RULE OF LAW

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The Rule of Law

Case studies and their relevance to Legal Studies

Richard Gilbert, Chief Executive Officer
Rule of Law Institute of Australia

Legal Studies State Conference 2011

The Rule of Law Institute of Australia (RoLIA)

The Rule of Law Institute is an independent non-profit association formed to uphold the rule of law in Australia.

The Institute's objectives are:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

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A V Dicey

British jurist Albert Venn Dicey popularised the phrase "rule of law" in 1885. He wrote 'An Introduction to the Study of the Law of the Constitution' (1885) which discussed the rule of law and the principles of parliamentary sovereignty as supreme rule maker and an independent court system (separation of powers).

Dicey emphasised three aspects of the rule of law:

1. no one can be punished or made to suffer except for a breach of law proved in an ordinary court;
2. no one is above the law and everyone is equal before the law regardless of social, economic, or political status; and
3. the rule of law includes the results of judicial decisions determining the rights of private persons.

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File 1: Threat to Rule of Law by flood of legislation

THE AUSTRALIAN FINANCIAL REVIEW

FRIDAY 21 JANUARY 2011 www.afr.com Price $3.00 (incl GST)

'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

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

Continued page 14

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

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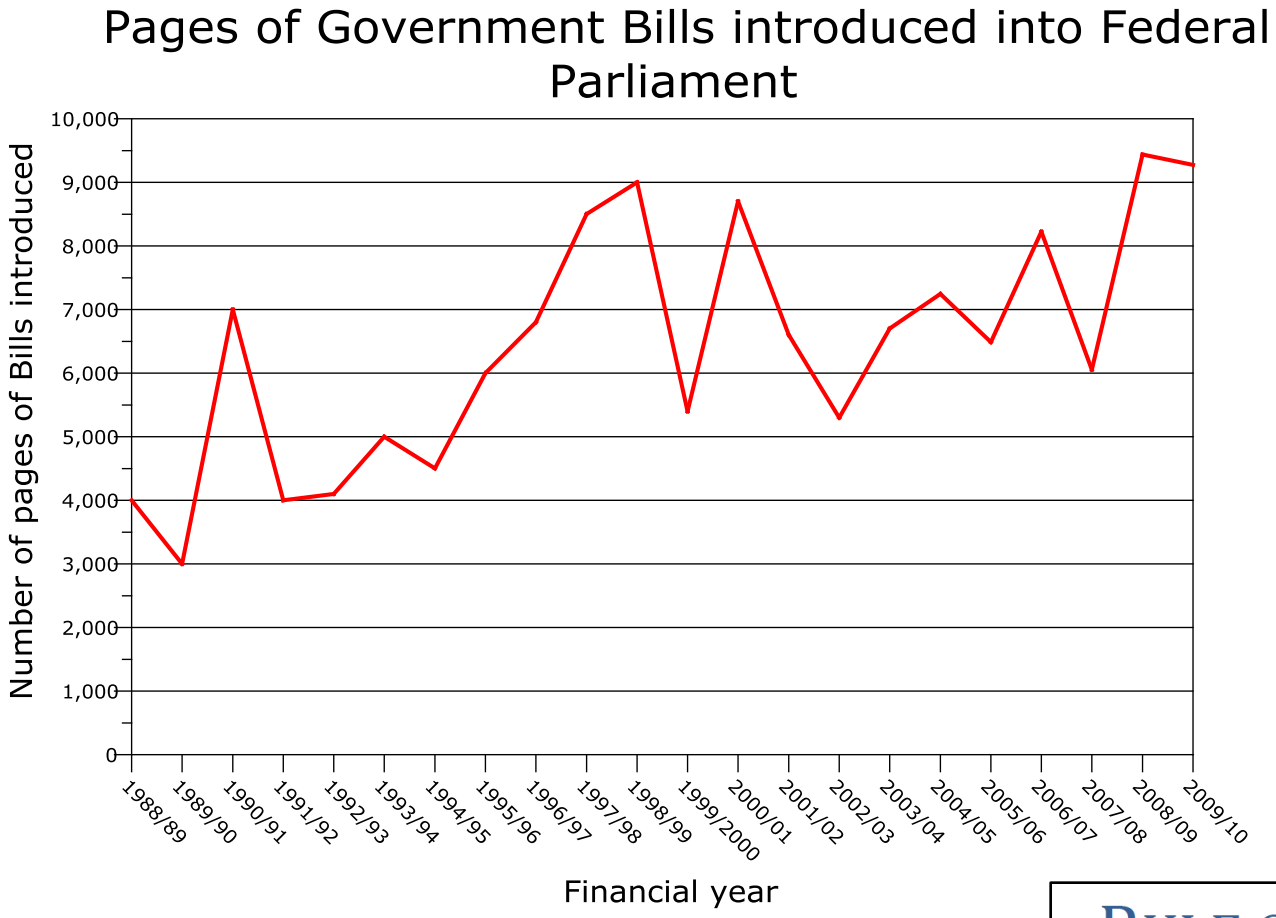
Threat to rule of law by flood of legislation



