Is the Rule of Law in Australia under challenge?

1. Introduction

Every year the World Bank Institute gathers data on indicators (judicial independence, public confidence in the legal system and so on) in an attempt to measure observance to the rule of law in each country in the world [1].

In the Bank's latest report, published in June of this year, the rule of law measures for the period 1996-2008 place Australia in the top 10% of the 212 countries surveyed, ahead of the UK and USA [2].

This comes as no surprise.

We have freedom of speech.

We know that our judiciary is independent, impartial and highly competent. We have a strong independent bar, the members of which are not punished for taking on cases which are contrary to government policy. We have highly intelligent academics, who are not frightened to teach or publish what they think. And, regardless how we may view individual politicians, we know that our democratic parliamentary system is one of the best in the world.

But Chief Justice Spigelman has said [3]:

> "A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially."

I suggest that the administration of laws in Australia is at a critical cross road. There is an emerging trend in the administration of laws by the executive branch of government which seriously challenges the rule of law.

2. The emerging trend

There is, of course, a profound difference between "rule by law" and "rule of law".

In my view, the rule of law in Australia is feeding on itself at an ever increasing rate, and is inverting into the law of rules; it is this which is in turn feeding the emerging trend.

We have now reached the position where Australia is drowning in a sea of rules. There are thousands of Federal Acts, State and Territories Acts and rules and regulations.

In the Federal area there was in the 2008 calendar year about 9,042 pages of new Acts passed by the Federal Government. Yet in the 10 years from 1929 to 1939 there were only 2,425 pages of new Federal Acts passed.

Now, every 3 months the Federal Parliament passes more legislation than in the whole of the 10 years from 1929-1939.

It is true that we now have the threat of global warming and terrorism. But those living in 1929-1939 had a few problems of their own, the great depression of 1929 to 1936 (at its peak in 1932 unemployment reached 32%), the revolutionary forces of communism and fascism at work in Australia seeking to overthrow the system, and World War II (with the threat of invasion from Japan).

Having looked back 75 years to the 1930's, if you now look forward to the position in 75 years or so; it has been estimated that if the present trend continues tax legislation alone in Australia will cover, by the end of the century, 830 billion pages and take 3 million years to read [4].

You may respond that the administrator of the law will not apply the law unreasonably. But therein lies the rub, and the corollary to the law of rules; namely as the rule of law inverts into the law of rules the role of the administrator of the law becomes increasingly pivotal.

You may also say that we can turn on our computer and instantly see the latest version of s165-115ZB of the 1997 Tax Act or any other provision in any Federal or State Act. But this instant gratification is not the pinnacle of the rule of law, but may be the antithesis. For what is critical to the rule of law is the gap between the "law on the books" and "law in action" [5].

Each new law adds to the unsustainable level of required compliance.

In consequence, the Achilles heel to the operation of the rule of law in Australia can be seen in the administration of the laws by the executive branch of government.

The emerging trend I refer to is that of requiring the administrator of the laws (usually a government department) to have a role which is in conflict with the rule of law. This, if unchecked, will lead to what I describe as the "rule of the regulator".

Perhaps I may explain what I mean with examples. In doing so, I am conscious that it is easy to take a cheap shot at those administer our laws; what follows is not a personal criticism of government officials who do a tremendous job under conflicting pressures, but a comment on the effects of having laws requiring an unsustainable level of required compliance and requiring administrators to take on a role in conflict with the rule of law.

3. The changing role of the administrator

We can now see what happens when you the change the role of an administrator by considering the role required of one of Australia's largest government departments, the Australian Taxation Office ("ATO") on the introduction a number of years ago of what was euphemistically called "self-assessment".

The burden of knowing, complying with the ever changing mass of tax laws, and then annually assessing the correct tax payable, was by "self-assessment" thrown upon taxpayers. Before then it was the

role of the ATO to annually assess. Heavy civil and criminal penalties are now imposed on those taxpayers who get it wrong.

After self-assessment the role of the ATO changed.

On 21 October 2009 the current Treasurer said in Parliament [6]:

> "Individual Australians do not just see a tax system. What they see is a tax jungle."

That is not the only perception – after self-assessment the perception is of the ATO as the predator in that tax jungle – and that of the taxpayer the prey.

Many taxpayers look not to the law or courts for protection – but to not being seen by the predator.

