I(1), s 12GF) coupled with substantively identical related exceptions and qualifications concerning proportionate liability. The apparent purpose of this legislative morass seems to be along the same lines in these bizarrely distinguished precise fields. Thus, it is difficult to discern why the public, their lawyers (if they can afford them) and the Courts must waste their time turning up and construing which of these statutes applies to the particular circumstance. Should it make any difference whether some mendicant engaged in conduct in relation to “financial services” (s 12DA(1)) or “a financial product or a financial service” (s 1041H(1))? In *Wingecarribee Shire Council v Lehman Bros Australia Ltd (In Liq)*[[26]](#footnote-26)I expressed some frustration, saying:

“Why is there a difference? Why does a court have to waste its time wading through this legislative porridge to work out which one or ones of these provisions apply even though it is likely that the end result will be the same?”

1. As Edmund Davies LJ lamented in *The “Putbus”*[[27]](#footnote-27):

“Were bewilderment the legitimate aim of statutes, the *Merchant Shipping (Liability of Shipowners and Others) Act, 1958*, would clearly be entitled to a high award. Indeed, the deep gloom which its tortuousities induced in me has been lifted only by the happy discovery that my attempt to construe them has led me to the same conclusion as my brethren.”

1. As this example shows, complexity can result in incomprehensibility. Plain English drafting is not the answer – indeed, it can contribute to the problem. One thing is clear, and that is that the ordinary person cannot readily understand most statutes, however they are expressed. Which man or woman in the street could read the thousands of pages of the *Corporations Act* or the *Competition and Consumer Act* in the thirsty search for knowledge of his or her rights and liabilities? The nineteenth century English judge, Maule J, was credited by Glanville Williams, I suspect inaccurately, with observing that:

“everybody is presumed to know the law except His Majesty’s judges, who have a Court of Appeal set over them to put them right.”[[28]](#footnote-28)

1. Sir Samuel Griffith CJ, however, did say in a judgment that a distinguished lawyer had once told him that “the law is always certain although no one may know what it is”[[29]](#footnote-29).
2. No doubt, some professionals – lawyers and accountants – enjoy the complexity of much of our important commercial statutes because that feature enables them to earn more in fees. This hardly leads to efficiency or any overall benefit to the community that could not be achieved by more principles-based drafting of legislation.
3. Business people, lawyers and other professionals are diverted from productive uses of their lives if they have to spend considerable time and effort making sure every “i” is dotted and “t” crossed in seeking to comply with multitudinous statutory scenarios, or work out which one is applicable to their situation.
4. On the other hand, legislation, such as the cartel provisions of the *Competition and Consumer Act*, that prescribes in great detail what is and is not an offence, invites those whose activities it could affect to consider carefully what scenarios may be permissible so that they can pass through holes in the legislative net.
5. That legislation requires those whom it affects to address each and every possible situation that it prescribes in order to navigate through the regulatory shoals and reefs in multiple narrow channels. There is no “big picture” or norm of conduct prescribed; instead, there is a plethora of minutiae that require compliance on pain of acting unlawfully or even criminally. That is generally not a good thing in attempting to regulate human behaviour.

**The practical impact of legislation on litigation**

1. The fifth and sixth impacts of the prescriptive legislative drafting policy that I suggested earlier concerned the effect of legislative drafting complexity on litigation from the perspectives of each of the parties and the Courts. The aphorism “justice delayed is justice denied” expresses a deeply embedded value of the common law. It stems from c 29 of Magna Carta where King John promised 799 years ago that:

“We will sell to no man, we will not deny or defer [i.e. delay] to any man either justice or right.”