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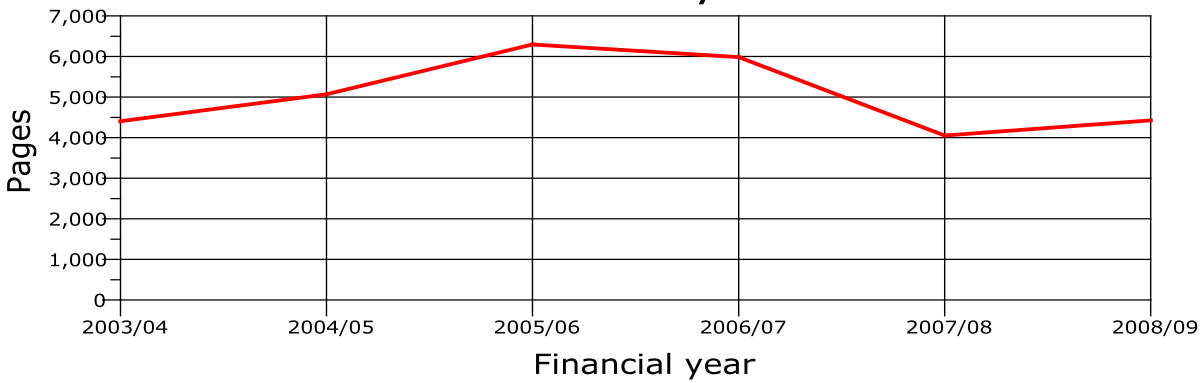
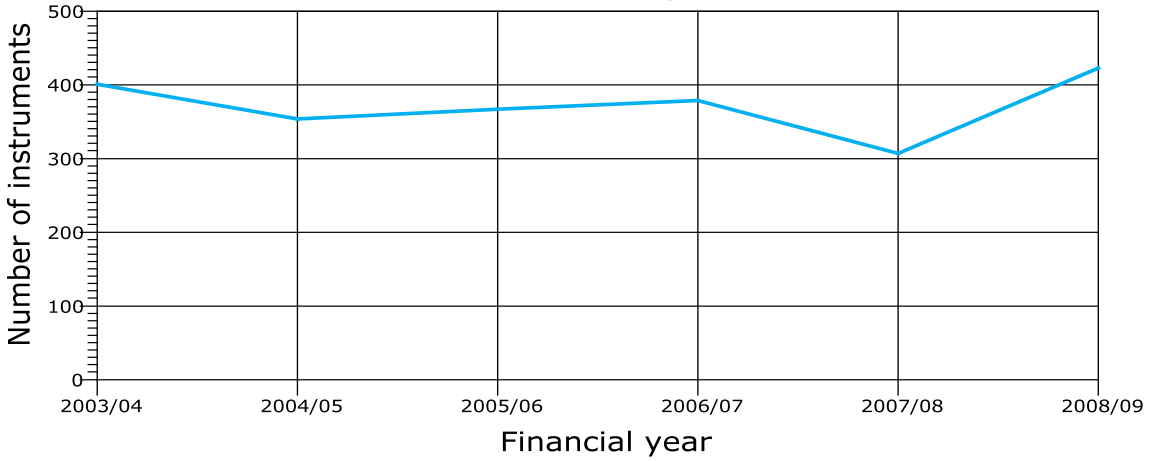
Threat to rule of law by flood of legislation

Number of pages of instruments (regulations) drafte by The Office of Legislative Drafting & Publishing pe financial year



Number of instruments (regulations) drafted by the Office of Legislative Drafting & Publishing per financial year



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Threat to rule of law by flood of legislation

- Over the past 10 years, the total pages of bills per financial year introduced into Federal Parliament by the Government has doubled to around 9000 pages per year.
- The new laws confer further power on the administration, increasing fear of regulation and confidence in law.
- With the growth in legislation, the community can never hope to sufficiently monitor and scrutinise the important changes.

