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'Opening the Tax Act is like entering the door to a parallel universe' – Federal Court chief Patrick Keane

Top judge hits out at federal laws

James Eyers

LEGAL TANGLE

'Justice Michelle Gordon said tax professionals suffered from myopia because they focused too much on purely tax law issues.' Page 14

'Company directors should treat tax compliance as part of their corporate governance responsibilities or run the risk of prosecution.' Page 4

The Chief Justice of the Federal Court has lambasted the massive increase in the volume and complexity of federal laws, which are creating headaches for the judiciary and slowing down the resolution of major court cases.

Chief Justice Patrick Keane, a former Queensland solicitor-general who was appointed to the Federal Court last February from the Queensland Court of Appeal, said working on the federal judiciary was more difficult than state courts because federal laws were typically more proscriptive.

"Opening the Tax Act is like entering the door to a parallel universe," Chief Justice Keane told *The Australian Financial Review* in his first interview in the job. Federal tax legislation runs to almost 16,000 pages.

"It's really hard. At the end of the day, our job is to make the best we can out of what emerges from the sausage machine."

The comments come amid growing concerns from business that the Council of Australian Governments is struggling to reduce the complexity of business regulation.

Chief Justice Keane also criticised the government's attempts to push businesses to settle commercial litigation by exchanging information before claims were filed. A far more effective approach would be to encourage senior lawyers to become involved in dispute resolution at an earlier stage.

Many Federal Court judges were finding it difficult to come to grips with statutes and were struggling to determine how legislation was meant to change laws, he said.

"Often, you could almost be forgiven for thinking that when legislation is being drafted, people come

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Chief justice hits out over federal

WHAT HE SAID

On the complexity of laws:
The Native Title Act is not an easy read. The Tax Act is a parallel universe. The Copyright Act and the legislation that underpins the migration controversies – these are quite complex statutes.

On discovery:
It does no one any good to have the last three years of a corporation's life put on a database so that at a trial, people can meander through it and see if they can find something of interest . . . The best resource the courts have got are the good lawyers, and the sooner we get them involved the better.

On the size of the Federal Court:
I don't necessarily think we should be looking at expanding the empire. I think we should be small and effective.

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to a difficulty, and think, 'We could actually resolve that, but that would require a level of disputation that we don't want to have among ourselves at this stage, so we will leave it for the judges to work out'."

Over the past 20 years, while the number of bills introduced into Parliament each year has remained relatively constant, the number of pages in each bill has more than doubled, research by the Rule of Law Institute of Australia has found.

Each new federal bill runs to an average of almost 9000 pages, compared with around 4000 in the late 1980s. The institute, which was established in 2009 by law firm Speed and Stracey, which acts for major clients including Westfield and the Lowy family, has also found that each page of a new bill generates half a page of new regulations.

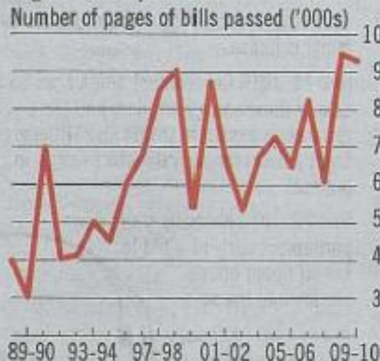
"The explosion of legislation and regulation presents a real threat to the rule of law as there is an inverse relationship between the growth of legislation and the community's capacity to monitor, comprehend and comply with the law," Richard Gilbert, the institute's chief executive, said.

The Chief Justice's comments also reveal an irony in the federal government's attempts to introduce laws to encourage litigants to resolve commercial litigation more cheaply and expeditiously, when it is the complexity of commonwealth laws, and their constant amendments, that are making the resolution of cases more difficult.

The Civil Dispute Resolution Bill seeks to create a system of "pre-action protocols" that will require all parties in Federal Court claims to lodge a statement setting out the "genuine steps" taken to try to resolve it. But the Federal Court asked the government in November for a substantial rewrite of the bill.

The Chief Justice remains concerned the obligations may dissuade some commercial litigants from filing claims in the Federal Court, in favour of other jurisdictions.

