Legal Studies State Conference 2012

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"Individual rights or the imperatives of the state – which should be paramount under the rule of law?"

Introduction

This paper will cover three main topics.

1. What is the rule of law and why do we have it?
2. The rule of law in Australia.
3. Recent examples where Australian legislation has offended the rule of law.

Rule of Law Institute

The Rule of Law Institute of Australia is an independent not-for-profit body. The Institute relies on the assistance of a lot of volunteer and pro bono work together with private donations. It receives no government funding. The Rule of Law Institute aims to promote discussion on the importance of the principles which underpin the rule of law. The broad objectives of the Institute are to:

- Foster the rule of law in Australia.
- Promote good governance in Australia by the rule of law.
- Encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- Reduce the complexity, arbitrariness and uncertainty of Australian laws.
- Reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The Rule of Law Institute carries out its objectives in a number of ways including:

- Addressing the relevance and significance of the rule of law in the community, universities and high schools.

- Participating in public debate on rule of law issues.

- Reviewing new legislation being enacted by the Parliaments throughout Australia for compliance with the rule of law.

- Monitoring government agencies' compliance with the rule of law, including the model litigant rules, coercive powers, investigations and transparency.

- Highlighting attempts to close court proceedings to the public and to undermine the independence of the judiciary.

What is the "rule of law" and why do we have it?

The rule of law is a set of principles or yardsticks by which laws (statutory and common law – judge made) and actions by those with some legal authority (eg regulators and courts), can be measured to see if they comply with those principles.

In a public policy context characteristics of a good law include whether they:

(a) balance individual/private rights with the good of the whole community;

(b) are fair and equitable;

(c) reflect community standards;

(d) are consistent with Government policy.

The rule of law is not concerned with these matters.

Other basis upon which laws can be analysed to assess whether they are good laws or otherwise is whether or not they infringe civil liberties or fundamental human rights. The rule of law is also not concerned with these matters, although sometimes a law can offend the rule of law as

well as civil liberties as in the case of the anti-bike legislation that is referred to later in this paper.

The rule of law has a different and a narrower focus.

The 'rule of law' is not the same as 'rule by-law'. If there are no laws or customary law in any country or geographical area then there is no rule by law. But many countries have laws and legal systems that do not operate under the rule of law. As Professor Geoffrey Walker points out in his text on the rule of law, jurists in Hitler's Third Reich and in fascist Italy claimed them to be more entitled to be called law-states than the liberal democracies because in both nations more human relations were regulated by the law than ever before. Yet each of them was the very antithesis of a state which observed the rule of law. In a country like Robert Mugabe's Zimbabwe, there is a legal system and laws, but the rule of law is by and large not a principle under which that regime has operated. Last week the Australian Senate passed a Bill to abolish the Australian Building and Construction Commission (ABCC), a regulator that since that the Institute has sought to have abolished since the Institute commenced in 2009. The ABCC had very extensive coercive powers that can be exercised by the Commissioner in an arbitrary manner. In response to the proposed abolition of the ABCC comments were published in the press claiming the building sector would return to the 'law of the jungle' and that the regulator had helped re-establish the rule of law in the construction industry. However what that regulator may have assisted in doing is to re-establish rule by law in the building industry and not to re-establish the rule of law.

Like many laws the rule of law needs to be understood in its historical context and in particular its development in England and Great Britain. English history is marked by a significant struggle over many centuries between the Monarchy and Parliament. Monarchs, their Lords and Barons from time to time imposed harsh laws (in particular severe taxes), arbitrarily had people arrested and confined without charge or trial, and when it suited them did not comply with their own laws. In 1215 the Magna Carta was the first major inroad into the absolute power of the British Monarch. The Magna Carta imposed legal limits on the King's power. 50 years later in 1264 the then Monarch was forced to call the first Parliament. Thereafter followed hundreds of years of tension between the Monarchy who often thought of themselves as still having absolute power and Parliament which saw itself as a break on the Monarch's powers. This culminated in the English civil wars in 1642 which were won by the Parliamentarians, followed by the passing of the

Bill of Rights in 1689. The Bill of Rights established restrictions on the royal prerogative, provided that the Sovereign could not suspend laws passed by Parliament or levy taxes without Parliamentary consent, could not interfere with Parliament, nor require excessive bail or inflict cruel or usual punishment. Following the independence of Parliament, an independent judiciary was established so that a person brought before the law or who sought to have civil issues resolved would be judged without interference from the Monarchy. It is the resolution of this power struggle over many centuries that gave birth to the rule of law.