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RoLIA Response

Published in The Sydney Morning Herald, Weekend Edition November 21-22, 2009.

Welter of laws seen as threat to country

Joel Gibson
LEGAL AFFAIRS

IF AUSTRALIA keeps making new laws at the current rate, there will be 830 billion pages of tax legislation by the turn of the next century, the Rule of Law Association's Robin Speed said.

In the past year alone Federal Parliament passed 9042 pages of new law - four times the number passed between 1929 and 1939, he told a conference yesterday.

Mr Speed, a partner in the law firm Speed and Stracey, said the administration of laws in Australia was at a critical crossroad.

Unlike elsewhere, where corruption threatened the rule of law, he said, excessive regulation was the danger in Australia because it shifted power to faceless bureaucrats and made the law impenetrable for the average person.

An example, he said, was the estimated 80,000 private rulings given by the Australian Taxation Office in the past eight years, which can carry authority equal to High Court decisions.

The chief executive of the Australian Institute of Company Directors, John Colvin, said the shift of decision making from courts to government agencies with vested interests was a "very real concern" for business.

The Federal Court judge Justice Margaret Stone said one reason for the trend was "the increasing lack of trust parliament has for the judiciary".

Professor David Weisbrot, chairman of the Australian Law Reform Commission, said "quite a few" of 51 government agencies the commission surveyed were not even aware of the scope of their coercive powers under federal legislation.

The NSW Chief Justice, James Spigelman, compared Australia's predicament to the one that led to the English Civil War, when the Stuart kings refused to enforce the laws of the parliament.

"It's an issue whose time may have come again, but I'm not suggesting the mode of resolution should be the same."

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Student questions

- How do you think the boom in legislation and regulations affects your every day life?
- Are you concerned that if you were a lawyer you might miss a change in the area of law when representing a client?
- Do you think it will make access to justice more expensive as it takes a lawyer more hours to determine advice?
- What do you think the government should do?

Senate Scrutiny of Bills Committee

The committee examines all bills which come before the Parliament and reports to the Senate whether such bills:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Work:

- In 2009–10 the Scrutiny of Bills Committee secretariat processed 258 bills (210 in 2008–09) and the committee commented on 160 bills (111 in 2008–09).
- The committee regularly publishes two documents: the *Alert Digest* and the *Report*. The *Digest* contains an outline of each of the bills introduced in the previous sitting week, as well as any comments the committee wishes to make in relation to a particular bill. When concerns are raised in a *Digest*, the committee writes to the minister responsible for the bill, inviting the minister to respond to its concerns.

Membership: Senator Coonan (*Chair*), Senator Bishop (*Deputy Chair*) and Senators Marshall, Pratt, Siewert and Troeth

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Office of the Queensland Parliamentary Counsel/Scrutiny of Legislation Committee

- a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.
- ***fundamental legislative principles*** are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.
- QLD also has a Scrutiny of Legislation Committee which considers proposed Bills according to the fundamental legislative principles.

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Legislation needs a title which is true to brand

- The volume of legislation means that if a title of a Bill is not specific enough, important provisions may not be noticed by those who provide oversight.
- The Senate Scrutiny of Bills Committee may not have the expertise or resources to scrutinise every provision of each Bill so the community must remain vigilant.

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Example 1: Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2010

- Makes it an offence for taxation officers to disclose tax information that identifies an entity, or is reasonably capable of being used to identify an entity, except in *certain specified circumstances*.
- Actually sets out more ways for taxpayer information to be disclosed to agencies and ministers, where the title implies that taxpayer information is being restricted.

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Example 2: Financial Framework Legislation Amendment Bill 2010

While there were changes to the financial status of the ALRC and several other agencies, substantial management changes to the ALRC were also included in the Bill:

- The office of 'Deputy President' is abolished.
- The ALRC is limited to 6 members (plus the President) when before there was not a limit.
- The ALRC-controlled Board of Management is abolished and Attorney-General controlled Management Advisory Committee created in its place.
- The Attorney-General can now appoint part-time Commission members under the Act.
- The Attorney-General can direct policies of the ALRC on administrative matters.