1. If a statute prescribes a cascade of alternatives that might apply to a factual scenario, the parties will usually not want to take the risk of tying themselves to just one of those alternatives in their pleadings or evidence. Ordinarily, the parties cannot afford to take the risk of falling between two, or, more likely, among twenty or more legislative stools, so they will plead and lead evidence for every possible permutation. That costs time and money, usually a lot of each. It results in pleadings that, not unnaturally, reflect the statutory Hydra whence they were concocted. It lengthens the interlocutory processes and the trial as every stone is upturned and every rabbit burrow is explored. Then, some hapless judge is bombarded with rival submissions exposing all of those alternatives so as to ensure, from each side’s perspective, that each will be found or not found to have happened. For the judge that is just the start of the arduous process of making sense of what happened and whether it can and does fit into each of the multifarious legislative boxes, once he or she works out what the boxes are.
2. Now judgments do not just pop out of judge’s heads – they take time – a lot of time – to consider and write. The more that is in issue, the more complex the statutory provisions, the longer the time to write and, correspondingly, the longer and more impenetrable the reasons for judgment. Moreover, the more detail – or dross – that a judge needs to deal with, the greater the chance that he or she will make a mistake that can provoke an appeal. More importantly, the real issues, including findings about what happened, take longer to decide. The longer and longer time that judges must spend now hearing, then deciding, such complex cases, the less time they have to resolve other parties’ cases. Parties to litigation, generally, want the Court to give them an answer in simple terms – who won or lost. They want not treatises, but certainty, so that they can get on with life or business knowing what the legal parameters are.
3. Thus, there is a substantive access to justice issue that has developed over the last 30 years from the phenomenon of longer and longer cases. When I began practice at the bar in 1980, a long commercial case took 2 or 3 days. Now, that is just the time for counsel’s opening addresses. Whole briefs came in foolscap pages that could be folded over and tied with pink ribbon – popularly, if misleadingly, called “red tape”. Now, they arrive in court on trolleys – or worse still, USB sticks or iPads.
4. Criminal cartel cases are, of their nature, likely to be either guilty pleas or hotly contested jury trials. The more technicality in legislation, and the more alternatives, the greater will be the likelihood that defendants of substantial means will contest cases where there is every chance that they can find a defence in the technical morass created by the legislation. Moreover, the cases are almost necessarily going to be longer because the Crown will need to charge the various alternatives within the range of definitions that are reasonably open on the available evidence. The bamboozling wording of the legislation is likely to result in appeals, however carefully the judge crafts a summing up, and those appeals will have every potential to find that the judge made a technical, or perhaps substantive, misdirection due to the multiple layers of complexity. The financial burden on the defendants, who are entitled and have every right to be presumed innocent unless and until proven guilty beyond reasonable doubt, will be measured in millions and perhaps tens of millions of dollars. Then there is, of course, the incommensurable, but vitally important, emotional burden on the individuals involved.
5. The costs of the prosecution, and pre-charge investigation, will also be massive. But supervening these factors will be the burden on the judicial resources of the Court and in the impact of this, in turn, on its ability to hear and determine other parties’ matters. There will be lengthy pre-trial processes, as contemplated in the Original Jurisdiction (Indictable Offences) provisions in Div 1A of Pt III of the *Federal Court of Australia Act 1976* (Cth).
6. There will follow a no doubt lengthy trial and, if a conviction results, an appeal. These processes are intended to, and do, have serious consequences for all those involved. And, of course, the vital constitutional function of the Courts is to resolve, as an arm of the government of our society, disputes independently, transparently and in a reasoned, principled way according to law. But, if the devil is in the microcosmic, multilayered detail, the process of resolution may become protracted and, worse still, distracted into error.
7. Moreover, the Court system cannot be allowed to become overwhelmed by the need to deal with ever longer, more complex legislation offering multiple statutory choices that are each to be given separate meaning and operation and in which the participants must pay for the right to use the system. Such a scenario has the makings of a Kafkaesque nightmare not just for the immediate parties, but for the community generally.
8. As a society, it is time for us to question why Australian legislation has become so bulky and impenetrable. It defies credulity that any human being, even an officer in the legislative drafting branch of the Treasury, could read the over 3,800 pages of the *Income Tax Assessment Act 1997* (Cth) as a whole. That Act is, I venture to suggest, far less interesting and several times longer than Tolstoy’s *War and Peace*. Why? What is the Parliament seeking to achieve by this? It contains the seeds of attracting what Justice Antonin Scalia and his co-author, Bryan A Garner, described as the “unintelligibility canon of statutory interpretation”[[30]](#footnote-30). They quoted an observation of Dean Roscoe Pound[[31]](#footnote-31) that:

“There are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern. In such cases the statute must simply fall.”

1. Scalia and Garner commence their discussion, which, as one might expect, espouses the virtues of a textualist approach to statutory construction, with the following passage[[32]](#footnote-32):

“A legendary Irish Act provided that the material of an existing prison should be used in building a new prison and that the prisoners should continue their confinement in the old prison until the new one was completed[[33]](#footnote-33). This account is surely apocryphal, but the point it makes is revealing: To give meaning to what is meaningless is to create a text rather than to interpret one.”