The rule of law has three fundamental principles. These were articulated by Professor Dicey in his 1885 text *Introduction to the Study of the Law of the Constitution.* :

(a) The absolute supremacy or predominance of the law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. The people are ruled by the law, and by the law alone; a man may be punished for a breach of law, but he can be punished for nothing else.

(b) Equality for all before the law. Every person no matter their rank or condition is subject to the ordinary law. This excludes the idea of any exemption of officials or others from the duty of obedience to the law. We are all subject to the jurisdiction of the ordinary tribunals.

(c) An independent judiciary that determines people's rights and obligations under the law.

These three principles remain the foundation of the rule of law today. Since 1885 the three principals have developed further and the 'rule of law' now includes:

- that there should be ready and open access to the courts of law for those who seek legal remedy and relief;

- that all persons are entitled to a fair and open trial and the presumption of innocence; and

- that the law should be certain, general and equal in its operation. Where it's necessary to have discretions exercised by regulators or others, there should be clear guidelines as to how those discretions

> should be exercised. Someone subject to the discretion should be able to determine in advance with a reasonable degree of accuracy how that discretion is going to be exercised with respect to their circumstances.

In summary, in a legal system that adheres to the rule of law, the people subject to it, should know what the law is and have reasonable certainty as to the consequences of breaking that law. The same laws should apply to all persons subject to the legal system and any determination of whether the law has been broken and the consequences of any breach, or to determine a party's rights and obligations, should be conducted by an open and independent judicial system.

Understood in its historical context the rule of law in part protects individual rights and obligations from State power when the exercise of that power offends those rights. But it is not an independent basis upon which a law can be held to be void or an action by someone with legal authority can be held to be of no effect.

The rule of law in Australia

The first Supreme Court of the Australian Colonies was established in New South Wales in 1823. Prior to then, judge advocates applied British law in the colony. Five years later in 1828 the UK Parliament enacted the Australian Courts Act which provided that all laws and statutes in force in England at the time of passing of the Act shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land. With the laws of England came the rule of law to each of the Australian colonies. Parliament in the form of the NSW Legislative Council commenced in 1824 but there were no elections until 1843.

In 1901 the Australian Constitution commenced operation. Initially little was said about the rule of law and the Constitution. 50 years later in 1951 the High Court was asked to strike down the *Communist Party Dissolution Act*. The Menzies government caused widespread debate when it passed the Act in 1950. By way of preamble the Act provided that the Australian Communist Party was a revolutionary party using violence, fraud, sabotage, espionage and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the established system of Government of Australia, particularly by means of strikes or stoppages of work in certain industries declared to be vital to the security of defence of Australia. The operation of the Act was two

pronged. First it dissolved the Australian Communist Party, its property being forfeited to the Commonwealth. The High Court held this law could not be supported by the defence power in the Constitution and was unconstitutional. Second the Act also permitted the Governor General to dissolve bodies of persons associated with the Communist Party or communism, the forfeiture of their property, the penalising of acts directed towards the continuance of their activities, and making them ineligible to hold office under or for employment by the Commonwealth or in an industrial organisation. Although the High Court did not say that the second prong of the Act infringed the rule of law that was the effect. The Act gave the Governor General and accordingly the Federal executive Government the power to determine every element involved in the application of the provisions of the Act to reach the conclusions necessary to invoke the power given by the Act. The Court was concerned about the wide and arbitrary way in which a determination could be made by the Governor General. In his decision Dixon J said that:

> "*Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example, in separating the judicial power from other factors of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."*

In other words the rule of law was an assumption on which the Australian Constitution is based. But it is not a Constitutional guarantee or right. A subsequent referendum to amend the Constitution was narrowly defeated.