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File 2: The NSW Crime Commission & Journalistic Privilege

NSW Crime Commission and Journalistic Privilege

- The Police Integrity Commission was instructed to begin an investigation into the allegations that the NSW Crime Commission had been colluding with crime figures to share money and avoid prosecutions.
- The NSW Crime Commission has begun proceedings to stop the Integrity Commission investigation.
- The Sydney Morning Herald reported on the allegations against the NSW Crime Commission.
- In March 2011, Fairfax Media received a court order brought by the NSW Crime Commission requiring all records of communication between employees of Fairfax and the Police Integrity Commission, specifically two reporters.
- Reporters should be free to report the news without fear of reprisal or exposure of their sources. Freedom of speech is imperative to the rule of law in Australia.

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RoLIA Response

Journalists need to be protected

The article "Crime commission demands journalists' phones and records" (March 18) is disturbing. It shows that more care needs to be taken in conferring powers on government commissions and agencies. Journals of record such as the *Herald* must be able to freely and openly report the news. If the rule of law in Australia is to be equal to the challenges of a modern democracy, the media must be able to protect their sources, within the sensible bounds as suggested by *Herald* publisher Peter Fray - otherwise transparency and accountability in government will be the loser.

The journalist shield reforms being thrashed out in Canberra need to apply to journalists writing for publications such as the *Herald*.

Richard Gilbert

Chief executive, Rule of Law Institute of Australia

Published in The Sydney Morning Herald, Sat 19 March 2011

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Freedom of speech risks being silenced

ROBIN SPEED

Should journalists be free to write articles critical of government agencies and keep confidential their sources? The highly secretive NSW Crime Commission thinks not. It is fighting an investigation by the Police Integrity Commission into its operations.

Two journalists at *The Sydney Morning Herald*, Linton Besser and Dylan Welch, wrote articles critical of the Crime Commission and its dealing with criminals, which the paper published. The commission wants to seize the reporters' mobile phones and SIM cards, presumably to discover their sources and to deter further disclosure. If they fail to co-operate, the reporters face being in contempt of court and run the risk of going to prison.

Freedom of speech has no meaning if governments and their agencies are above public criticism and being accountable. To be credible, criticisms must be soundly based. This involves journalists investigating the matter, speaking to a range of people, collecting information, cross-checking the information, drawing reasonable inferences and forming an experienced view, often within a short space of time. No self-respecting journalist or media organisation wants to publish anything that is not soundly based.

published in part or whole by the media. The article is in the public domain and everyone is able to examine every sentence, every word and every comma. Then, under our freedom of speech, everyone is free to state publicly whether the article is inaccurate, misleading or unfair.

It is no mean feat to criticise publicly government agencies, such as the NSW Crime Commission which probably, as a result, has a secret dossier on the journalists concerned. The commission is immensely powerful with extraordinary powers, including phone-tapping, collecting information and searching your home without you ever knowing. It wants to know everything about anyone it selects, including their family and friends.

While the commission wants to investigate and know everything about everyone else, it wants the public to know little or nothing about it. Justifying its secretive position and extraordinary powers as necessary to

In the real world, few can afford to be disclosed as whistleblowers. For most the toll on their lives, careers and family is too great. But off-the-record conversations with journalists, which are not in breach of the law, may lead to a line of inquiry that reveals or confirms the truth. Such sources need to be kept confidential, otherwise they will dry up.

The recently enacted Federal Evidence Amendment (Journalists Privilege) Act provides for disclosure of a source if a court is satisfied that having regard to the issues to be determined in the proceedings before it, the public interest in the disclosure of the identity of the source outweighs:

(a) any likely adverse effect on the source and anyone else; and

(b) the public interest in the communication of facts and opinion to the public by the media and the ability of the media to access the sources of facts.

The act is totally unsatisfactory. The disclosure exception is too broadly based and lacks any certainty. A source gets no comfort from knowing that disclosure depends upon a court ultimately deciding whether disclosure is in the public interest. The source is not even a party to the court proceedings – how can he or she be effectively represented (and who pays for that)?