Paperwork



"It is one thing to create new avenues of possible solution which are voluntary. It is another thing to raise the barriers where, particularly in relation to large commercial disputes that superior courts are concerned with, people will say, 'Let's go and litigate somewhere else'," he said.

A far more effective approach for streamlining litigation would be to encourage senior legal partners and barristers to become more involved in cases earlier in the litigation process, Chief Justice Keane said. This would reduce costs and ease the burden on the judiciary in complex cases.

The much-maligned system of time-charging by lawyers was also adding to the length of large cases, he said, which would only be reversed when in-house corporate counsel forced large commercial law firms to change their billing practices.

"We have had the time sheet with us for 30 years now, and the problems with the growth of mega-litigation have, not coincidentally, emerged during those three decades. The real test is the evident concern emerging from in-house counsel in the corporations that they don't like being billed by the hour. As John Kenneth Galbraith would say, we can rely on the countervailing power of those clients to break it down if it indeed is as inefficient as some expect it is."

Chief Justice Patrick Keane . . . parallel universe of complexity. Photo: JAMES DAVIES

He also reinforced the recent demands of the Council of Chief Justices that the government abandon its controversial proposal for a new, national regulatory board for the legal profession to be staffed with a majority of members appointed by state attorneys-general.

The Council of Australian Governments will consider the structure of the proposed National Legal Services Board early this year.

"Lawyers running cases, for a large part of their professional lives, run cases against governments," Chief Justice Keane said.

"It has been an article of faith with us since the 17th century that the courts operate on the basis the lawyers are their officers and their first duty is to the court and the second duty to the client. There is no duty to the government.

"Their role is one of fierce independence and it is fierce independence against governments. In much of the litigation they do, it would be a real change in those arrangements if admission to the profession is regulated by . . . a body which was dominated by the executive government, even a benign one."

The Chief Justice also raised ques-

law overload

TOUGH JUDGMENT ON TAX LAW

Badly drafted tax laws are to blame for much of the costly and time-consuming litigation in the courts, a leading Federal Court judge says.

Justice Michelle Gordon told an Australasian Tax Teachers Association conference in Melbourne yesterday that when legislation lacked clarity it caused difficulties for taxpayers and other stakeholders.

She said the same problems undermined legislation in a number of fields, not just tax.

"The words which create the difficulty, though, seem to have the same common characteristic: they are generic words that inherently possess degrees of meaning," she said.

"The difficulty is one which I suspect could in large part be avoided."

Justice Gordon said greater critical analysis of laws during the drafting process was required.

There was also a problem with "overdrafting" of legislation as a result of political negotiation or for other reasons.

"You've really got to go back to the source and that's the drafters and sometimes I'm critical of them, seriously critical. Sometimes I think their instructions are poor," she said.

"If we actually get the drafters to understand what the real issue is and actually give it some scope then the complexity might reduce."

Justice Gordon said professionals also relied too heavily on case law precedent.

"Each case is dependent on the evidence led and the facts found. However, it seems that every word in every case decided by the courts is analysed by the profession as though it is written in stone and carries some legislative force it doesn't."

Justice Gordon said tax professionals suffered from myopia because they focused too much on purely tax law issues. She also criticised big firms for not giving their graduates a sufficient range of experience that allowed them to see issues for clients beyond narrow specialisations.

Mathew Dunckley

tions about the government's proposed restructure of federal courts. The "preferable course" was for the general jurisdiction of the Federal Magistrates Court to be maintained as a separate court, he said. He also pointed to the "legitimate concern" of moving away from a court martial structure for military justice that "gives the accused the benefit of the view of his peers".

"That that is a good thing is probably a reason why [courts martial have] lasted so long," he said. "On the other hand, the decision as to how you approach the dispensation of military justice is in the end a matter for the Parliament. If we are given the work, the reality is we have justices in our court who have military experience who would be happy to be engaged to do the work. But in the end it is a matter for the government to strike that balance having regard to the interests of all the parties involved."

The Chief Justice also called on the government to consider establishing a small claims tribunal at the federal level, modelled on the Victorian Civil and Administrative Tribunal, which would be more cost-effective and alleviate pressure on the Federal Court in disputes about pensions and veterans' entitlements.

■ *LEGAL AFFAIRS: The nation's premier weekly section on legal issues resumes in the AFR next Friday.*