The Rule of Law and Some Aspects of the Current Legal Scene in Australia

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I am indebted to Nick Clark, Education Coordinator of the Rule of Law Institute of Australia, for research and in particular for his assistance in obtaining statistics relevant to the increase in fees in federal courts.

Introduction

My present purpose is to consider Rule of Law implications of some aspects of the current Australian legal scene.

What do we mean by the 'Rule of Law'?

It was Professor Albert Venn Dicey, Vinerian Professor of English Law in the University of Oxford, who coined the expression the 'Rule of Law', with the publication in 1885 of his famous work, *Introduction to the Study of the Law of the Constitution.*

Professor Dicey used the expression to refer to three features of the English legal system, of which the first is the most important and the one of present interest. He expressed it in this way:

> 'No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before the ordinary Courts of the land. In this sense [he said] the Rule of Law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constrain.'

This first denotation of the expression 'the Rule of Law' had been expressed more succinctly by Thomas Fuller in 1733 when he said: 'Be you ever so high, the law is above you.'

The expression 'the Rule of Law' signifies an ideal, or a cohesive group of ideals, which a just society must live up to. It certainly includes Dicey's first meaning of all being equally subject to the law: the ideal of government, including the administration of justice, being according to law rather than according to the unfettered power of the few. But I suggest that the expression is also appropriately understood to encompass associated supporting ideals, such as the accessibility of legislation, the courts and judge-made law; the separation of the powers of the legislature, the executive and the judicature; and perhaps human rights standards.

Some of these ideals are reflected in legislation, indeed in the Australian Constitution.

Without attempting a definition, I turn to particular issues that seem to me to have Rule of Law implications in Australia.

Invoking the aid of the courts in the implementation of government policy

The independence of the judiciary is a necessary bulwark of the Rule of Law. It is expressly safeguarded in the Australian Constitution and in the Constitutions of the Australian States. Security of tenure is assured by the common provision, to take s72 of the Australian Constitution as an example, that a judge may not be removed from office except by the Governor-General in Council, on an address by both Houses of Parliament 'on the ground of proved misbehaviour or incapacity', and that a judge's remuneration may not be diminished while the judge continues in office.

Contrast the position of judges in Vietnam, a one-party state, whose performance is reviewed and evaluated every year "for the purpose of training, distribution of tasks or dismissal" and who will not be re-appointed if many of their decisions are set aside for failure to follow precedents of the Supreme People's Court.

Over the last two decades the High Court has found implied safeguards, founded in the Commonwealth Constitution, for the independence of the courts, both Commonwealth and State, and therefore for the Rule of Law. These questions have arisen because of attempts to invoke the aid of the courts in the implementation of legislative policy. Those attempts, and the wrong understanding of the role of the courts which they reveal, are inimical to the Rule of Law ideal.

The first example is to be found in State legislation that enlisted the courts' aid in the fight against crime. This has taken two forms: preventive detention legislation and legislation dealing with criminal organisations.

The preventive detention legislation provides for detention of certain serious offenders beyond the expiry of the terms of their sentences, where they are thought to pose an ongoing threat. The legislation enlisted the aid of the State's Supreme Court. In *Kable v Director of Public Prosecutions (New South Wales)* (1996) 189 CLR 51, the High Court ruled the *Community Protection Act 1994* (NSW) invalid, while in *Fardon v Attorney General for the State of Queensland* [2004] HCA 46, the High Court upheld Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003*, which contained conventional criminal safeguards. New South Wales then copied the Queensland Act in its *Crimes (Serious Sex Offenders) Act 2006.*

I am concerned here, not with the underlying constitutional argument, but with the assumption of the legislation that the courts could be relied upon to support a worthy objective even in a manner inconsistent with the nature of a court.