This has occurred not for any lack of bona fides by the ATO, or lack of competence or grab for power, but because of the wrong legislative response to the mass of tax laws which require an unsustainable level of required compliance.

The current criminalisation of tax collection has the same origin.

It is part of this change of role that the administrator (whether the ATO or other government department) is, every day, invested with an ever increasing arsenal of powers of investigation, such as search warrants, telephone tapping and informants. Now, no self-respecting Australian government department can apparently exist without these powers.

Is it because we all have become criminals?; or because of thirst for power by government departments? I think not. I suggest the better explanation owes its origin in the inversion of the rule of law and the attempt to find a solution by compromising the role of the administrator of the laws.

Nowhere is this more evident than the February 2009 Report of the Senate Economic's Committee on the Trade Practices Amendment (Cartel Conduct and other Measures) Bill 2008 for imposing criminal sanctions on cartel participants.

The Committee's inquiries highlighted that the first concern was that there were insufficient criteria distinguishing between criminal and civil cartel activity and innocent conduct.

In its summary to its Report, the Committee stated:

> "While it is desirable to have certainty in determining which cases will, and will not, attract a criminal cartel investigation, it is very difficult to legislate to this effect. The bill must therefore be seen as providing the ACCC with the power to refer a matter for criminal prosecution while retaining flexibility for it to determine each case on the specific circumstances."

Under the guise of "flexibility" (whatever that means) there was an abandonment of excluding from the legal definition of criminal cartel, innocent conduct which should not fall in the definition. Rather, the ACCC and the DPP were given the "flexibility" of not prosecuting those involved in a "criminal cartel" if they thought it not serious enough.

The Senate Committee was given the example of the agreement by two doctors who operated independent practices in a country town and who agreed that one would work on Saturday and the other on Sunday. The Committee recognised this was caught by the definition of criminal cartel in the Bill, but the concerns were swept aside as a case where there the ACCC and DPP would not be expected to prosecute.

That is the antithesis of the rule of law.

4. The administrator ceasing to being indifferent to the outcome

The essential role of the administrator of the law is to apply the law in accordance with the rule of law, regardless of the personal views of the administrator. As the Chief Justice has said [3], Australia cannot claim to operate under the rule of law unless the law is administered fairly, rationally, predictably, consistently and impartially.

The Chief Justice has said of impartiality [3]:

> "Impartiality requires the decision maker to be indifferent to the outcome."

It is part of the emerging trend that the administrator becomes itself a regulator and ceases to be indifferent to the application of the law.

What is emerging is the administrator of the laws who is an independent regulator and who applies his view of the laws on those he considers it should be applied.

In June 2009 Parliament enacted criminal sanctions against cartel conduct referred to earlier. The ACCC is charged with administering the new laws, and its Chairman wrote in the Australian Financial Review on 22 July 2009 on the introduction of the new cartel provisions:

> "The start of criminal sanctions means those who engage in some of the most serious forms of theft from consumers and businesses will be treated like the criminals they are."

He then referred to the guidelines issued by ACCC as to what was, and what was not, serious cartel conduct and said:

> "Yet elements of the legal fraternity and some businesses seek greater guidance as to the ACCC's line dividing criminal and civil conduct."

and

> "Let me make it very simple – if you don't want the risk of going to jail, don't get involved in illegal cartels. This is the only advice lawyers will need to provide their clients. For those who disregard this advice the ACCC will use the full force of the law to bring you to account either financially or through incarceration."

Further, in an interview reported in the Australian Financial Review on 17 December 2008, the Chairman is reported as saying in respect of executives thinking of entering into a cartel:

> "We will hunt them down. I can tell you now: there is nothing that will deter us from hunting them down". "I want people to sweat. I want them to go to bed at night and think, 'If I haven't confessed by tomorrow morning, someone else might have confessed first, put a marker down and that I run the risk of going to jail for up to 10 years.'"

It is the regulator who decides whether to investigate a possible breach of law, it is the regulator who carries out the investigation with extensive powers of compulsory examination, telephone tapping and access to premises. It is the regulator who decides whether to refer a possible criminal offence to the DPP for the decision to prosecute and who works on collecting the evidence in a prosecution.

It is the regulator to whom Parliament has left "flexibility" – rather than certainty in the law.

