North West Law Association and
Murray Mallee Community Legal Service

Law — Complexity and Moral Clarity

Chief Justice Robert French AC
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Introduction

Complaints about complexity in the law are legion. They are founded on legitimate concerns. Unsurprisingly, the answer to those complaints is not a simple one.

The primary complaint is that our statute laws are becoming increasingly complex. They are therefore less accessible to the public and even to non-specialist readers within the profession. It is correspondingly more difficult for people who are bound by them or their advisors to discern their purpose. The law to that extent loses moral clarity — it is harder to know what it is good for. Acceptance tends to rest upon other foundations, respect for the democratic process and concern about the consequences of non-compliance with the law.

Complicated statutes are not the only sources of complexity in the law. Simple laws can attract their own kind of complexity. By enacting a law in short, broadly-stated terms, the parliament passes to the courts the task of interpretation and application across what may be a vast array of circumstances to which the law can be applied. In some cases to read that kind of law with accuracy requires the statute in one hand and a set of law reports in the other. There are many examples of both kinds of complexity. What follows is a tale of two sections in the one Act — one simple and one difficult.

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The widow and the tax law — a tale from the trenches

In 2005, the Full Court of the Federal Court heard a case about a 90 year old widow, Mrs McNeil, who held a few thousand shares in St George Bank Ltd.[1] In 2001, she received a little windfall, $576.64 from the Bank in connection with Sell Back Rights issued to her as part of a capital restructuring which the Bank had undertaken that year. The Commissioner of Taxation said that $514.00 of that money had been received as taxable income and if it wasn't income it was a taxable capital gain.

The taxpayer and her advisers and the Commissioner were the beneficiaries of the plain English used in provisions of the *Income Tax Assessment Act 1997* (Cth) to assist them in making their decisions. The text was cast in the second person 'you' calculated to establish a sense of friendly intimacy between the law and those subject to it. In that spirit of non-threatening familiarity and apparent simplicity, s 6-5 told the taxpayer that:

> Your *assessable income* includes income according to ordinary concepts, which is called *ordinary income*.

What could be simpler than that — 'income according to ordinary concepts'? Nobody could accuse the drafter of complexity in expression. Where then was the difficulty? The relevant Explanatory Memorandum for the Bill which had introduced the section into the Act gave the clue:

> The courts have developed principles for determining what is ordinary income. However there is no complete set of rules for determining that question.[2]

Much was there left unsaid.

In Australia, as we all know, there are innumerable judicial decisions stretching over a century determining when money received is ordinary income, when it is not, and when it is capital. Approaches to characterisation have been gathered

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1 *Commissioner of Taxation v McNeil* (2005) 144 FCR 514.

2 Explanatory Memorandum, Income Tax Assessment Bill 1996 (Cth) 38.

together under broad but almost content free, generalisations. The Chief Justice of New South Wales, in 1935, in *Scott v Commissioner of Taxation*[3] told his readers that the application of the term 'income' in particular circumstances is left to 'the ordinary concepts and usages of mankind'. The High Court in 1965 said the term was applied 'in the sense which it has in the vocabulary of business affairs'.[4] Sometimes those generalities have been joined by a metaphor likening capital to a tree and income to its fruit.[5] One metaphor suggests many others, including one offered by an advisory website —that capital is the parent and income the child. Professor Julius Stone called the term 'income' a 'category of meaningless reference', particularly in connection with the distinction between income and capital.[6] Lord Denning MR once wrote of the same distinction in typically colourful language:

> It is a blurred and undefined area in which anyone can get lost. Different minds may come to different conclusions with equal propriety. It is like the border between day and night, or between red and orange. Everyone can tell the difference except in the marginal cases; and then everyone is in doubt ...
> In this area, at least, where no decision can be said to be right or wrong, the only safe rule is to go by precedent. So the thing to do is to search through the cases and see whether the instant problem has come up before. If so, go by it. If not, go by the nearest you can find.[7]

So much for the simplicity of a simply stated law.