The criminal organisation ('bikie gangs') legislation was relevantly of a generally similar kind. In *South Australia v Totani* (2010) 242 CLR 1 the High Court held that s14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA) was invalid, and in *Wainohu v New South Wales* [2011] HCA 24, it held the New South Wales *Crimes (Criminal Organisations Control) Act 2009* invalid. However, on the 13 March 2013, in *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7, the Court upheld Queensland's *Criminal Organisations Act 2009* to pass muster.

Again, I refrain from discussing the reasoning by which the High Court has invoked Chapter III of the Constitution to save the impairment of the independent judicial role of the Supreme Courts, save to note that according to Justice Gageler in the case last cited, 'Chapter III of the Constitution mandates the observance of procedural fairness as an immutable characteristic of a Supreme Court and of every other court in Australia.'

The assumption to which I have referred, inimical to the Rule of Law, is more directly indicated by the reactions that have been expressed by politicians when the courts have given decisions that have displeased them, in particular, decisions that have been politically embarrassing to them. Such

statements not only betray a lack of understanding of the separation of powers: they also threaten the Rule of Law by their tendency to reduce public confidence in the courts.

A recent illustration is in then Prime Minister Gillard's comments on 1 September 2011 following the High Court's striking down, the preceding day, of legislation designed to implement the so called 'Malaysian Solution'. The case was *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32. The Prime Minister described the decision as:

> "[a] missed opportunity to send a message to asylum seekers not to risk their lives at sea and get into boats…"[1]

Lest it should be thought that remarks of this kind are confined to one side of Australian politics, listen to what Mr Ruddock, then Minister for Immigration, Multicultural and Indigenous Affairs, said on 18 March 1998 in response to the Federal Court's construction of the *Migration Act 1958:*

> 'Again the courts have reinterpreted and rewritten Australian law ignoring the sovereignty of parliament and the Australian people.'[2]

and

[1] Australian Broadcasting Corporation, 'Gillard attacks High Court over ruling', *Lateline*, 1 September 2010 <http://www.abc.net.au/lateline/content/2011/s3308132.htm>
[2] Ibid.

'…what we're finding is that notwithstanding that legislation the courts are finding a variety ways and means of dealing themselves back into the review game.' [3]

In a speech delivered by him at the 'Confidence in the Courts Conference' in Canberra on 10 February 2007, Mr Ruddock, by then Attorney General, correctly observed:

'The rule of law requires public confidence in the courts.'[4]

and

'A society governed by the rule of law is one where disputes are decided by a competent, independent and impartial judiciary. It is a society where citizens and governments obey those decisions because they trust the courts.'[5]

This operates both ways. The public, including our elected representatives, must see a judiciary which is seeking to construe and apply legislation faithfully to the Judicial Oath and without bias or any 'agenda'. But on the other hand, our elected representatives must accept that there will be some decisions of the judicial institution that will cause them grief.

[3] Ibid.
[4] Philip Ruddock, 'Confidence in Courts (Speech delivered at the Confidence in the Courts Conference, Canberra, 10 February 2007).
<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2007/Confidence%20courts/papers/Ruddock.pdf>
[5] Ibid.

Inappropriate expressions of criticism of the courts are not confined to politicians. One need only refer to intemperate attacks that are made in the media from time to time, in particular in relation to what are perceived to be the inadequacy of penalties imposed on persons convicted of serious crime. To the extent that these criticisms also diminish the courts (rather than the commentator) in the estimation of the public, they are inimical to the Rule of Law.

Not long after I was appointed as a judge, an attempt was made to establish a conversation between the judiciary and legislators with a view to ensuring that politicians understood the role of the judiciary. The initiative was one taken by the Judicial Conference of Australia, and the late Justice John Lockhart took a leading role in it, I recall his reporting to the judges of the Federal Court in general terms of the result. The meeting, and there may have been more than one, took place in the New South Wales Parliament House.

Perhaps it is time for a fresh attempt of that kind to be made.

Accessibility of legislation

The Rule of Law is served by legislation that is readily available and able to be understood by its readers. The target readership will sometimes, but not always, be members of the public who have a reasonable level of intelligence and education. I say "not always" because some legislation necessarily assumes a level of understanding of general law concepts which even members of the public which satisfy that description will not possess.

