

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
COMMERCIAL LAW ASSOCIATION OF AUSTRALIA
“50 YEARS OF COMMERCIAL LAW”
OPENING ADDRESS
31 JULY 2015*

1. Good morning everyone. I will begin by respectfully acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and paying my respects to their elders, both past and present. It is a pleasure to open this commemorative conference celebrating 50 years of the Commercial Law Association, and commercial law more generally. It is a particular pleasure because this is one of the few anniversaries where I can boast my youth and say that I was not practising at the time the commemorative event occurred, in this instance the formation of the Commercial Law Association. This does however come with the one downfall that I cannot describe the commercial or legal scene in Australia prior to the existence of the Commercial Law Association. Ever since I practiced as a solicitor and barrister in commercial law, the CLA, I am pleased to say, has been there.

2. I am nonetheless sure that I am not biased in considering the CLA as a permanent fixture, crucial to the Australian commercial and legal sectors. The CLA has worked tirelessly in fostering an understanding of commercial law and practice in both the commercial and legal sectors, and encouraging debate on possible reform for the benefit of both of those sectors. Given how much this area of law has changed since the CLA's inception, I'm sure we are all glad that the CLA has been around to guide us through the various developments and amendments.

3. Even to recount, at a very broad level, the history of commercial law in the last fifty years would take longer than anyone cares to hear. When one considers the history of corporations alone, it is a convoluted one in which the CLA has seen no less than five different attempts to create a unified scheme.

4. First, when the CLA began in 1965, the States had recently implemented the *Companies Act* modelled on the 1961 “Uniform Companies Bill”. The legislation comprised a heavenly succinct 385 sections. Then, second, in

* I express my thanks to my researcher, Miss Madeline Hall, for her assistance in the preparation of this address.

1981, a co-operative scheme was introduced by the Commonwealth *Companies Act* and *Companies (Acquisitions of Shares) Act*. Each State passed the corresponding Companies Code and Companies (Acquisition of Shares Code). This was followed by the third attempt, in 1989, to have a federal law governing companies. That was of course defeated in the decision of *New South Wales and the Commonwealth*¹. After that came, fourth, the purported conferral of jurisdiction on the Federal Court as per the *Corporations Act 1989*. It was only following the defeat of this in *Re Wakim*² that fifth and finally, a fully unified system was achieved with the state referral of power under the current *Corporations Act 2001*. Mercifully, this last attempt appears to have been successful. Although it is well to remember that it is technically dependent on each State's ongoing referral of power.³

5. Needless to say, the constant legislative amendments across all aspects of commercial law have kept everyone, not least the Commercial Law Association, busy. As I said before, it has been a crucial component in developing the education and understanding of commercial law and practices in Australia. It has also, particularly through its refereed journal, the *Commercial Law Quarterly*, frequently vocalised critiques on the state, or should I say flux, of commercial laws.
6. I do not think I am being unduly dejected or critical when I am tempted to side with some of these criticisms. One in particular, is the view that it is quite disappointing, albeit surprising, that despite all of the attempts to unify and amend commercial laws, the result is still something quite undesirable. By that I mean to complain not about the fact of regulation per se. Rather, the manner in which the laws are expressed. It is the complexity and futile length of the current laws that I consider to be undesirable.
7. To quote Lee Loevinger, speaking even before the CLA was born, “[i]t is one of the greatest anomalies of modern times that the law, which exists as a public guide to conduct, has become such a recondite mystery that it is incomprehensible to the public and scarcely intelligible to its own votaries.”⁴ I regrettably consider commercial law in Australia as one of the most obvious examples of this anomaly today.

¹ *New South Wales v Commonwealth* (1990) 169 CLR 482.

² *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

³ The latest agreement of an extension of the referral of power was on 24 August 2011 to expire in 2016 (Corporations (Commonwealth Powers) Act 2001- Corporations (Commonwealth Powers) (Reference Period Extension) Proclamation 2011 (2011-128) LW 3 March 2011.

⁴ Loevinger, 'Jurimetrics: The Next Step Forward' (1949) 33(5) *Minnesota Law Review* 455, 455.