In Mrs McNeil's case she also had the help of an explanation of a capital gain, which was more detailed and more complex in its expression than the provision about assessable income. It still adopted the same engagingly friendly tone. Section 104-155 of the Income Tax Assessment Act told her of a number of events which might attract the application of capital gains tax to her little windfall. Relevantly, she was informed:

> (1) *CGT event H2* happens if:

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3 (1935) 35 SRNSW 215, 219 (Jordan CJ).

4 *Arthur Murray (NSW) Pty Ltd v Commissioner of Taxation* (Cth) (1965) 114 CLR 314, 320.

5 A metaphor apparently originating in *Eisner v Macomber* 252 US 189, 206–7 (1920) and endorsed in *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656, 663 [21] (Gummow ACJ, Hayne, Heydon and Crennan JJ).

6 Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 340.

7 *Heather (Inspector or Taxes) v P-E Consulting Group Ltd* [1973] 1 All ER 8, 12.

> (a) an act, transaction or event occurs in relation to a CGT asset that you own; and
> (b) the act, transaction or event does not result in an adjustment being made to the assset's cost base or reduced cost base.
>
> (2) The time of the event is when the act, transaction or event occurs.
>
> (3) You make a *capital gain* if the capital proceeds because of the CGT event are *more* than the incidental costs you incurred that relate to the event. You make a *capital loss* if those capital proceeds are *less*. (emphasis in original)

The provision went on to tell her that a CGT event H2 did not happen if the act, transaction or event required her to do something that was another CGT event that happened to her.[8]

At first instance in the Federal Court the primary judge, Conti J, held that what the taxpayer had received was not income. He also held that it was not a capital gain. In the Full Court, Justice Dowsett and I held that what she had received was not income according to ordinary concepts and that a CGT event H2 had not happened to her. Justice Emmett dissented. He held that the benefit derived by the taxpayer was income to ordinary concepts. He agreed, however, that a CGT event had not happened and that the taxpayer was not assessable for a capital gain. The matter went to the High Court. The High Court, by majority, allowed the appeal holding that the grant by St George Bank of Sell Back Rights on the listing date was the derivation of income by her and was assessable to tax as such. Justice Callinan dissented.[9]

The case illustrates the two ways in which complexity arises in statute law. A simple broadly expressed provision on the one hand attracts a plethora of judicial exposition such that some would say the true meaning of the statute, if it has one, is buried in the cases. On the other hand, a provision which aspires to precision by using technical and detailed language may be a good deal harder to read and still requires interpretation.

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8 *Income Tax Assessment Act 1997* (Cth) s 104-155(50(b).

9 *Federal Commissioner of Taxation v McNeil* (2007) 229 CLR 656.

In the end, a degree of complexity is an inescapable aspect of the law. Although simply stated laws use ordinary English words assembled in a readable way, their simplicity cannot reduce the diversity of circumstances to which they may have to be applied. The judiciary is not relieved of the task of interpretation and application across unimagined cases. Nevertheless, the interstitial law-making function of the court, in statutory interpretation, is carried out within broad and understandable parameters set by the parliament and expressed in ordinary English language which everyone can understand at some level. A good example of that kind of law is the prohibition on conduct in trade or commerce which is misleading or deceptive or likely to be misleading or deceptive. It sets out a legal norm in comprehensible language. The immense variety of its applications is evidenced in countless cases decided since it first became part of our law in 1974. Complexity in the development of that kind of law is understandable. It simply reflects what is happening in our society.

There are some cases in which simple language has generated complexity for which societal complications do not necessarily carry the blame. In s 92 of the Constitution, a few words of plain English provide that on the imposition of uniform duties of customs:

> trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The extensive judicial interpretation of those words since Federation led the High Court to observe in *Cole v Whitfield*:[10]

> Sir Robert Garran contemplated that a student of the first fifty years of case law on s 92 might understandably 'close … his notebook, sell … his law books and resolve … to take up some easy study, like nuclear physics or higher mathematics.[11]

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10 (1988) 165 CLR 360

11 Ibid 392. See Sir Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958), 415.

Complexity in interpretation and application may be associated with simply expressed laws. There are, however, more complaints and, perhaps more grounds for complaint, about laws which are characterised by detailed and prescriptive drafting pursuing what is often an illusory precision. Concerns about that kind of drafting have long been with us, but they are worth trying to tease out.