The accessibility and intelligibility of legislation is a basis for holding governments to account, consistently with the Rule of Law, which will be absent if legislation is not readily available and understood.

Yet it is well known that the volume and complexity of legislation have greatly increased in recent years. This is in part due to the increased complexity of the subject matter which modern legislation must address: today, life in general, and commercial life in particular, are characterised by a speed of communication and new technologies that were once unimaginable.

It is no answer to limit an Act of Parliament to general principles, leaving the detail to subordinate legislation. That device only shifts the problem and has the added disadvantage of less direct

parliamentary oversight. I will describe in the next section of this paper a particularly egregious illustration of the present problem.

In 2011, the Commonwealth Office of Parliamentary Counsel produced a document called *Guide to Reducing Complexity in Legislation*.[6] It described itself as 'part of the Government's *Clearer Commonwealth Laws* initiative'. It is addressed principally to professional instructors and drafters in the Commonwealth legislative sphere. It acknowledges that complexity resulting from the decisions of Cabinet or Ministers is beyond their control.

Attachment A to the *Guide* is repeated as Attachment A to this paper. It listed the 26 longest Acts on the Commonwealth Statute Book as at 12 August 2010. The *Guide* made the point though, that the number of pages of an Act is not a reliable indicator of its complexity, and indeed that plain rewrites of old Acts tend to occupy more pages because of the increased amount of white space in the rewritten version.

I have no immediate answer to the present problem. There is one aspect of it, however, about which something can be done: refrain from amending too frequently. When legislation is amended before

[6] Office of Parliamentary Counsel, *Reducing Complexity in Legislation*, (17 May 2011). <http://www.opc.gov.au/about/docs/ReducingComplexity.pdf>

the ink is dry on the last round of amendments, it is well nigh impossible to be confident that what you are reading is the current law.

Inconsistency, invalidity and shifting the burden

This "rapidity of amendment" problem is illustrated by recent amendments to the legislation governing the superannuation industry. Those amendments also illustrate other species of Rule of Law problem: complexity and uncertainty.

The superannuation industry is heavily regulated. The way in which the raft of regulatory measures has been imposed on it give cause for concern from a Rule of Law viewpoint.

The legislation has been rapidly successively amended to give regulatory powers to the Government (through a regulation -making power), and to Australian Prudential Regulation Authority (APRA) (through the making of Prudential Standards and the attaching of conditions to licences), with a provision for an order of precedence in case of inconsistency.

The detail would be tedious to relate so I will summarise in the hope that you will get the general idea.

The main amending Act is the *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Act 2012* (the TOPS Act) which amended the *Superannuation Industry (Supervision) Act 1993* (the SIS Act).

Section 29E(1) of the SIS Act itself imposes conditions on the licences of all registrable superannuation entities (RSEs) and also empowers the Government, by regulation, to do so.

Section 29E(7) of the SIS Act imposes on all RSE licences of a particular class an additional condition prescribed by regulation.

A new Part 3A (ss34B – 34F) of the SIS Act gives APRA a wide power to make Prudential Standards concerning registrable superannuation entities (RSEs).

APRA issues licenses to RSEs to which it is empowered to attach conditions with which the particular licensee must comply.

Section 29EA(1) empowers APRA to impose additional conditions on any individual RSE licence after notice to the licensee, but not a condition that is imposed by s29E of the SIS Act or by regulation under that section.

Section 29EA(2A) provides that APRA may express a condition that it imposes on a particular licence to have effect notwithstanding anything in the Prudential Standards made by it.

Section 31 of the SIS Act provides that regulations may be made prescribing 'Operating Standards' for superannuation funds, their trustees and RSE licensees.

Section 34D(2) of the SIS Act provides that a Prudential Standard is of no effect to the extent that it conflicts with the SIS Act or the SIS Regulations.