1. Lest my complaint about the over burdensome, indeed overwhelming complexity and tortuosity of the Commonwealth’s current legislative drafting philosophy of prescription be thought idiosyncratic, let me quote from the executive summary of the Australian Law Reform Commission’s 2006 Report: *Same Crime, Same Time: Sentencing of Federal Offenders*[[34]](#footnote-34):

“Part IB of the *Crimes Act* became the focus of a number of criticisms. At a general level it was said that the legislation was unclear about whether it intended to achieve greater equality of treatment between federal offenders serving sentences in different states and territories; was complex and ambiguous; and omitted any detailed reference to the aims and purposes of sentencing. Specific provisions have been variously criticised for their complexity, poor drafting, inflexibility, limited scope, or because they lead to undesirable practical outcomes.”

1. That report dealt with another vitally important matter and has been ignored. Any judge who has sentenced using Pt IB of the *Crimes Act 1914* (Cth) will empathise with the Commission’s observations. Why are these criticisms – which are intended to be constructive and socially useful – apparently ignored? The *Income Tax Assessment Act 1997* (Cth) was intended to be a rewriting of the 1936 Act to overcome what, by 1996, had become a legislative Golgotha. The Treasury got part way through the exercise and gave up, leaving the absurdity of what we have now – nearly 6,000 pages of highly technical, unharmonised provisions in two substantial Acts, not to mention the associated taxation laws. The Treasury then set to work to confound corporate lawyers by making the *Corporations Act* as absurdly compartmentalised as the tax legislation, and as difficult to follow. Their more current piece-de-resistance is of course the *Competition and Consumer Act*.
2. Let me be quite clear. The business community of this country cannot be expected to deal with legislation of this unnecessary detail. The cost of trying to understand the discordant patchwork of wish list amendments that have been welded onto a simple body of an original Act must be truly mind boggling. Do we really need a telephone booksize statute to regulate corporations?
3. One of the more bizarre aspects of the winding up provisions in the 240 odd pages of Ch 5 of the *Corporations Act* is that there is no power to wind up certain foreign companies. For example, Saad Investments Company Ltd, a company involved in a multi-billion dollar international financial collapse, realised an alleged $83 million profit on its disposition of shares held in a corporation traded on the Australian Securities Exchange. That company could not be wound up here. Its Cayman Island liquidators wanted to transfer the remaining $7 million to their colony. That would result in the company not being liable to pay any tax at all on the profit it made here because the Commissioner of Taxation could not enforce an Australian tax debt in a foreign jurisdiction under the rules of private international law, reflected in the Cayman Islands law.
4. That company had engaged only in an isolated transaction or invested its funds, and s 21(3)(h) and (j) of the *Corporations Act* deemed that it did not carry on business in Australia and so was not a Pt 5.7 body amenable to winding up here. The irony was that, no doubt, the Treasury must have thought that it had good policy reasons to remove the Court’s plenary power to wind up any company, as had existed for over a century in earlier legislation. I cannot discern any policy reason justifying this cascade of complexity over which bodies are or are not in which parts of Ch 5 of the *Corporations Act* and why each needs its labyrinthine separate provisions[[35]](#footnote-35).
5. These examples I hope illustrate how complex, fragmented, yet purportedly comprehensive, drafting of some of the most significant laws affecting Australia’s trade and commerce have added layers of metaphorical red tape for no apparent policy purpose. There is no sense in making practitioners go into a maze of dense legislation to find the exact niche authorising a person or a Court to do something that should be simple. Such simplicity can be achieved by creating broad powers for a court to wind up any company present in the jurisdiction. The Courts generally can work out the cases where it is or is not appropriate to grant relief.
6. Lawyers, judges and uninitiated citizens, when considering legislation of general application to daily life, should not have to feel like Theseus entering the labyrinth to slay the Minatour in doing ordinary commercial work. Legislation will necessarily seek to reflect an objective that the Parliament, usually prompted by the Executive, seeks to effect. The choice is between principles-based and prescriptive drafting of the laws that give effect to that objective.
7. We have now endured the Commonwealth’s experiment with the prescriptive drafting style for over 20 years. It is time to recognise that it has not led to greater clarity or certainty. To the contrary, it has imposed substantive extra costs on the community, both directly in having to absorb and then comply with the minutiae and indirectly in the burden it has foist on the courts and those who litigate in them.
8. Because we live in a common law based legal system, the courts will always need to interpret and apply legislation. Those who seek to defend prescriptive drafting by arguing that it enables non-lawyers to know what and where the law is make the manifestly false assumption that their prescription in fact achieves this. It does not. It makes the law less, not more, accessible than principles-based drafting with the flexibility of judicial or administrative discretions and judge made rules or guides as to their exercise. Similar discretions are inherent in both comprehensive and principles-based styles, because the Parliament wisely recognises that in most situations, human problems and circumstances vary from case to case. You just cannot provide for every possibility in legislation any more than in life.
9. Individualised justice according to law is better than formulaic inattention to the infinitely variable factual positions of those to whom the law applies.