8. Consider, for instance, the cartel conduct provisions in Division 1 of Part 4 of the *Competition and Consumer Act*. As one Federal Court judge has commented in the *Commercial Law Quarterly*, section 44ZZRA "...commences a 20-page long labyrinth with the disarming words: 'The following is a simplified outline of this Division'".⁵ It was the same judge who eloquently described the multiple provisions that replaced section 52 of the *Trade Practices Act* as "legislative porridge".⁶ In fact, any division of legislation that requires a simplified outline, should be simplified itself until an outline is no longer needed.
9. It is not as if this problem is confined to one aspect of commercial law either. Aside from competition, there is of course the notorious *Income Tax Assessment Acts*. Note we all still have to deal with a duality of income tax statutes, along with the ratings act.⁷ This is not to mention the cheerfully named *A New Tax System (Goods and Services Tax) Act 1999*. I think this multiplicity is a travesty in itself. Although the division of the assessment and ratings acts is probably constitutionally necessary.
10. However, in addition to this, the provisions within the pieces of legislation themselves are nothing short of horrendous. A particular favourite of mine was section 221YHAAC, subsection (2) paragraph (e) subparagraph (iii) subdivision (A). It is commendable that that specific section has in fact now been repealed, but why did it ever exist at all, let alone for around 20 years? And why is it the case that since 2012 there have been another 15,000 pages of new tax rules?⁸ Clearly the problem is not going away, even if section 221YHAAC has.
11. Beyond the tax legislation I fear a similarly alarming trend is also emerging in the *Corporations Act*. Already there is section 1317DAJ, subsection (2) paragraph (b) and subparagraph (vi). Or section 206EAA, subsection (1) paragraph (a) subparagraph (ii). Or section 324DAB, subsection (2) paragraph (d) subparagraph (ii). To modify Walter Scott's quote, oh what a tangled web we weave, once we legislate with too much ease!
12. Compounding the problem of the seemingly exponential growth in legislative acts is the corresponding growth in subordinate legislation and regulations. From the 1960s to the 2000s the ratio of regulations to sections in the relevant

⁵ Rares, 'Competition, fairness and the courts' (2014) Sept-Nov *Commercial Law Quarterly* 17 (Rares), 17.

⁶ *Wingecarribee Shire Council v Lehman Bros Australia Ltd (In Liq)* [2012] FCA 1028; (2012) 301 ALR 1 at 247, [947]-[948].

⁷ *Income Tax Rates Act 1986* (Cth).

⁸ Anderson, 'Tax paperwork pilling up under coalition' *Australian Financial Review* (Sydney) 24 July 2015, 7.

corporations legislation has decreased, from 1 regulation to every 14.8 sections, down to 1 regulation to every 2.4 sections.⁹ While this may be justified on the grounds of allowing primary legislation to be kept clear and simple, as I have just illustrated, this is not what is in fact occurring.¹⁰ It does therefore seem that we have caught the worst of both worlds, where we are increasingly extending primary legislation *and* our reliance on subordinate regulations.

13. The ramifications of this problem are well known. It affects compliance with, accessibility to and enforcement of, the law. The latter effect is particularly evident by the enforcement history of the 20 pages on cartel conduct in our *Competition and Consumer Act*. Despite being introduced in 2009, there is yet to be any criminal prosecution for this offence.¹¹ This is in comparison to the United States' one provision in the *Sherman Act*, which has many convictions to its name and can be explained "...to a jury of 12 citizens who are not endowed with the reasoning power or intellect of Ludwig Wittgenstein".¹² That is not to say that the far more generalist style of the *Sherman Act* is necessarily preferable. Undoubtedly a balance needs to be struck between broad outlines and assiduous detail. However, there is no doubt in my mind that at present we are too focused on detail and not on outline.

14. Another indication that our focus is out of kilter, is section 46 of the *Competition and Consumer Act*. "The total number of actions brought by the ACCC in respect of section 46 in 37 years represents only 0.5% of all the complaints received by the ACCC in this area in the last 10 years".¹³ Both commentators and the ACCC Chairman attribute this low proceedings rate as in part due to the "number of hurdles" that have to be satisfied to bring a successful action.¹⁴ I believe this complaint, as with the cartel conduct offence, is inextricably linked to the structure, length and wording of the provisions. It is not simply, as some would have you believe, due to a purpose, rather than an effects test.

15. Of course, the problem of unduly complex and long legislation is being experienced worldwide. In America the rather devastating observation can be

⁹ Bottomley, 'Where did the law go? The delegation of Australian corporate regulation' (2003) 15 *Australian Journal of Corporate Law* 1 (Bottomley), 6.