So, we have:

- general licence conditions imposed by the SIS Act;
- general licence conditions imposed by the SIS Regulations
- operating standards imposed by the SIS Regulations;
- Prudential Standards made by APRA; and
- conditions attached to a particular licence by APRA.

The potential volume and complexity of this regulatory régime and the provision putting the onus on licencees to work out if inconsistency exists and if so which provision prevails, is troublesome from a Rule of Law viewpoint.

There is, however, for the legal profession at least, a silver lining. Section 57(3) of the SIS Act provides:

> 'Nothing in the governing rules of the superannuation entity prohibits a trustee of the entity from seeking advice from any person in respect of any matter relating to performance of the duties or the exercise of the powers of the trustee. A provision in the governing rules that purports to preclude a trustee of the entity from being indemnified out of assets of the entity in respect of the cost of obtaining such advice, or to limit the amount of such an indemnity, is void.'

Accessibility of the courts

The Rule of Law and a strong independent judiciary are empty ideals if people cannot access the courts.

Several things could be discussed here: for example, the shrinking of funds available for legal aid, and the necessity of maintaining or even increasing the number of judges appointed to a court in order to make for reasonably early hearings and delivery of decisions. But what I wish to highlight is the increase in filing fees in Federal Courts. By "federal courts" I mean the High Court, Federal Court, the Family Court, and the Federal Circuit Court.

The increases are striking. So much so that the Senate Legal and Constitutional Affairs References Committee produced a report on the matter in June of this year entitled 'Impact of federal courts fee increases since 2010 on access to justice in Australia'.

Fees increased sharply on 1 January 2013 which included general increases in court fees of 40% for corporations, 15% for non-corporate entities, and 20% for family law fees.[7]

[7] Senate Legal and Constitutional References Committee, Parliament of Australia, *Impact of federal courts fee increases since 2010 on access to justice in Australia* (2013) 5 [1.15]

The picture of the increases is made complex by the differentiation between individuals and corporations and between listed corporations and others, as well as by the discretionary power to waive fees. Attachment B to this paper shows the increases in detail.

The following general observations may be made about the increases since 2008.

Filing fees in the High Court for corporations have risen by 178% over the last 5 years. Item 105, 'Application initiating a proceeding (but not including an application referred to in another fee item)', was $2726 in 2008 and is now $7565 in 2013. The same item for non-corporations increased by 85%.

In the Federal Court, filing fees relating to appeals have risen sharply by 151% for corporations and 132% for individuals. Fees for mediation by a court officer for corporations have more than doubled, and they have increased by almost 80% for other litigants, although by only 38% in the Federal Circuit Court.

The fee to apply for a divorce in the Federal Circuit Court was $432 in 2008, $577 after July 2012 and then $800 after 1 January 2013. Also, the increase in the "reduced filing fee" payable by people

with certain government concession cards or those who can demonstrate financial hardship on a divorce application rose from $60 to $265 on 1 January 2013.

In 2009/ 2010 court fees accounted for 10 percent of the cost of all Commonwealth Courts, and this rose to 30 percent as a result of the increases in 2013.

Fees payable to federal courts are set by the Government, not by the courts, and 80 percent goes into consolidated revenue, while 20 percent goes to the Courts.

It is no answer to say that court filings have not decreased, if that be the case, since a decrease in filings by the "have-nots" may have been countered by an increase in filings by the "haves".

On the question of access to justice, the Attorney General's Department's submission to the Committee was that the concept is broader than that of access to the courts and embraces ADR and even conflict prevention. According to this dangerous view, high fees constituting a barrier to entry may not be a bad thing since it may force would-be litigants into a different form of access to justice!

Happily, and as might have been expected, some submitters to the Committee challenged this attenuated view of access to justice: they were Associate Professor Michael Legg, the Law Society of South Australia, and the Rule of Law Institute of Australia. Several submitters noted that it is contrary to the Rule of Law that the provision of justice should be on a cost-recovery or user-pays basis.