**Access to justice**

1. People will not have access to justice if the hurdles to litigating in a practical way are too high. That brings me to the Productivity Commission’s Enquiry on this topic.
2. As might be expected, the Commission brought an economist’s approach to its task. Unfortunately, in a number of significant respects that approach failed to appreciate the importance of the Constitutional separation of powers between each of the three arms of government. In particular, the draft report contains some recommendations that, *first*, equate the exercise of judicial power with a form of service delivery rather than the governmental function of authoritatively determining controversies independently and individually in accordance with law[[36]](#footnote-36), *secondly*, confuse the exercise of Executive power by statutory tribunals with judicial power[[37]](#footnote-37), *thirdly*, suggest that significant questions of practice and procedure in the conduct of litigation, such as the use of particular forms of issue identification by pleadings or other means, the adduction of expert and other evidence and discovery, are amenable to a one size fits all approach[[38]](#footnote-38) and, *fourthly*, and without apparent irony, access to justice ordinarily should be on the basis of charging the user the direct and indirect cost “of providing the service for which the fee is charged”[[39]](#footnote-39).
3. The Productivity Commission’s key draft recommendations to which I have referred were as follow. My first and second concerns arise from Ch 8. There the Commission suggested that[[40]](#footnote-40):

“Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence‑based evaluations, where possible.”

Chapter 8 went on to make generalised draft recommendations about how “organisations” should address ADR in their processes.

1. My third concern stems from the Commission suggesting in Ch 11 a number of changes in Court processes. These included that Courts should apply four elements from the Federal Court’s Fast Track model more broadly; namely, the abolition of formal pleadings, early focus on the real issues in dispute, more tightly controlling the number of pre-trial appearances and requiring the strict observance of time limits. It suggested that all courts should utilise the individual docket system for civil matters, unless that were not feasible[[41]](#footnote-41).
2. The Commission suggested that courts should limit general discovery and set out what it contended that Court Rules should prescribe[[42]](#footnote-42). It also sought feedback on whether the current Practice Note[[43]](#footnote-43) on discovery in the Equity Division of the Supreme Court of New South Wales was effective and its implications for access to justice[[44]](#footnote-44). The Commission suggested that Courts should consider implementing similar rules to Pt 31 of the *New South Wales Civil Procedure Rules* concerning expert evidence as well as how courts should regulate the adducing of expert evidence, and whether a single or court appointed expert should be ordered or required[[45]](#footnote-45).
3. The collective term “alternate dispute resolution” or “ADR” describes a variety of mechanisms for parties to resolve their differences before litigation or during it or as a true alternative to any court proceedings. The potential benefit to litigants and courts in Australia of ADR in relation to current litigation became very apparent in the late 1980s as a result of changes of attitude in New South Wales. There were two causes: *first*, the Commercial List judges in the Supreme Court of New South Wales began making extensive use of their powers to refer questions to referees for report, as a mode of trial[[46]](#footnote-46), that the Court subsequently considered adopting in whole or part and, *secondly*, on his retirement as Chief Justice, Sir Laurence Street AC KCMG began promoting the use of mediation both in and before litigation. That led to an efflorescence the use of this means of ADR.
4. These two causes changed the landscape of litigation and dispute resolution in Australia and reflected similar developments internationally. Now, many lawyers do mediation courses as part of their professional education. The techniques used in mediation give important insights in how to negotiate in a way that may lead to successful resolution of disputes.
5. One important factor that lawyers, and particularly barristers, do not appreciate unless they gain a proper understanding of mediation, is that “it is not just about the money”. Often one or more individuals, including the human faces of corporations, feel a genuine sense of grievance that they believe another party has not heard or understood. What such a person wants may include simply that the other acknowledges how he or she felt about what happened which enables him or her then to discuss resolution freed of that burden. And, concomitantly, the other person, hearing directly from the aggrieved person without the overlay of lawyers, many acknowledge a problem in his or her conduct and also feel clearer about how to resolve matters.
6. The opportunity mediation offers to parties is that they can find a solution to their issues consensually. This may include features that could not be ordered by a court. For instance, parties can renegotiate agreements or agree to new mechanisms to take their relationship further. In an appropriate case, the Courts can, and ordinarily will, encourage parties to engage in ADR, and have powers like that in s 53A of the *Federal Court of Australia Act 1976* (Cth) to order mediation of the whole or part of civil proceedings. That is part of a Court’s task to encourage, where appropriate, the more proportionate conduct of civil proceedings as suggested in Pt VB of that Act and its analogues[[47]](#footnote-47).
7. The Commission’s recommendations concerning procedural reforms are helpful and warrant consideration. Indeed, many may well be worth pursuing in some, but not all, courts in one form or another. I will discuss case management a little later. At the moment I want to address my fourth concern arising from the confusion of concepts inherent in the Productivity Commission’s provisional view that Courts are involved in service delivery and that justice is for sale at cost price.
8. This concern comes from the Commission’s draft recommendations in Ch 16 and particularly the first two which are[[48]](#footnote-48):