Concerns about complexity

Complexity in statute law raises a number of issues, which include:

- *Their democratic legitimacy* — the inaccessibility of the law to the ordinary reader, the ordinary run of non-specialist legal practitioner and even perhaps a significant number of the legislators who voted for it, may affect perceptions of its democratic legitimacy.

- *Public confidence in the law* — the difficulty of discerning the public purposes served by such laws reflects a want of moral clarity and, coupled with that, an acceptance that the law is just and reasonable. Obedience to such laws flows from their status as laws because they are the product of a constitutional law-making process.

- *The certainty of the law* — complex laws carry their own difficulties in interpretation and associated difficulties in predicting how the law will be interpreted and applied by those concerned with its enforcement and by the courts.

- *Transaction costs* — the transaction costs of interpreting complex laws and advising upon those interpretations involves time and therefore cost on the part of non-specialist advisers and perhaps less time but more cost expended on specialist advisers. Complexity gives rise to contestable interpretations which may engender more disputes requiring dispute resolution mechanisms and, ultimately, a resolution by the courts.

- *The growth of less visible soft law* — complex law administered by public authorities tends to require extensive written guidance to the officers of those authorities who have to administer the law. Those administrative guidelines may become, for all practical purposes, the real law so far as many people are concerned.

Those are some of the matters which give rise to concern about complexity in the law. They have a concrete foundation in the growth in the number and volume of enactments by Federal, State and Territory parliaments. Beyond the statutes there are countless regulations, by-laws, rules and a diverse array of statutory instrument made by Ministers and various forms of public authority, including the hundreds of local governments throughout Australia.

Plausible reasons for this galloping growth in regulation include:

- Our society has become more complicated in composition, outlook and the diversity of interests which it comprehends.

- More is expected of governments.

- Governments want to be seen to have a legislative program and to be doing things. A new law is an achievement.

Many examples can be selected of the growth in volume and complexity of particular laws. One always topical case is the *Migration Act 1958* (Cth). Its first incarnation was the *Immigration Restriction Act 1901* (Cth), one of the first pieces of legislation passed by the Commonwealth Parliament. Its purpose was fairly clear from its long title:

> An Act to place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants.

When enacted it had 19 sections. Its border control mechanism was simple. It prohibited the immigration into the Commonwealth of 'any person who when asked to

do so by an officer failed to write out at dictation and sign in the presence of the officer a passage of fifty words in length in a European language dictated by the officer'.[12] Certificates of Exemption, a precursor to the entry permit and later the visa, were another mode of entry. By 1935, the Act still only had 19 sections. By 1950, it had expanded to 64 sections. It was replaced by the *Migration Act 1958* (Cth) which began its life with 67 sections. By 2002, when I last bothered to count, the Act had grown to 740 sections, supported by hundreds of regulations set out in two volumes. The Act has not become any smaller since then. Its provisions make abundant use of alpha-numeric combinations — a kind of insidious arteriosclerosis which affects many laws.

The particular example I have given is not atypical. More generally, there has been an enormous growth in the number and volume of the laws to which Australians are subject. In 1901, the Commonwealth Parliament passed 17 Acts. Since 1973, the House of Representatives has considered about 200 Bills each year and has passed between 150 and 200 of them. The total number of pages of legislation passed in the first decade of Federation were 1,072. In the first six years of the 21st century there were 40,266 pages of statute law enacted.[13] We have more laws, and more technical and detailed laws. Their volume and complexity tends to diminish their moral clarity.

Moral clarity

The concept of moral clarity means it is easy to understand what the law is good for. 'Thou shalt not kill' has moral clarity. The concept is closely related to that of legislative purpose. If the purpose of a law is clear, then people affected by the law have some prospect of knowing what it is good for. Purpose in this context, is to be distinguished from legislative intention which suggests a fictitious collective state of mind on the part of a parliament.[14] Purpose on the other hand, may be discerned from a statement of objects in the law. It may be discerned from the identification of the mischief to which the law is directed through the Explanatory Memorandum or a

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12 *Immigration Restriction Act 1901* (Cth) s 3(a).