More recently in 2010 the High Court gave judgment in *Kirk* v *WorkCover NSW,* Heydon J, commented on a NSW law concerning work safety.

> *"The trial judge concluded that Mr Kirk did not supervise the daily activities of employees or contractors working on the Farm. The suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors – even the owners of relatively small farms like Mr Kirk's – is, with respect, an astonishing one. A great many farms in Australia are owned by natural persons who do not reside on or near them, and a great many other farms are owned by corporations the chief executive officers of which do not reside on or near them. The suggestion reflects a view of the legislation which, if it were correct, would*

> *justify many of the criticisms to which counsel for the appellants subjected it as being offensive to a fundamental aspect of the rule of law on the ground that it imposed obligations which were impossible to comply with and burdens which were impossible to bear."*

It was not necessary for the Court to strike down the law. The Court held that WorkCover NSW had misinterpreted the law which it had been doing for many years. The correct interpretation as determined by the High Court did not offend the rule of law.

In respect to State Constitutions one state, Queensland, has included in the preamble of its Constitution the following statement:

> *"The people of Queensland, free and equal citizens of Australia –*
>
> *(b) adopt the principle of the sovereignty of the people, under the rule of law, and the system of representative and responsible government, prescribed by this Constitution; ..."*

But that does not give Queensland Courts the power to strike down laws that offend the rule of law principles.

The importance of the rule of law in criminal matters was highlighted recently by the previous Director of Public Prosecutions, NSW Nicholas Cowdery in a recent paper to the Institute's annual conference:

> "*The rule of law is not an optional consideration if human rights and democracy are to be assured. It requires a strong, independent and principled judiciary. (Conversely, a weak or compromised judiciary contributes to its erosion.) It requires a clear acknowledgement of the separation of the judicial power from both the legislative and the executive and of the role of the judiciary in the constitutional enforcement of the law – including observance of the law by the other two branches of government. The consequences of failure of the rule of law are felt most keenly in criminal justice, where the liberty of the subject is at risk and the consequences of corruption of these principles can be dire. The independence of the prosecutor is essential. Constant vigilance is required to ensure that these principles survive. We cannot afford to be complacent or to place uncritical trust in our political representatives and rulers. To them the rule of law may be no*

more than a slogan – to us, it is of essential substance and has very practical consequences."

The rule of law is not part of the common law of Australia as that term is generally understood as being a reference to judge made law. Courts cannot strike down laws on the basis that they offend the rule. Although the rule of law is an assumption that underpins the Australian Constitution and is referred to in the Queensland Constitution both the Australian and Queensland Parliaments can enact laws that offend the rule of law.

Nevertheless Courts can and often do comment on whether laws infringe the rule of law. Courts are also willing to find that laws that offend the rule of law have been misinterpreted or are void for some other reason. Laws that offend the rule tend to be looked at more critically by appellate courts than other laws.

Anti-bikie legislation

One recent example of legislation which has fallen well short of 'rule of law' principles is the so-called "anti-bikie" legislation enacted in South Australia and New South Wales. In response to a number of highly publicised incidents involving rival motorcycle clubs including the death of a Hells Angel member at Sydney Airport, a number of States enacted legislation designed to disrupt the activities of criminal organisations and their members by restricting the ability of the members to associate. The legislation is not limited to bikie gangs.

Unlike the Federal Parliament, State Parliaments are not restricted by their Constitutions as to what laws they can pass. As long as the laws are for the peace, welfare and good government of the State - eg s5 *Constitution Act 1902* (NSW). States have the general power to pass laws outlawing bikie gangs. However the States are like everyone else in Australia subject to the Australian Constitution.

The anti-bikie provisions embodied a classic struggle between:

- the fundamental individual rights of the bike clubs members who have common interests to meet and socialise; and

- the imperative of the States to attempt to curb the criminal activities of the bike gangs and provide protection to the wider community.

The legislation also involved civil liberty issues, the right to freely associate.

Both the South Australian Act and the NSW Act involved similar issues to the *Communist Party case* but here it was State not Federal legislation.