When a regulator takes such a strong position as that taken by the ACCC, it is hardly surprising that there is a perceived, if not actual, lack of impartiality in an investigation process. It is no answer to have the decision to prosecute in the hands of the DPP or to have a jury decide guilt or innocence; investigations can take years to

complete and in the meantime can ruin careers, families and businesses, even if a prosecution is never brought or is unsuccessful. The time, effort and publicity suffered by a person in the years of an investigation can be huge. This is illustrated this week by the failure of the ASIC prosecution in the One.Tel case and raises a number of important issues, including whether in such prosecutions only the wealthy can afford to plead not guilty.

Impartiality in the investigation process is essential, regardless of the personal views of those carrying out the investigation.

5. What is important - the law - or what the administrator says?

I suggest that it is a reality check to ask the relative importance in practice of the law as compared to what the administrator of the law says the law says. The greater the importance of what the administrator says, the greater the danger to the rule of law.

In our tax system few large transactions can proceed without obtaining in advance an ATO ruling. This is not because the ATO has inherent wisdom or knowledge of the tax laws but because the concern that the ATO may take a different view of the law's meaning or apply an anti-avoidance provision, such as Part IVA. Once a taxpayer has an ATO ruling on what the ATO says the law says it becomes law and is superior to the law. Regardless what the High Court may decide the actual law means, a contrary private ruling prevails for the taxpayer who obtained the ruling [7].

It has been estimated that in the past 8 years the ATO has issued over 80,000 private rulings on the meaning of the tax law [8]; this is in addition to the countless public rulings, class rulings, product rulings, tax determinations and other ATO publications.

If a taxpayer fails to follow a public ruling, he may be subject to penalty tax. In calculating penalties, ATO public rulings are treated as "authorities" which are required to be weighed against the authority of High Court decisions, and in some cases in preference to them [9].

In 2007 the Full Federal Court criticised the ATO over its pursuit of taxpayers in relation to employee benefit arrangements promoted by "aggressive tax planners". After Kiefel J found for the taxpayers (on the FBT question) in relation to such arrangement (Essenbourne Pty Ltd v FCT [10]), the ATO publicly declared it did "not accept that the Court's comments" on the interpretation of the relevant provisions was correct [11]. Hill J in a subsequent decision (Walstern Pty Ltd v FCT [12]) stated his view that Kiefel J was not clearly wrong, but in fact was "clearly right".

The ATO, however, continued to apply the law in the manner set out in an earlier ATO public ruling, contrary to the two Federal Court decisions (which the ATO did not appeal).

In 2007 the Full Federal Court (FCT v Indooroopilly Children Services (QLD) Pty Ltd [13]), hearing another case involving similar arrangements, Allsop J (with whom Edmonds J agreed) stated in criticism of the ATO:

> "From the material that was put to the full court, it was open to conclude that the appellant was administering the relevant revenue statute in a way known to be contrary to how this court had declared the meaning of that statute."

The ATO subsequently accepted that "it would have been better if the issue could have been brought before the Full Court more promptly" [14].

6. The regulator's need for convictions and the nuisance of the presumption of innocence

The presumption of innocence is fundamental to the rule of law.

I suggest that it is part of the emerging trend for there to be a perceived need of the new regulator to obtain convictions, and in consequence the push to remove what he considers are barriers to convictions.

In the Glong petrol case the ACCC brought proceedings against eight retailers alleging price fixing. The Federal Court in a judgment of over 200 pages carefully examined all of the evidence and found there was no price fixing arrangement [15]. The ACCC did not appeal, but ever since then has loudly complained about the high standard of proof required by the Federal Court and has vigorously campaigned for a change of law so that convictions can be more readily obtained.

Faced with the inconvenience of rules of evidence, and other devices by lawyers for an accused, such as the presumption of innocence, the trend is to modify the rules of evidence or abolish them.

The "spin" to justify the change is illustrated by the Explanatory Memorandum to the Foreign Evidence Amendment Bill 2008 where the overturning of the hearsay exemption and the effective reversal of the onus of proof for foreign business records was described in these terms.

> "The primary purpose of the Bill is to amend Part 3 of the Foreign Evidence Act to streamline the process for adducing foreign material that appears to consist of a business record." (emphasis added)

One may ask streamlining for whose benefit.

The other approach used by government "spin merchants" to justify lowering evidentiary standards or imposing special adverse treatment is to classify people into groups and then demonise them. Having done this the rules of evidence or other penalty provisions are then substantially modified for that group so that a conviction can be more readily obtained or the penalty provision applied more easily by the administrator.