The act should be amended immediately to provide that disclosure should only be ordered where national security is at stake.

At the end of the day journalists write an article which may be

In the real world, few can afford to be disclosed as whistleblowers.

protect us from "them", it takes only a short time before there is an apprehension that we need protection from *it*.

In addressing accountability of such government agencies, the first question is whether its extraordinary powers are necessary, and to the extent any is, what conditions should be met before being exercised (unless this is addressed first, any form of accountability is frequently too limited and too late). Having first contained any problems in this way, it is necessary to address the culture of the agency and to get that right on an ongoing basis. Once those two things are done, you can address the most meaningful form of accountability for the agency concerned.

The media is and will remain a most effective means of accountability. Journalists play an essential role in the freedom of speech. If you silence them by silencing their sources, you silence freedom of speech, and thereby seriously jeopardise the rule of law in Australia.

Robin Speed is the president of the Rule of Law Institute of Australia
www.ruleoflawaustralia.com.au

Published in The Sydney Morning Herald, Wed 23March 2011

File 3: Paul Hogan & right of free movement

Paul Hogan – right of free movement

- Investigated as part of Project Wickenby by the ATO and the Australian Crime Commission for potential tax evasion.
- Departure Prohibition Order by ATO prevented him from leaving Australia after he visited for his mother's funeral.
- The only authority that should be permitted to make orders restraining a person's liberty in this way is a judge of a Supreme Court of a State or a judge of the Federal Court of Australia.

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- It is a fundamental principle of Rule of Law that a person's liberty is not interfered with in any way except by Court Order
- A Dawn raid was conducted on the family home of the financial adviser to Paul Hogan, constituting another breach of rights
- Mr Hogan is now suing the Australian Government for destroying his earning potential and reputation

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RoLIA response

The Australian Financial Review
www.afr.com • Wednesday 8 September 2010

Letters

Raid on Hogan adviser needs scrutiny

The call by Ben Morris (Letters, September 7) for full scrutiny and accountability in the Australian tax system should first start with the dawn raid on the family home of the financial adviser to actor Paul Hogan.

The media reported that the adviser's wife answered the door to face 10 armed federal police officers. She asked them to wait while she woke her sleeping children. But they rushed past and began searching the home. A police officer woke her younger daughter by shining a torch in her face and demanding she get out of bed. If the reporting is accurate, the incident needs to be independently investigated. It was not a raid involving terrorists, would-be terrorists or life threatening.

Government agencies have extensive coercive powers which include the power to carry out raids on homes, interrogate people, secretly access their premises and withdraw freedom of movement. There is a real fear growing that such powers are being used for improper purposes i.e. to put pressure to settle with the government agency concerned or to deny access to the person's assets to defend themselves or to obtain information which is then selectively used in pursuit of the person.

There needs to be an immediate full-scale judicial inquiry into the above dawn raid and the other claimed misuses of power. Without such, there will be no meaningful scrutiny or accountability or confidence in our tax system.

Robin Speed
President, Rule of Law Institute of Australia, Sydney NSW

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Student questions

- Do you think the ATO should have the right to prevent you leaving Australia? Why not?
- If a court is given such power what must it consider in making such an order?
- What do you think of the ability to raid the home of a financial advisor to a suspect?
- Under what conditions is such a raid justified (e.g reasonable suspicion that material documents are about to be destroyed?)