South Australia – Take 1

The South Australian anti-bikie provisions are contained in the *Serious and Organised Crime (Control) Act 2008* and these were the first provisions to be challenged in the High Court in *South Australia v Totani.* The Act operated in two parts. First section 10 of the Act empowered the South Australian Attorney General to make a declaration if he was satisfied that members of an organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in South Australia. The Attorney General made the declaration in respect to the Finks motor cycle gang. Second the Attorney General then applied to a Magistrate for a control order against Mr Totani under s14 of the Act. That section required the Magistrate to make the control order if the person was a member of the Finks motor cycle gang. The only discretion the Magistrate had was to determine whether or not Mr Totani was a member of the Finks motor cycle organisation. Neither the declaration by the Attorney General nor the control order by the Magistrate required either of them to form any belief that Mr Totani had committed a criminal act. By virtue of s35 of the Act if Mr Totani associated on six or more occasions during a period of 12 months with a member of a declared organisation or another person who had a control order made against them, he would be guilty of an offence punishable by imprisonment for up to five years. The High Court held that the Magistrate was now no longer acting in an independent judicial manner, a fundamental principle of the rule of law. The Magistrate was acting at the behest of the Attorney General and was not acting in a matter compatible with the proper discharge of judicial responsibilities. The Magistrate was really just rubber-stamping an executive decision by the Attorney-General. Section 14 of the Act attempted to give the control order the imprimatur of the Court which the Attorney General was not entitled to because it was an executive decision not judicial. Although it is a State court, State courts are referred to in the Commonwealth Constitution and in particular they can be invested with Federal jurisdiction. Accordingly they are subject to the Federal Constitution which Dixon J in The Communist Party Case said was underpinned by the rule of law. Just as

in the 17th century when Monarchs were no longer permitted to interfere in judicial decision making nor was the South Australian Parliament or the Attorney General permitted to in effect to do the same in South Australia in 2010.

In his judgment in *Totani* Chief Justice French stated that:

> *"The rule of law, upon which the Constitution is based, does not vary in its application to any individual or group according to the measure of public or official condemnation, however justified, of that individual or that group. The requirements of judicial independence and impartiality are no less rigorous in the case of the criminal or anti-social defendant than they are in the case of the law-abiding person of impeccable character."*

The High Court held that s14 of the Act, by which the Magistrate rubber-stamped the Attorney General's decision, was invalid. The rest of the Act survived.
South Australia has recently introduced amending legislation to try to correct the deficiencies in the original Act. I will later outline the relevant changes to that Act arising from the *Totani* decision.

New South Wales – Take 1

The corresponding New South Wales provisions were contained in the *Crimes (Criminal Organisations Control) Act 2009* which operated slightly differently to the South Australian provisions. Under the Act only an "eligible judge" of the Supreme Court could classify an organisation as a "declared organisation". (In South Australia, the Attorney General made the order). Under s9 of the Act the declaration could only be made where the eligible judge was satisfied that:

- members of the organisation associated for the purposes of organising, planning facilitating, supporting or engaging in "serious criminal activity"; and

- the organisation represented a risk to the public safety and order of New South Wales.

In considering whether to make a declaration the judge may have regard to any matter it considers relevant including links between the organisation and serious criminal activity, criminal convictions of current or former members. In this a judge of the NSW Supreme Court (not a

Magistrate) had a wide discretion. It could not be said the judge was not acting independently. The vice of the Act was that s13 provided that the judge was not required to provide any grounds or reasons for the making of a declaration. The majority of the High Court judges in *Wainohu* held that it was a hallmark distinguishing arbitrary decisions from substantial judicial decisions that the latter was required to and did give reasons for the decision. It is a fundamental principle of the rule of law that arbitrary decisions cannot be made by the executive, regulators or judicial bodies. Although the outcome was not expressed to be by reason of offending the rule of law it was important to the High Court that there be no suggestion of arbitrary decision making, a fundamental rule of law principle, which required reason to ensure that others could read the decision and verify that it was not made arbitrarily. The High Court was so concerned by the offending provision that it struck down the entire Act not just s13.