The proposition that higher court fees might have the effect of encouraging disputants to resort to ADR was attacked on at least three bases: first, there is no empirical evidence that they have that effect; second, if they do, it signifies only that the 'haves' can afford access to the courts while the 'have-nots' cannot; third, the outcome for the have-nots may be worse than if they had access to the courts.

The suggestion that higher fees would deter unmeritorious, indeed vexatious, litigants is answered by the observation that they will also deter meritorious ones.

The majority of the Committee's members, the Government and Coalition Senators, recommended further research to develop quantitative data and quantitative evidence on the effect of fee setting on

the behaviour of disputants and on broader access to justice issues. The Chair, Senator Penny Wright, recommended that fees be 'wound back' to their pre-2013 levels.

Subsequently, on 21 June 2013, the Productivity Commission was requested to undertake a major inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law.

There is so much 'double speak' in this area. Promoting access to justice and equality before the law (Rule of Law ideals) would, one might expect, come at a cost. We are either prepared to meet that cost or we are not.

Accessibility of Judge-made law

Does the citizen have ready access to the judgments of the courts?

Are those judgments as intelligible as can reasonably be expected, having regard to their subject matter?

The computer and the good work of AustLII enables the first question to be answered 'yes'.

As to the second question the short summaries that have come to be provided by most, if not all, courts to accompany judgments of particular importance has been a welcome development.

This brings me to an idea that I raise for consideration and which may be controversial.

I suggest, in the interests of the accessibility of judge-made law, the author of a judgment (I use the term to refer to reasons for judgment) formulate, perhaps at the beginning of the judgment, a statement of the legal principle which the judgment establishes, applies or follows (or, if it does not carry the day would establish, apply or follow). This would be particularly relevant to judgments of members of the High Court and of intermediate appellate courts.

The suggestion is not limited to the *ratio decidendi,* strictly so called, because I contemplate that it would apply to dissenting judgments and to multiple judgments, as well as to those that provide the basis for the actual decision in the case.

Of course, already there can be found distinct statements of legal principle in the judgments of the courts. For example, in a famous passage in his judgment in the well known contract case, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 352, Justice Mason said:

> 'The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous of susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.'

However, I have in mind a statement generally of the form: 'the rule that I am applying is…' or 'in this case I am deciding…'.

It can be said against the suggestion that the language in which such deliberate statements of principle are expressed will come to be treated as the language of statute; that the result will be to

treat the principle as operating in a vacuum devoid of facts; and that in any event what is important is what posterity, not the author, makes of a case and understands it to have decided.

But in one way or another, it is always the language of the author-judge from which the precedential value of a case arises. Who better than the author-judge to tell us what he or she thought was the legally significant part of the judgment.

The suggestion bears consideration by any judge when writing a judgment.

Alternative dispute resolution (ADR)

There are advantages, and in a particular case there can be disadvantages, of alternative dispute resolution, by which I mean non-litigious resolution of disputes that are susceptible to resolution by the courts.

Arbitration is the particular form of ADR which I wish to discuss.

Let me disclose that I do some arbitration work and, more importantly, let me make clear that I support the efforts that have been made and continue to be made by arbitration practitioners and others to make Australia, and in particular Sydney, an attractive alternative arbitration seat to Hong Kong and Singapore. That task is a difficult one and I say ‘more strength to their arm’. Nonetheless, I will raise a Rule of Law concern below.

First, however, I note that it is sometimes complained that resort to private arbitration deprives the courts of the opportunity to give decisions on significant legal issues, which would constitute binding precedents and therefore become part of the fabric of the law. This particular complaint seems to me to be futile. At least in theory, contracting parties choose to go to arbitration because,

rightly or wrongly, they perceive this to serve their interests better than going to court. They can hardly be blamed for failing to put the public interest ahead of their own interests.

I say "in theory" because agreements to arbitrate are very often contained in standard form contracts and have not been individually negotiated. I suggest that a dispute resolution clause is the last aspect of a standard form contract to interest the parties.