“Draft Recommendation 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

* in cases concerning personal safety or the protection of children
* for matters that seek to clarify an untested or uncertain area of law – or are otherwise of significant public benefit – where the court considers that charging court fees would unduly suppress the litigation.

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

Draft Recommendation 16.2

Fees charged by Australian courts – except for those excluded case types alluded to in draft recommendation 16.1 – should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:

* whether parties are an individual, a not‑for‑profit organisation or small business; or a large corporation or government body
* the amount in dispute (where relevant)
* hearing fees based on the number of hearing days undertaken.”

1. In today’s society, often the Executive government is a party to litigation, including as the prosecutor in criminal cases, or as a regulator seeking to enforce civil rights or obligations. Requiring individuals who cannot meet means tests or corporations to pay fees equal to the direct and indirect cost of the litigation of a dispute will be likely to have a substantive deterrent effect not just on the willingness of people to litigate but on their ability to exercise their common law right of access to the Courts – i.e. to have access to justice in a meaningful way.
2. A legislative requirement that a person pay a fee or tax equal to the direct and indirect cost of providing the Court and its facilities to hear a matter raises substantive questions of the constitutional validity of such measures that the Courts may have to resolve. But, it also raises a significant difference between the dry view of an economist and the utilitarian principle that the Courts of justice must be accessible to all. The principle that anyone must be able freely to apply to the Courts was explained by Lord Wilberforce in *Raymond v Honey*[[49]](#footnote-49), who said:

“any act done which is calculated to obstruct or interfere with the due course of justice, or the lawful process of the Courts, is a contempt of court.”

1. In an early case, *The King v Smithers, Ex Parte Benson*[[50]](#footnote-50), the High Court held that an Australian citizen had the constitutional right:

“to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions**. He has a right to free access to** its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and **the Courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it**.” (emphasis added)

1. Where the government in many cases will be the defendant, its imposition of prohibitive Court fees may have impacts that have nothing to do with the narrow, but professionally understandable, focus of economists on ideas of cost recovery. As a matter of practicality, such an impost may make government decisions virtually unchallengeable by ordinary citizens and businesses. That has profound and highly undesirable social consequences in a democracy that cannot be measured or quantified in monetary or economic terms.
2. If parties are not to take the law into their own hands they must be able to apply to the Courts to enforce their rights and the liabilities of others. When I say “able”, I mean as a matter of practical reality, including within the parties’ financial means. The availability of judicial power to quell disputes independently and authoritatively is a hallmark of a democratic society governed by the rule of law. Justice is not capable of being for sale. That does not mean that the Parliament and the Executive may not be able to impose reasonable fees for particular steps in litigation.
3. In introducing the *Legal Aid and Advice Bill 1948* (UK) into the House of Commons, the Attorney-General, Sir Hartley Shawcross recounted a very famous sentence passed by Maule J in the 1840s in a bigamy case[[51]](#footnote-51), saying:

“A hawker convicted of bigamy urged in extenuation that his wife had left her home and children to live with another man, that he had never seen her since and that he had married the second wife in consequence of the desertion of the first.