For those that are interested, the teaching aid slides for the *Wainohu* decision are on the Institute's website.

New South Wales – Take 2

In New South Wales, the offending Act was re-enacted by the *Crimes (Criminal Organisations Control) Bill 2012* with very minor amendments. This amended Bill was passed last week by the NSW Parliament.

The 2012 Bill repeals the *Crimes (Criminal Organisations Control) Act 2009*, which was unnecessary as the High Court said it was all void, and re-enacts virtually all of the provisions in the same form except for s13. Section 13 now specifies that where an eligible judge makes a declaration, the eligible judge is **required** to provide reasons for doing so. The second reading speech which introduced the 2012 Bill states that the NSW Government believes this will be sufficient to address the constitutional issue identified in the decision of the High Court. I think it is sufficient to address that Constitutional issue, but that doesn't mean there are not other issues including rule of law issues that the High Court hasn't yet considered. A declaration made by an eligible judge does nothing by itself other than refer to a particular organisation. As with the previous Act a judge can make a declaration if he or she is satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in NSW. The second step is that a Police Officer can then apply to Supreme Court for a control order relating to one or more person specified in the officer's

application. To make a control order the court has to be satisfied the person is a member of a declared organisation and sufficient grounds exist for making the control order: s19. But the Act is very vague on what constitutes sufficient grounds. It seems to suggest that the Court need only take into account the affidavit by the police officer verifying that the contents are correct. There are no guidelines for the Court to determine if sufficient grounds exist. In reality the section seems to operate only on the basis the person is a member of the declared organisation. As with the original South Australian Act it seems the Court is being used to merely rubber stamp the police officer's application, which is not an independent judicial function. Alternatively the provision is so vague to be unworkable and allows for arbitrary decision making. The section (s19) that permits the Court to make a control order if sufficient grounds exist, should be contrasted with section 9 of the same Act which permits the Court to declare an organisation. The judge has to be satisfied that the members of the organisation associate for serious criminal activity and the organisation represents a threat to public safety and order. In considering whether or not to declare the organisation the Court has to consider five specified matters including the link between the organisation and serious criminal activity, and any criminal convictions recorded against current or former members. In s19 there are however no guidelines as to what a court has to take into account to determine if there are sufficient grounds for the making of a control order. The Act does not specify what is required to be in the affidavit for such sufficient grounds to exist. A person who contravenes a control order by associating with another controlled member of the declared organisation is guilty of an offence and can be imprisoned for up to five years. Perhaps such sufficient grounds will be included in the regulations which we have not yet seen.

South Australia – Take 2

On 15 February 2012 the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Bill 2011* was introduced into the House of Assembly in South Australia. Only s14 of the SA Serious and Organised Crime 2008 was held to be invalid by the High Court. That section required the Magistrate to make a control order if it was satisfied that a person was a member of a declared organisation, thereby rubber stamping the Attorney General's decision which was held to be incompatible with the Court's integrity as an independent and judicial body. South Australia has moved away from the NSW legislative requirement that there be unspecified sufficient grounds for the making of a control order: s19 NSW Act. Section 22 of the 2012 South Australian Amending Bill

now provides that the Court may make a control order only if it is satisfied that an individual:

(a) is a member of the declared organisation; or

(b) has been a member of the declared organisation or has been engaged in serious criminal activity or has associated with members of the declared organisation; or

(c) engages or has engaged in serious criminal activity and associates or has associated with other persons who engage or have engaged in serious criminal activity;

and the making of the order is appropriate in all the circumstances.

In other words the Court has a very wide jurisdiction and can decline to make the order if it is not appropriate in all the circumstances. Further under the NSW legislation a control order prevents an individual from associating with another person who is also the subject of a control order. A contravention is a criminal offence and punishable by up to five years in jail. South Australia however takes a slightly different approach in that at least to some extent the control order can be moulded to suit the circumstances and may not necessarily just prohibit the person from associating with other persons as is the case with the NSW Act. A control order under the South Australian provisions may restrict the person from being in the vicinity of a specified place or premises, possessing a specified article or weapon or carrying more than a specified amount of cash. In determining an application for a control order the Court must have regard to any matter it considers relevant together with the respondent's history of behaviour, the extent to which the order might assist in preventing serious criminal activity, the prior criminal record and any legitimate reason the person may have for associating with others. In other words the South Australian legislation provides for what most practitioners would regard as a judicial function. In my view the amended South Australian legislation is more likely that the NSW Act to survive a further challenge.