I once heard it suggested by a respected arbitration practitioner that the courts should support the cause of making Australia a recognised centre for commercial arbitration by exercising restraint in upsetting arbitration awards. This was another unfortunate illustration of the erroneous idea that the courts' aid can be properly invoked in support of a worthy objective.

The desire of those who have been actively promoting Australia as a desirable centre for international commercial arbitration by ensuring the finality of awards, has in fact been fulfilled, albeit by a quirk of legislative history.

That history is as follows:

(a) In 1985 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) was entered into. The New York Convention had to grapple with the problem of differences between countries as to the circumstances in which arbitral awards foreign to the particular country would and would not be enforced. Article V of the Convention resolved this question by allowing a very limited role for the courts. It may be that this was the "lowest common denominator" principle at work.

(b) In 1974 the Commonwealth Parliament passed the *Arbitration (Foreign Awards and Agreements) Act 1974*. At that time that Act provided only for the recognition and enforcement of foreign arbitral awards by giving effect to the New York Convention. Section 8 of the Act reflected Article V of the Convention, allowing very limited review of foreign awards by Australian courts.

(c) In 1985 the Model Law on International Commercial Arbitration was adopted by UNCITRAL. This Model Law was a template, not a Convention. It provided for generally the same limited grounds on which an international arbitration award made locally would not be recognised or enforced by the courts of the country that chose to enact it or on which a party might apply to

those courts do have such an award set aside. Those limited grounds mirrored those of Article V of the New York Convention.

(d) In 1989, by the *International Arbitration Amendment Act 1989,* the Australian Act of 1974 was renamed the 'International Arbitration Act 1974' (the IA Act) and enacted the Model Law as a law of Australia, but of course, only in relation to international arbitrations of which the seat of the arbitration was Australia. This meant that the same very limited grounds now applied when Australian courts were called on to adjudicate upon international arbitration awards made by arbitrators in Australia as well as those made by arbitrators in foreign countries.

(e) In 2006 UNCITRAL amended the Model Law and in 2010 the IA Act adopted it in its amended form.

(f) Beginning in 2010, the (uniform) State and Territory Commercial Arbitration Acts were replaced by new Commercial Arbitration Acts based on the Model Law. So, in the case of New South Wales, for example, the *Commercial Arbitration Act 1984* (NSW) was repealed and replaced by the *Commercial Arbitration Act 2010* (NSW) the provisions of which were based on the Model Law, and therefore contained the same limited grounds for setting aside and refusal to recognise or enforced domestic arbitration awards.

So now the wheel had come full circle.

The result is that, to take the case of New South Wales domestic arbitrations, no longer is there a right of appeal on a question of law as there was under the former s38, and no longer can an aggrieved party apply to have an award set aside for misconduct as was possible under the former s42 ("misconduct" had been liberally interpreted to embrace procedural irregularities falling short of a failure to accord natural justice).

The present position in New South Wales is that subject to a conditional right of appeal under s34A of the 2010 Act (mentioned below), s34(1) of that Act, following Article 34(1) of the Model Law, provides that recourse against an arbitral award may be had only by an application to set it aside on these limited grounds:

(i) contractual incapacity or other ground of invalidity of the arbitration agreement to arbitrate

(ii) that the applicant to set aside was not given proper notice of the appointment of the arbitral tribunal or of the arbitral proceeding or was otherwise unable to present that party's case in the arbitration;

(iii) that the award deals with a dispute falling outside the submission to arbitration; and

(iv) that the composition of the arbitral tribunal was not in accordance with the arbitration agreement.

The award may also be set aside if the court finds that:

(i) the dispute is one not capable of being resolved by arbitration under New South Wales law

(ii) the award is in conflict with the public policy of New South Wales.

Apparently thinking that this denial of recourse to the courts went too far, the New South Wales Parliament introduced s34A which gave a right of appeal to the Supreme Court on a question of law arising out of an award, but only if:

(a) the parties have agreed that there is to be a right of appeal

AND

(b) the court grants leave to appeal.