13 Chris Berg, 'Policy without Parliament: The growth of regulation in Australia', *Institute of Public Affairs: IPA Backgrounder* 19/3 (November 2007) 2.

14 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

Second Reading Speech. It may most convincingly be discerned from the operation and effect of the law.

The difficulty in many of our laws is that a particular legislative purpose is not always apparent. That may be because the law gives effect to a political compromise which seeks to take account of conflicting societal interests. Where legislative compromises serve purposes which are in tension, the task of interpretation becomes more difficult and moral clarity is compromised.

Giving meaning to the meaningless — more tales from the trenches

The area of taxation law provides a rich harvest of examples of purposeless interpretation. In the days before GST we had sales tax and many hours of innocent amusement were spent by courts determining whether certain goods or services fell within, or outside, classifications attracting different rates of tax. Was an office chair, which could be used for household purposes, able to be classed as 'a chair of a kind used for household purposes'. So the late Justice Graham Hill and I asked ourselves in the Full Federal Court in 1993. What were the essential characteristics of household chairs?[15] We were asking the question in a sales tax case but I don't think we knew why we were asking the question. That kind of case is the kind that would fall within the category, well known to the law, of an 'arid intellectual exercise'. It was a small consolation that sometimes such cases would open interesting little windows into particular aspects of industry or commerce. I sat on one such case in the 1990s trying to decide whether a drink called 'Sub Zero Alcoholic Soda' was a 'spirituous beverage' for the purposes of a particular rate of sales tax. The drink was a party drink which was very fashionable for a while. However, as the evidence showed, it was a by-product of the production of Fosters Light — an alcoholic liquor left over from a distillation process. It was mixed with fizzy water and lemon juice, given a snappy name and marketed as a product for the younger social sophisticate.

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15 *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* (1993) 44 FCR 450, 460 (French J), 470 (Hill J).

That class of problem did not disappear with the disappearance of sales tax. The political compromises that underpinned the enactment of the GST legislation in 1999 produced a number of cases reflecting the absence of a clear public policy underlying particular applications of the legislation. In one case Justice Sundberg of the Federal Court, had to determine whether a mini-ciabatte was a biscuit and hence GST free, or something else and hence not.[16] He held it was not. It was upheld on appeal by three Justices of the Federal Court, sitting as a Full Court.[17]

I suspect, but do not know, that the creation of many of the categories and the interpretive difficulties to which they give rise are responses to particular interest groups. That is no doubt part of the democratic process. But when a legislative purpose cannot be discerned, interpretation is difficult and the outcome unpredictable.

One large field of statute law affected by interests in tension with each other is that of intellectual property which covers patents, copyright, trademarks and designs. It seems to be a feature of intellectual property law that there is often something of a tug of war between owners and users, particularly in the field of copyright in the digital age. It has been suggested that the owners tend to have the upper hand because they are smaller in numbers, better resourced and better organised than users.[18] While each of the intellectual property statutes, patents, copyright, trademarks and designs have relatively clear historical origins and purposes, their complexity and attempts to balance the contending interests which that complexity reflects make purposive interpretation difficult.

The challenge of interpretation of intellectual property legislation reflecting compromises not informed by a straightforward normative model was illustrated in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*.[19] The case concerned the interpretation of a provision of the *Copyright Act 1968* (Cth) which provided for civil remedies against the vendors of 'circumvention devices', being devices whose purpose was to circumvent technological protection measures. The term 'technological

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16 *Lansell House Pty Ltd v Federal Commissioner of Taxation* [2010] FCA 329.

17 *Lansell House Pty Ltd v Federal Commissioner of Taxation* [2011] FCAFC 6

18 Peter Drahos, *A Philosophy of Intellectual Property* (Ashgate, 1996) 203–210; Christina Bohannan and Herbert Hovenkamp *Creation without Restraint: Promoting Liberty and Rivalry in Innovation* (Oxford, 2012) 47.