Ann Applebaum in Gulag: A History reminds us that the rule of law requires that an individual is punished only for what he does, not for who he is or with whom he is associated.

Mark Robertson, barrister has made the following comment [16]:

> "Applebaum refers to Josef Statins slippery technique of claiming to protect the community from "enemies of the people", "wreckers" and "saboteurs". She cites Hannah Arendt's description of this technique, being to create "objective opponents" or "objective enemies" whose identity changes according to the prevailing circumstances."

We see all sorts of people classified together and given special legislative treatment. A common classification is a company director.

A company director may be civilly or criminally liable for corporate breaches, unless he can establish an available defence. It has been estimated that there are more than 600 different State-based laws holding directors personally liable for company misconduct, even where there is no personal culpability by the company director [17].

Another illustration of this selective classification is the recent amendment to Division 35 of Pt 2.5 of the Income Tax Assessment Act by the Tax Laws Amendment (2009 Budget Measures No2) Bill 2009. There the group singled out for special treatment are individuals who earn more than $250,000 per annum. If you earn less than $250,000 you are entitled to deduct against your income losses from your other business activities provided you met one of four objective tests i.e. the business made a profit in three out of the last five years. But if you earn more you are required to go cap in hand to the ATO and ask them to exercise their discretion to allow the losses. The justification for this singling out of special treatment is stated in the Explanatory Memorandum to be:

> "Those amendments improve the integrity, fairness and equality of the non-commercial losses rules by recognising that the current exceptions operate in a discriminating way because high income individuals

> are more able to satisfy the objective tests and use these to avoid tax."

Several things are worthy of note in that extract. First, it follows the trend of Explanatory Memorandums becoming "spin" documents which would make a used car sales man blush. Second, it follows the trend of demonising the persons in the classification i.e. those who earn more than $250,000 thereby saying they are tax avoiders (presumably because they have the temerity to want to offset losses actually sustained from one business activity against another).

Fundamentally the Explanatory Memorandum displays an unwillingness of the government to grapple with the real issues.

7. Conclusion

The above is not intended as a personal criticism of members of the executive branch of government. The Commissioner of Taxation, and others do a first rate job in difficult circumstances under tremendous conflicting pressures.

Rather, it is a criticism of the mass of our laws which require an unsustainable level of required compliance, and the emerging trend of the rule of the regulator who applies the law in accordance with his own views of those laws and what he considers is in the best interests of the community.

In my view, unless this trend is changed, the rule of law in Australia is under serious threat.

Robin Speed
20 November 2009

Notes

[1] World Bank Group Press Release 29 June 2009 No 2009/446/DEC: www.worldbank.org. The Worldwide Governance Indicators database is the result of a research project initiated by Kaufmann and

Kraay in the late 1990's, and is now co-authored with the World Bank Institute. The indicators measure six broad dimensions of governance, including the rule of law, of 212 countries and territories, drawing together 35 different data sources.

[2] Norway and Denmark are the 2 leading countries. Australia is ranked 11th, UK 17th and the USA 18th.

[3] Address at 20 March 2003 International Legal Services Advisory Council Conference Sydney.

[4] Professor Geoffrey De Q Walker: National Observer July 2004: The Federal Tax System: The Decline of Laws Empire.

[5] 2003 International Legal Services Advisory Council Conference Sydney.

[6] Hansard: House of Representatives 21 October 2009 (p57).

[7] Division 357 in Schedule 1 to Taxation Administration Act 1953

[8] National Tax Liaison Group Minutes: 26 November 2008.

[9] S284-15 in Schedule 1 of Taxation Administration Act 1953; see MT 2008/2. The ATO is under no obligation to draw the attention of a taxpayer to a public ruling; Glennan v FCT (2003) 53 ATR 101.

[10] (2002) 51 ATR 629; 2002 ATC 5201.

[11] 14 March 2003: The then Commissioner of Taxation: Tensions in tax administration.

[12] (2003) 54 ATR 423; 2003 ATC 5076.

[13] (2007) 65 ATR 369.

[14] Decision Impact Statement 23 March 2007.

[15] ACCC v Leahy Petroleum Pty Ltd; [2007] FCA 749.

[16] An article by Mark Robinson, barrister "A disregard of the law" (TIA 41 (No. 11), June 2007.

[17] Submission by Institute of Company Directors dated 2 June 2009 to Treasury on prescribed private funds.