Australian Crime Commission (ACC)

In 2011 the Federal Government introduced the *Crimes Legislation Amendment (Powers and Offences) Bill 2011*. The ACC is the central criminal intelligence government agency in Australia and is highly secretive with extraordinary powers of investigation. It can summon any one to be examined by its officers. The person summoned is obliged to

answer every question under oath, has no privilege against self-incrimination, and in prescribed circumstances can go to jail if he or she discloses to any one (including their family) that they were summoned or gave evidence.

One of the intended operations of the Bill is to allow the ACC to share its secret information with the private sector. In other words the ACC could 'inform' on an employee, to the employee's employer. The proposed laws permit the ACC to inform the senior executive of a company that a named employee may be engaged in some form of criminal activity.

What is not clear is how the private sector "deals" with the ACC information, nor how the employee is protected in this process.

There are legal and moral obligations to respect the employees' rights but there is also a responsibility to the company and shareholders to act when an organisation such as the ACC states its view on such a serious matter.

The fatal defect in authorising the ACC to make this disclosure of information gathered in secret to the private sector is the incompatibility between the presumption of innocence of the employee and the assumption in the Bill that the view of the ACC as to the guilt of a person is conclusive and that the information disclosed is complete, accurate, admissible in court and has been independently verified.

At present the ACC Act contains the minimum rule of law safeguards. Namely that the ACC is an investigator and it is a matter for the law enforcement agencies to decide whether to act on the information collected by it. The ACC does not have power to prosecute; that is the role of the independent Commonwealth Director of Public Prosecutions. The ACC does not have the power to find a person has committed a criminal offence and send him to jail; that is the role of the independent courts whose proceedings are open to the Australian public.

Inherent in the Bill is the risk of bypassing these safeguards, sweeping away the presumption of innocence, having the employee damned as a "rogue employee" and having the private sector do the dirty work of "dealing" with the employee; and all behind closed doors. No proper protections are provided to the employee. Nor is an employer protected who dismisses an employee when it turns out the ACC was wrong or its information defective or it failed to disclose the information in its possession disclosing innocence.

For this reason the Institute objected to the Bill in the form it was in, and gave evidence to the Federal House of Representatives Standing Committee on Social Policy and Legal Affairs. As a result the Institute is pleased to note that the Government has proposed amending the Bill, but not in the way we wanted. Instead of the Government withdrawing the proposed power for the ACC to provide information to private sector corporations about their employees, it can still occur provided the information:

(a) If the ACC does not prejudice the safety of a person or that persons fair trial; and
(b) the corporation must ensure that the ACC information is not used or disclosed in a way that might prejudice the reputation of the person.

This is one example where the rule of law has operated to help protect individual rights against Federal power.

Summary

So in conclusion, the examples of anti-bikie legislation and the extraordinary powers of disclosure of the Australian Crime Commission are but two instances where legislation gives rise to a conflict between the imperatives of the state and the rights of individuals.

It is easy to discern public policy merit in of these legislative initiatives, whether it is:

- protecting the wider community from the criminal activities of outlaw motorcycle gangs; or

- warning private firms against an impending threat of being infiltrated by organised crime.

However, the rule of law favours neither individual rights nor State imperatives. Rather it simply requires adherence to its fundamental principles as outlined earlier. The examples I have used are not of the rule of law striving to protect the rights of the individual as they are seen as more worthy or superior to the goals of the State, instead they are examples of where advancement of the principles of the rule of law have, as a fortunate by-product, protected an individual's rights.

It is important that those that teach legal studies, those studying to be a lawyer or to obtain a law degree, or who are just interested in the law, understand the rule of law.

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