I doubt very much that the parties to an arbitration agreement will ever so agree.

In summary and in substance, the courts have been 'dealt out of the game'. Perhaps this is as it should be but there is an aspect of concern from a Rule of Law viewpoint.

While the courts have been dealt out of the game as a result of a 'legislative creep' that began in Australia back in 1974, there can be no doubt as to what the motivation of the legislators has been in making the 2010 amendments. This was to make Australia an arbitration-friendly environment – an environment competitive with Hong Kong and Singapore. So, we have the then Commonwealth Attorney General, the Hon Robert McClelland MP, stating in the House of Representatives on 13 May 2010 that the amending Bill was:

> 'about making Australia a regional centre for international commercial arbitration. With the reforms contained in the bill and the strong support of our expert and highly regarded practitioners, Australia can certainly become a significant centre for international commercial arbitration in the Asia-Pacific region.'

The Shadow Attorney General, Senator George Brandis, said of the Bill that it sought:

> 'to increase the attractiveness of Australia as a venue for international commercial arbitration. This is a high-value service in which Australia should enjoy a particular competitive advantage. Any initiative that seeks to enhance that advantage should be welcomed. The opposition therefore is glad to support the bill.'

What is striking about the recent developments is the apparent lack of any real consideration of the merits of reducing access to the courts. What seems to have been all important was to bring

Australia into line with other countries and to make it an attractive seat for the conduct of arbitrations.

It may be that the result is entirely acceptable, but at least it gives pause for thought from a Rule of Law viewpoint that access to the courts could be reduced only for **those reasons**.

Conclusion

We are fortunate to live in a country in which the Rule of Law ideal is generally observed. It is, however, somewhat fragile and needs vigilant protection – an objective, I believe, of the Rule of Law Institute of Australia.

Attachment A: Longest Acts on the Commonwealth Statute Book

Office of Parliamentary Counsel, Reducing Complexity in Legislation, (17 May 2011), 26 <http://www.opc.gov.au/about/docs/ReducingComplexity.pdf>.

Attachment A—Longest Acts on the Commonwealth statute book (as at 12 August 2010)

	Act title	No. of pages
1	*Income Tax Assessment Act 1997*	3769
2	*Corporations Act 2001*	2134
3	*Social Security Act 1991*	2054
4	*Income Tax Assessment Act 1936*	1815
5	*International Tax Agreements Act 1953*	1365
6	*Customs Tariff Act 1995*	1298
7	*Veterans' Entitlements Act 1986*	1174
8	*Trade Practices Act 1974*	1041
9	*Offshore Petroleum and Greenhouse Gas Storage Act 2006*	1026
10	*Customs Act 1901*	948
11	*Environment Protection and Biodiversity Conservation Act 1999*	899
12	*Broadcasting Services Act 1992*	832
13	*Navigation Act 1912*	801
14	*Taxation Administration Act 1953*	693
15	*Migration Act 1958*	668
16	*Fair Work Act 2009*	619
17	*Social Security (International Agreements) Act 1999*	604
18	*Copyright Act 1968*	602
19	*Family Law Act 1975*	583
20	*Telecommunications Act 1997*	570
21	*Native Title Act 1993*	567
22	*Corporations (Aboriginal and Torres Strait Islander) Act 2006*	552
23	*Crimes Act 1914*	549
24	*A New Tax System (Goods and Services Tax) Act 1999*	533
25	*Water Act 2007*	512
26	*Bankruptcy Act 1966*	504

Note: Only the substantive text of the Act is included in the page number count.

Attachment B: Federal courts filing fee increases 2008 - 2013

Attorney-General's Department, Additional Information Received No 1 to Legal and Constitutional Affairs References Committee, *Impact on federal courts fee increases since 2010 on access to justice in Australia*, 7 May 2013.
<https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=aaf30470-f379-43d6-b2d9-9fcbbf1bb7cf>