Mr. Justice Maule said, ‘I will tell you what you ought to have done in the circumstances, and if you say you did not know I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages. That would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the ecclesiastic courts for a divorce *a mensa et thoro*. That would have cost £200 or £300 more. When you had obtained a divorce *a mensa et thoro*, you only had to obtain a divorce *a vinculo matrimonii*. That procedure might possibly have been opposed in all its stages in both Houses of Parliament and altogether those proceedings would have cost you £1,000. You will probably tell me that you never had one-tenth of that sum, but that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor.’ Then he added, ‘You will be imprisoned for one day.’”

1. The economists’ catch cry of user pays runs headlong into that value when it comes to governments charging significant fees for access to the Courts. The justification offered is that the persons who use the Court system should pay for the time they take in it. Now it is not far to seek that this is a threat to the independence of the Courts and the entitlement of everyone, rich or poor, to have access to them in order to obtain justice. It is the function of government to **provide**, not tax, an effective and authoritative Court system that can quell controversies. That is why the judiciary is the third arm of government in a democracy. The Commission would not dream of suggesting that constituents pay, other than through their ordinary taxes, a fee to make representations to or visit their Parliamentarians. It is just as wrongheaded to do so in respect of their right of access to the Courts.

**Case Management**

1. Competition, and criminal cartel, cases are likely to be complex, lengthy and costly. Although these cases normally will involve corporations and often a government party[[52]](#footnote-52), it is likely that the criminal cases will also have individuals as defendants. Some individuals may be very senior executives and their costs may be covered by their employer or directors and officers’ insurer. However, other individuals may be more junior and may be only able to afford modest or legally aided representation. The defendants often will have quite disparate interests and may wish to raise a variety of different issues. All of these factors suggest that criminal cartel trials will require significant pre-trial case management with a view to them running as efficiently and as economically as possible having regard to the resources particularly of individuals to maintain their defences.
2. As I mentioned earlier, the length of litigation, and particularly trials, today is significantly longer than in the past. The Courts have been able to develop their inherent and implied powers to case manage civil proceedings. Those powers have been supplemented by statute, such as Pt VB of the *Federal Court of Australia Act* for the civil side and Div 1A of Pt III of that Act on the criminal side. In *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[[53]](#footnote-53), French CJ, Kiefel, Bell, Gageler and Keane JJ referred to the fact that case management is an accepted aspect of the system of civil justice administered in Australia. This reflected the common law’s recognition that, as the Court said[[54]](#footnote-54):

“a different approach was required to tackle the problems of delay and cost in the litigation process. Speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution of proceedings. The achievement of a just but timely and cost-effective resolution of a dispute has effects not only upon the parties to the dispute but upon the court and other litigants.”