19 (2005) 224 CLR 193.

protection measure' was defined and its interpretation was the subject of contention in *Stevens' case*. The High Court held that the combination of access codes on CD-ROMs used in Sony PlayStation consoles and Boot-ROM readers of such access codes which prevented use of copied CD-ROMs were not technological protection measures within the meaning of the Act. A mod chip device designed to bypass the access code requirement and allow the use of copied CD-ROMs in the PlayStations was therefore not a circumvention device.

The Court reflected upon the difficulty of interpreting the language of the Copyright Act because of the difficulty of identifying the purpose of the provisions it had to interpret. Section 15AA of the *Acts Interpretation Act 1901* (Cth) required the Act to be construed according to its underlying purpose or object. There was, however, little in the way of useful indicators of the statutory purpose. The extrinsic materials gave no clear indication of how the Bill for the amending legislation which introduced the circumvention device provisions of the Act took the final form that it did. Their Honours said:

> Indeed, the very range of the extrinsic materials, with shifting and contradictory positions taken by a range of interest holders in the legislative outcome, suggests that the legislative purpose was to express an inarticulate (or at least not publicly disclosed) compromise.[20]

The attempt to attribute a particular purpose, much less a moral purpose to intellectual property law, is reflected in endeavours to devise convincing anti-piracy messages for DVDs. A typical form of message shows a thief breaking into a house or a vehicle and the voice over or caption saying — 'You wouldn't steal?' — trying to attach to copyright infringement the moral character of theft. However, the moral force of the theft analogy has been questioned. Professor Robert Stevens, who is Professor of Commercial Law at University College, London, has pointed out that 'in a world which is not one of limitless abundance, we need rules for determining who is entitled to physical things, but these rules of first possession have little application to ideas or information which cannot be possessed'.[21] Recently, the United Kingdom

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20 Ibid 207-208 [32] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

21 Robert Stevens, 'Rights and Other things' in Donal Nolan and Andrew Robertson (eds) *Rights and Private Law* (Hart Publishing, 2012) 115, 139.

Industry Trust for Intellectual Property Awareness has developed an anti-piracy message which uses satire under the title 'You make the movies' to convey the proposition that infringing copyright deprives producers of the revenues that enable them to make good films.[22] Some approaches may suit a particular kind of market participant better than others. A clear and persuasive anti-piracy message was posted by an American performer, Louis CK who made a video of one of his performances for online purchase for $5. His message was:

> Please bear in mind that I am not a company or a corporation. I'm just some guy. I paid for the production and posting of this video with my own money. I would like to be able to post more material to the fans in this way which makes it cheaper for the buyer and more pleasant for me. So, please help me keep this being a good idea. I can't stop you from torrenting; all I can do is politely ask you to pay your five little dollars, enjoy the video and let other people find it the same way.[23]

That is a message which, I think, offered an example of moral clarity.

Conclusion

As lawyers we have to accept that complexity in the law in one guise or another is always with us. In my opinion, the democratic legitimacy of our laws is more likely to be threatened by the complexity involved in over-detailed, prescriptive and inaccessible language, than in laws which set out broadly stated principles. Such laws give those charged with their administration a degree of flexibility and leave it to the courts to determine on a case-by-case basis in the tradition of the common law how the law applies to particular circumstances. There are, of course, those who will say this builds uncertainty into the law. But every word in a statute has a degree of uncertainty about its meaning. The more words, the more possibilities there may be for debate about their meaning. The more words in combination, the more opportunity there may be for argument about what those combinations mean. At least when it comes to judicial interpretation, certainty is not enhanced by the use of more words. It must be accepted that sometimes complex and detailed drafting is the only

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22 Ibid.

23 Louis CK, '*Word — Live at Carnegie Hall* https://buy.louisck.net/purchase/world-live-at-carnegie-hall.

way of dealing with a particular problem. However, simplicity which fosters an organic and responsive growth of the law is to be preferred where that option is open.

What is the role of the legal profession in response to the challenges posed by complexity and lack of moral clarity in our laws? Political and social realities place limits upon what can be done. That is not to say that nothing should be done. The role of the profession should be one of challenging unnecessary complexity and advocating for simplicity in expression and clarity of purpose in our statutes. In that kind of advocacy it will support the democratic legitimacy of our laws, their moral clarity and thus the rule of law.