¹⁰ Bottomley, 9.

¹¹ See however, rumours of a potential prosecution in *Australia reviews its Immunity Policy for Cartel Conduct* (28 May 2013) Clayton Utz Publications http://www.claytonutz.com/publications/news/201305/28/australia_reviews_its_immunity_policy_for_cartel_conduct.page.

¹² Rares, 19.

¹³ Laman and Nehme, 'Section 46 of the Competition and Consumer Act: The need for change' (2014) 22 *Australian Journal of Competition and Consumer Law* 112 (Laman and Nehme), 122.

¹⁴ Laman and Nehme, 121 and 122.

made that the Lord's Prayer is 66 words, the Gettysburg Address 286 words and the Declaration of Independence 1,322 words. Yet government regulations on the sale of cabbage total 26,911 words.¹⁵

16. In England as well, Lord Justice Harman had cause to comment the following in one case back in 1964: "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet but I have been leaping from tussock to tussock as best I might, eventually, pale and exhausted, [reaching]... the other side."¹⁶

17. Although the problem of unduly long and complex legislation may not be unique to Australia or this particular time period, comparisons do show that we definitely have a particularly severe case of it at the moment. Using again the example of competition, our act is approximately 20,000 words long. Yet, the equivalent counterparts in New Zealand, the UK and the US are all less than 5,000 words long.¹⁷ Comparisons between our *Corporations Act* and corresponding acts, such as the UK's *Companies Act*, are also unflattering. It therefore seems that, if words are a lawyer's commodity, the Commonwealth is misusing its market power and causing an oversupply, with all the detrimental consequences you would expect.

18. A natural question to ask is, why? Why is Australia so particularly plagued with the problem of unnecessarily long and complex legislation? Looking again at the misuse of market power and cartel conduct provisions, I think the answer to this question is that it is because of the use of prescriptive, rather than principled drafting techniques.

19. The prescriptive drafter insists on detail, to the point of complexity. They seek to formulise the infinitely variable factual possibilities of life. They have "unquestioning faith in the ability of Parliament [indeed of humans in general] to accurately comprehend problems and legislate for their solution".¹⁸ Of course these are "heroic assumptions"¹⁹ predicated on a false premise; that

¹⁵ David McIntosh in the National Review, quoted in Genesereth, 'Computational Law The Cop in the Backseat' (2015) CodeX: The Stanford Center for Legal Informatics Papers <http://logic.stanford.edu/complaw/complaw.html>.

¹⁶ *Davy v Leeds Corporation; Central Freehold Estates (Leeds) Ltd v Leeds Corporation* [1961] 1 WLR 1218, 1225 (Harman LJ).

¹⁷ Fels, Taylor and Smith, 'Simplifying Australia's competition laws' (2014) 30(8&9) *Competition and Law News* 94 (Fels, Taylor and Smith), 94.

¹⁸ Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14 *Sydney Law Review* 474 (Ramsay), 483.

¹⁹ Ramsay, 483.

is, the drafter's belief that words provide certainty. However, as every lawyer knows, words are the antithesis of certainty. As Oliver Wendell Holmes stated, "a word is not a crystal, transparent and unchanged; it is the skin of a living thought..."²⁰ This means, from a statutory interpretation point of view, "[t]he more words [there are], the more scope [there is] for dispute about meaning, the more chance of inconsistency and obscurity, the less likelihood of accommodation to change and the greater the risk of uncertainty and error."²¹ Understandably a judge, tasked with a statutory interpretation dispute, may respond as Eliza Doolittle did in *My Fair Lady*: "Words, words, words! I'm so sick of words".

20. It is ironic that conversely, the broader, more general and principle-based the provision is, the greater the chance of certainty. Of course, principled drafting "...necessarily involves a degree of delegation with respect to the interpretation and implementation of these principles".²² It is perhaps unsurprising therefore, that a judge, to whom the task of interpretation would most likely be delegated to, is advocating for such an approach to drafting.