1. Their Honours said that parties continued to have the right to bring, pursue and defend civil proceedings in the Court “but the conduct of those proceedings is firmly in the hands of the Court”. They pointed out that it was the duty of the parties and their lawyers, under provisions such as ss 37M and 37N of the *Federal Court of Australia Act*, to assist the Court in furthering the overarching or overriding purpose of conducting the proceedings as quickly, efficiently and inexpensively as possible, according to law, to aid in the just resolution of disputes.
2. At some point, the Courts may have to address whether the manner of hearing, including the adduction of evidence at trials, itself, has become too burdensome. The judicial method is open and transparent. Judges and juries must decide cases on admissible evidence. But is there just too much that is admissible and is that a systemic problem?
3. No other decision-making process that we use in our society requires the decision-maker to listen to and read the amount of material that modern trials call “evidence”. Some cases have lawyers who tender computer files comprising thousands of documents that the judge is supposed to read and analyse in order to decide the case on the evidence. Boards, cabinets, ministers and other administrative decision-makers all act on summaries of material or key points. They do not, ordinarily, go to the source material. Yet, not only do courts go to that very often voluminous source material, they must be taken to it, read it, analyse it, and then write about it.
4. Some of this is made necessary by statutes like s 18 of the *Competition and Consumer Act*. That section and its predecessor, s 52, effectively abolished the parol evidence rule in respect of written contracts which the common law developed to keep out of evidence the course of negotiations leading up to a written contract containing all the terms that the parties agreed.
5. Now, even litigation involving very large commercial transactions will be mired by lengthy evidence and judicial writing about every step culminating in a contract settled by teams of lawyers at leading firms that contains an entire agreement clause, because one party alleges that some remark or email suggested a state of affairs that the contract contradicts. I will leave to one side the undermining effect internationally this has for Australia as a country with which to do business. Critically, it means that the Courts cannot confine themselves to a crisp question of whether a written agreement provides for one outcome or another. Instead, one is required, like the oracle, to go through the entrails of the history of the transaction to discern whether someone did not mean what they later said or said what they later did not mean so as, possibly, to deny efficacy to a contract that, at the time, the parties thought was the last word on a done deal.
6. Similarly, in criminal cases, we require every stone to be upturned, put under a microscope, tested for DNA and analysed, let alone what happens to live witnesses. The question is whether this is too burdensome for the long term viability of our system of trial. It is not the function of the Productivity Commission or other branches of the Executive to select the answers, although they are right to raise the questions and to provoke the Courts to think again.
7. If our system of trial continues to require the volume of evidence to be tendered that we are now seeing in the computer age, trials will become beyond the means not only of individual parties but beyond the capacity of a judge to deal with them. Recently, Justice Bennett reserved her decision in the *Apple v Samsung* patent litigation after 180 hearing days. The task of writing a judgment or judgments for that is truly Herculean.
8. Australia has virtually abandoned the civil jury mode of trial over the last 50 years. I doubt that this made litigation quicker or better, although the number of technicalities some jury advocates can throw into such trials can make them longer than they need be. Our requirement that judges give reasons for their substantive decisions ensures transparency. But, as trials become longer, they require analysis of a plethora of legislative possibilities and voluminous evidence, a task that takes the judge, as the sole author of a judgment, more and more time. This has at least two impacts on the ability of Courts to do their work – writing time is time out of court on thinking about and then crafting longer and longer reasons. That means other cases cannot be heard. Moreover, the expense that this creates for the parties makes litigation accessible for fewer and fewer people.
9. We cannot say that we have a system of justice that is worth having if citizens of average means, or even of the means of professionals, cannot afford to go to court. Mr Justice Maule’s hawker is really the average member of our community. If such people cannot get representation to litigate matters that are serious for them because the cases will take too long and absorb too much of their resources, the system is likely not to be serving the community as well as it could or should.
10. Competition cases appear to accept, as a given, the necessity for lengthy detailed evidence. They reflect a general trend in litigation. The lawyer’s and judge’s challenge in the 21st century is to consider whether all the evidence that is currently treated as relevant or admissible is really necessary and whether there are more efficient, inexpensive, but just ways to put before the Courts the material for decision. Centuries ago, the common law developed exclusionary rules of evidence, such as the parol evidence rule, to contain the size of litigation and so ensure that there was a real and practical opportunity for ordinary members of the community to have access to justice.
11. The complexity of current legislation and the progressive expansion of what is justiciable may be curtailing rather than enhancing our society’s practical ability to provide the community at large with access to justice. We need to think again.

