INTRODUCTORY REMARKS FOR THE 2012 COMPETITION LAW CONFERENCE

Steven Rares[*]

1. I suppose the Federal Court is really at the cutting edge of what this session's topic foreshadows. I wanted to draw attention to one aspect of the enforcement of competition law from the perspective of the courts. It is comprehensibility. That concept has been ignored by the Treasury drafters of some of the nation's most significant legislation. This includes the byzantine Taxation laws, the ever growing less and less intelligible *Corporations Act* and *ASIC Act* and, of course, the *Competition and Consumer Act 2010*. This last misnamed Act places a fraction of what once was a comprehensive and comprehensible norm of conduct we all knew as s 52, into the microcosm of s 18 of Sch 2 known as the *Australian Consumer Law*.

2. We now find other bits of s 52 bizarrely cut up and strewn into the *Corporations Act*, the *ASIC Act* and the *Australian Consumer Law* with enormous definitions and provisions specifying each portion's discrete roles in the various regulators' arsenals. But this senseless waste of paper costs the community and the courts time and money. Why does it matter whether you are misleading or deceptive about a financial product or service, or a consumer transaction or a market dealing? Surely, if the standard to be obeyed is that persons in trade or commerce are not to engage in conduct that is misleading or deceptive, that is all that needs to be said in the legislation. Everyone can understand it. You do not need a team of lawyers to trace through whether you are liable under one Act or another. Regrettably, the idea of simple concepts in legislation is anathema to the present Commonwealth parliamentary drafting system.

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[*] A judge of the Federal Court of Australia. The author acknowledges the assistance of his associate Abbey Burke, in the preparation of this introduction to the second session of 2012 Competition Law Conference held on 5 May 2012. The errors are the author's alone.

3. Take another example, the new criminal cartel provisions in Pt IV of the *Competition and Consumer Act*. Instead of re-enacting the *Trade Practices Act 1974* or even renumbering it, we now have Division 1 of Pt IV that begins with s 44ZZRA headed "simplified outline" – who is this kidding? It is not simple. Imagine a criminal trial where everyone in the court is arguing, orally, about sections that have two numerals and four letters before you hit a subsection. The United States has a major competition statute that has driven free enterprise in that country for a century. It is called the *Sherman Act 1890* amended by the inaptly named *Clayton Act 1914*. It is two sections long. The sections are not themselves long. They are elegant, simple prose. The Chinese *Anti Monopoly Law* of 2008 is 57 sections long. Art 19 provides, very simply:

> "**Article 19** Where a business operator is under any of the following circumstances, it may be assumed to be have a dominant market position:
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> (1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market;
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> (2) the joint relevant market share of two business operators accounts for 2/3 or above; or
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> (3) the joint relevant market share of three business operators accounts for 3/4 or above.
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> A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if they fall within the scope of second or third item.
>
> Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market [position], it shall not be determined as having a dominant market position."

4. The Chinese legislation is concept driven and easily understood. The May 2011 reprint of the *Competition and Consumer Act* is only 1414 pages long.

5. Why does Australia need hundreds if not thousands of pages of legislation in which to express almost every major enactment? The more words, the harder it is to identify the right, liability, or standard of behaviour that the law has established. It is not just a fussy judge who has this morass to wade through.

Accountants, lawyers, businesses, right down to the corner shop, all have to deal with mega-regulation such as is in the *Australian Consumer Law* or the Taxation legislation.

6. In his second reading speech for the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, the Minister for Small Business, Independent Contractors and the Service Economy, Minister Assisting the Finance Minister on Deregulation and Minister for Competition Policy and Consumer Affairs, the Hon Craig Emerson MP, explained that one, commendable objective of all the nation's Parliaments was to reform and streamline federal, State and Territory consumer protection laws into one cognate Act. He said, without intentional irony:

> "As we move towards a single, national market—a seamless national economy as called for by the Business Council of Australia and the 2020 Summit—this tangle of consumer laws must be rationalised. We must reduce confusion and complexity for consumers and provide consistency of consumer protection. We must reduce compliance burdens for business."

7. Yet s 131A of the *Competition and Consumer Act* states that that Act and all but Pt 5-5 of Sch 2, do not apply to the supply or possible supply of financial services or products. Why not? Well, because these provisions are needed to be largely replicated, but with lengthy definitional labyrinths in Pt 2 of the *ASIC Act*. Of course, that was not the only place to prohibit misleading and deceptive conduct. I can mention s 1041H of the *Corporations Act* with respect to a civil contravention by misleading or deceptive conduct, in relation to a financial product or service; and then, of course, there are the criminal provisions of s 670A, dealing with misleading or deceptive takeover documents or s 728, dealing with misleading or deceptive fundraising documents.

8. For some reason no simplified outline has been enacted for all that. But then these provisions were drafted to make clear, to judges like me, propositions such as are found in s 23EJ(2) of the *Federal Court of Australia Act 1976*. No doubt many of you will understand that years of law school, legal practice and

the odd bit of being alive do not equip you to survive or work out what s 23EJ(2) provides. It states: "A juror is taken to be discharged if the juror dies". Leaving aside the potential for communication by jurors with their former colleagues through a Ouija board, it is difficult to think why the Parliament needed solemnly to enact this profound law.

9. One of the canons of statutory construction is that an Act must be read as a whole. The problem we as a nation are facing is that the Parliament has lost control of the drafting of legislation. Modern lengthy statutes, amended as they often are, several times a year, defy intellectual comprehension. They contain a lot of overkill. That is not good for legal certainty or predictability. Lawyers fight over words. The more words, the more lawyers can find new and hidden, perhaps unthought of meanings.

10. I think an urgent priority in enforcing competition law, is that it be conceptualised, synthesised and sent to a drafter who can express it in plain, simple and short terms. It would not be hard.