21. However, I hope that sort of cynicism does not lead people to discount the complaints against prescriptive drafting. It is not as if the detriments of prescriptive drafting are imagined. After all, the office of parliamentary counsel itself specifically identifies aversions to principle-based legislative drafting and judicial discretion as two causes of legal complexity.²³ Further, it is the prescriptive approach to drafting which has meant the *Competition and Consumer Act* is as it currently stands; primarily focusing in great detail on forms of behaviour, rather than on key principles of whether the behaviour, "whatever its form, substantially lessens competition".²⁴ Submissions to the recently completed Harper review have in fact demonstrated that a principled approach to drafting would allow sections like 46 to be reduced from the current 1,299 words to only 39 words.²⁵ Regrettably the model legislative provisions in the Final Report of the Harper review have not adopted this specific suggestion or a general change in drafting technique.²⁶

²⁰ *Towne v Eisner* (1918) 245 US 418, 425 (Holmes J).

²¹ Goode, 'The Codification of Commercial Law' (1988) 14 *Mon LR* 135, 156.

²² Ramsay, 475.

²³ Office of Parliamentary Counsel, *Causes of complex legislation and strategies to address these* (27 July 2015) Office of Parliamentary Counsel
http://www.opc.gov.au/clearer/docs/ClearerLaws_Causes.PDF.

²⁴ Fels, Taylor and Smith, 95.

²⁵ Compare Fels, Taylor and Smith, 99 and the current s 46, *Competition and Consumer Act 2010* (Cth).

²⁶ Harper, Anderson, McCluskey, O'Bryan, 'Competition Policy Review Final Report' (31 March 2015) <http://competitionpolicyreview.gov.au/final-report/>, Appendix A Model Legislative Provisions and Recommendation 22. The model section 46 is still 660 words.

22. However, it is suggestions like these and the international comparisons that I made earlier that remind practitioners and associations like the CLA that the status quo is by no means normal, necessary or needed. It is not something which must be put up with. To extend Justice Rares' comments on competition law, more broadly to all commercial legislation, "[t]he business community of this country cannot be expected to deal with legislation of this unnecessary detail."²⁷ What is so peculiar about Australian commerce that it requires a "telephone book-sized statute of laws",²⁸ when for other countries a slim paper back will suffice? Is our particular form of commerce really so very complex south of the equator that it requires a 400% increase in the length of laws to that in the northern hemisphere?²⁹ I think not.

23. However, given the longstanding nature of this complaint, I am unsure quite what it will take for the needed change in parliamentary drafting attitudes to occur. This is in part because I am unsure what is causing the prescriptive approach in the first place. Is it simply a misguided belief in the powers of parliamentarians to predict the future? A bad habit difficult to shake? Or is it more intentional? A constitutional attempt to consolidate Commonwealth power by covering the field through ridiculously comprehensive legislation? I am unsure. I am also unsure how so much legislation could be rewritten without losing the bulk of jurisprudence that has and is continuing to build up around each of the key commercial law statutes.

24. What I am sure about is that the status quo is not desirable, if even manageable, and that the wood has been lost for the trees. As James Madison observed, "[i]t will be of little avail to the people that the laws are made by men of their own choice if the laws [are]... so voluminous that they cannot be read, or so incoherent that they cannot be understood."³⁰ After fifty years of statutory splurge, our body of commercial law needs to become more accessible and comprehensible. I think this will fundamentally require a change in the approach to drafting from a prescriptive style to a principle-based one. Although difficult, I have no doubt that, if this could be achieved, the benefits to the commercial, social and legal spheres in Australia would be unquantifiable.

25. I would therefore encourage the CLA and its members to continue the hard work of the last 50 years in educating the commercial, corporate and legal communities and in advocating for commercial law reform. On that note, I must thank today's speakers, in advance. All of the sessions look set to be

²⁷ Rares, 23.

²⁸ Rares, 23.

²⁹ See above n 17.

³⁰ Madison, 'The Federalist No 62 The Senate' *Independent Journal* (New York), 27 February 1788.

fascinating, and I am pleased to see will cover the full gamut of topics within commercial law. It is precisely conference programs like today's which provide members of the commercial and legal communities an opportunity to come together and develop a better understanding of the law. Such events are also invaluable in generating suggestions for improvements and reform. As I have indicated, in my opinion, now that a unified commercial and corporate law system is firmly in place, great attention needs to be directed to the structure and style of the law. Admittedly, a simplified set of commercial laws would probably mean that the very need for and reliance on associations like the Commercial Law Association, would diminish to a degree. However, I cannot think of a worthier goal for the association to aspire to for the next 50 years. In this, and all its other endeavours, I wish the association the best of luck. I congratulate it on reaching, what I will politely refer to as its 20th anniversary of its 30th birthday. I hope everyone enjoys today's conference.