1. par 1.4 [↑](#footnote-ref-1)
2. pars 3.1, 3.3.1, 3.3.2, 3.3.3 [↑](#footnote-ref-2)
3. par 4.4 [↑](#footnote-ref-3)
4. par 6 [↑](#footnote-ref-4)
5. Parliamentary Counsel: *Reducing Complexity in Legislation* at [7]-[9] [↑](#footnote-ref-5)
6. *The King and Attorney-General of the Commonwealth v The Associated Northern Collieries* (1911) 14 CLR 387 [↑](#footnote-ref-6)
7. *Adelaide Steamship Co Ltd v The King and the Attorney-General of the Commonwealth* (1912) 15 CLR 65 [↑](#footnote-ref-7)
8. *Attorney-General of the Commonwealth v Adelaide Steamship Co Ltd* [1913] AC 781; 18 CLR 30 [↑](#footnote-ref-8)
9. [1913] AC at 800 for himself and Viscount Haldane LC, Lords Shaw of Dunfermline and Moulton [↑](#footnote-ref-9)
10. 6 E & B 47 [↑](#footnote-ref-10)
11. [1913] AC at 809-810 [↑](#footnote-ref-11)
12. 221 US 1 (1910) [↑](#footnote-ref-12)
13. [1913] AC at 801 [↑](#footnote-ref-13)
14. *Coco v The Queen* (1994)197 CLR 427 at 435-438 per Mason CJ, Brennan, Gaudron and McHugh JJ [↑](#footnote-ref-14)
15. (2004) 221 CLR 309 at 329 [21] [↑](#footnote-ref-15)
16. [1998] AC 539 at 587, 589 [↑](#footnote-ref-16)
17. in a passage approved by French CJ, Gummow, Hayne, Crennan and Kiefel JJ in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15] [↑](#footnote-ref-17)
18. (2009) 239 CLR 446 at 455-456 [28] [↑](#footnote-ref-18)
19. *Mills v Meeking* (1990) 169 CLR 214 at 234; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339-340 [↑](#footnote-ref-19)
20. *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 [159] [↑](#footnote-ref-20)
21. (2002) 123 FCR 298 at 410-412 [↑](#footnote-ref-21)
22. (2012) 293 ALR 257 at 268-269 [39] [↑](#footnote-ref-22)
23. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] [↑](#footnote-ref-23)
24. s 44ZZRD(2)(a) and (c) [↑](#footnote-ref-24)
25. s 44ZZRD(4)(b) and(c) [↑](#footnote-ref-25)
26. (2012) 301 ALR 1 at 247 [947]-948] [↑](#footnote-ref-26)
27. [1969] P 136 at 152 [↑](#footnote-ref-27)
28. Glanville Williams: *Criminal Law: The General Part* (2nd ed 1961) at 290 [↑](#footnote-ref-28)
29. *Riddle v The King* (1911) 12 CLR 622 at 629 [↑](#footnote-ref-29)
30. Antonin Scalia and Bryan A Garner: *Reading Law: The Interpretation of Legal Texts* (2012): Thomson/West, St Paul at 134 [↑](#footnote-ref-30)
31. 3 *Jurisprudence* at 493 (1959 [↑](#footnote-ref-31)
32. ibid at 134 [↑](#footnote-ref-32)
33. Ex from Ernst Freund, *Standards of American Legislation* 225-226 (1917; repr 1965) [↑](#footnote-ref-33)
34. ALRC 103 at p 86 [↑](#footnote-ref-34)
35. *Akers (as joint foreign representative) v Saad Investments Company Limited: (In Official Liquidation* [2013] FCA 738 at [19] per Rares J, [2014] FCAFC 57 at [72] per Allsop CJ, Robertson and Griffiths JJ agreeing [↑](#footnote-ref-35)
36. Ch 8 [↑](#footnote-ref-36)
37. Ch 8 [↑](#footnote-ref-37)
38. Ch 11 [↑](#footnote-ref-38)
39. Ch 16 [↑](#footnote-ref-39)
40. draft recommendation 8.1 [↑](#footnote-ref-40)
41. draft recommendation 11.4 [↑](#footnote-ref-41)
42. draft recommendation 11.5 [↑](#footnote-ref-42)
43. SC Eq 11 [↑](#footnote-ref-43)
44. Information request 11.3 [↑](#footnote-ref-44)
45. draft recommendations 11.8, 11.9, 11.10 [↑](#footnote-ref-45)
46. see *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd* (2012) 203 FCR 520 at 531-532 [37]-[41] where I discussed the power) [↑](#footnote-ref-46)
47. see *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Marketing Pty Ltd* (2013) 303 ALR 199 at 210-212 [53]-[57] per French CJ, Kiefel, Bell, Gageler and Keane JJ; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [92]-[93], [98]; see too *PFR II SA v OMFS Co I Ltd* [2014] 1 WLR 1386 at 1399-1400 [56]; [2013] EWCA Civ 1288 per Briggs CJ with whom per Briggs Beatson and Maurice Kay LJJ agreed [↑](#footnote-ref-47)
48. draft recommendations 16.1 and 16.2 [↑](#footnote-ref-48)
49. [1983] 1 AC 1 at 10 [↑](#footnote-ref-49)
50. (1912) 16 CLR 99 (following the decision of the Supreme Court of the United States in *Crandall v State of Nevada* 6 Wall 35 at 44; see too *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ [↑](#footnote-ref-50)
51. Hansard: HC Deb 15 December 1948 Vol 459 at 1221-1222 [↑](#footnote-ref-51)
52. the Crown or the Australian Competition and Consumer Commission [↑](#footnote-ref-52)
53. (2013) 303 ALR 199 at 210-212 [51]-[57] [↑](#footnote-ref-53)
54. 303 ALR at 210 [51] [↑](#footnote-ref-54)