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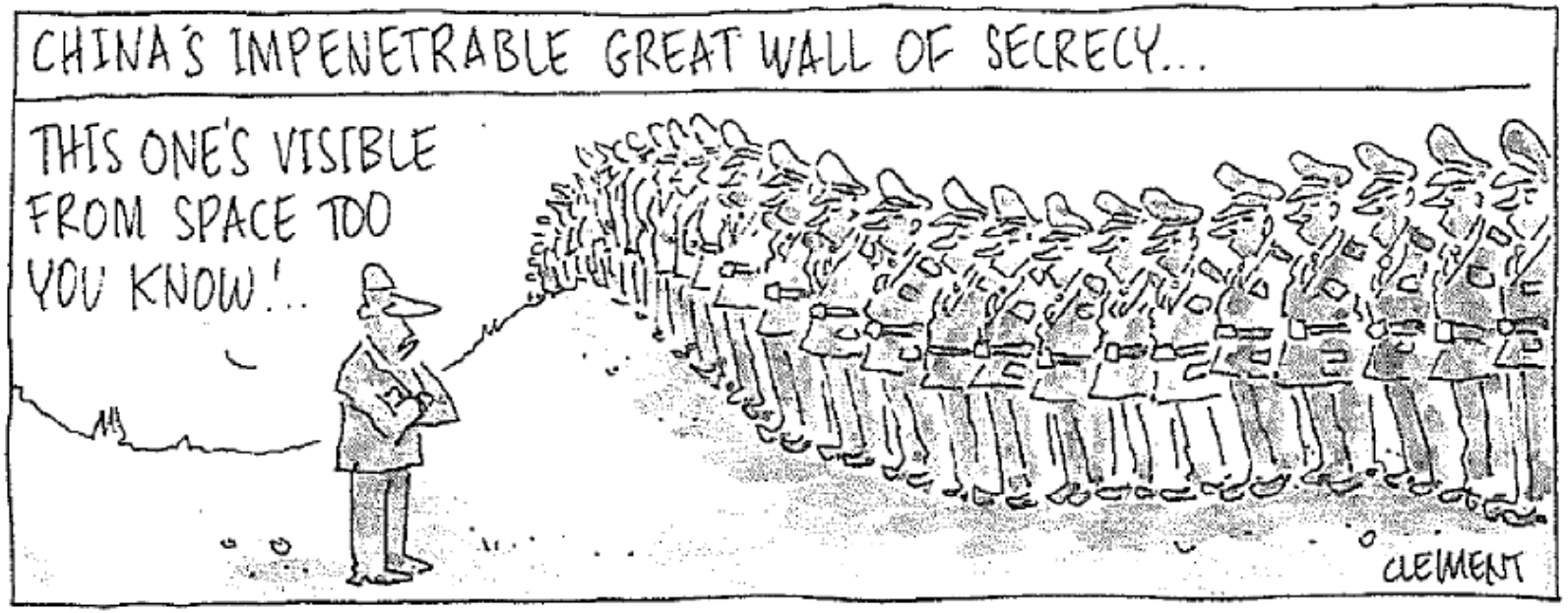
File 4: Stern Hu and the right to a fair trial

Stern Hu – the right to a fair trial

Mr Hu, an Australian Citizen and employee of Rio Tinto, was working in China and was arrested on charges of stealing commercial secrets and receiving bribes. He was sentenced to 10 years in prison.

Rule of law issues

- Denied proper legal representation
- The subsequent court case was closed – Australian media and diplomats excluded from the courtroom
- Presumption of innocence lacking in this case
- Mr Hu's lawyers were denied parts of the prosecution evidence before trial so could not prepare proper defence, also denied the opportunity of cross-examination of some witnesses as well as presentation of some defence evidence at trial
- Accountability of Australian Government
- Compliance with the China-Australia Consulate Agreement and the Universal Declaration of Human Rights
- Openness of Court system in China



Published in The Australian Financial Review, Wed 24 March 2010

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RoLIA response

RoLIA wrote to the Joint Standing Committee on Treaties of the House of Representatives, to request that they conduct an inquiry into the rule of law issues and Stern Hu.

The letter & response can be viewed on the RoLIA website:

http://www.ruleoflaw.org.au/submissions.aspx

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China's legal system fails basic tests

Hong Liang, the Chinese embassy's deputy head of mission, repeats the line that Australians should respect (and, presumably, therefore not criticise) the Chinese legal system as it is applied to Stern Hu because China respects Australia's legal system ("Rio Tinto executive admits to China bribes", March 23).

But to recognise that a foreign country has a legal system different from one's own is not the same as to respect that system. Respect and recognition of the Chinese legal system are words and worlds apart, as chalk is to cheese.

How can one respect a legal system (Chinese or otherwise) in which: A person is arrested, kept in jail and denied access to his family until his trial (Stern Hu was arrested in July 2009 and has been kept in jail ever since).

The person is not presumed to be innocent. The person is not provided with proper particulars of what he is meant to have done wrong and the evidence on which it is based. A person is not given a fair opportunity to prepare his defence.

The person is denied proper legal representation. The evidence against the person is not made publicly available.

Independence of the judiciary cannot be assumed. The trial is held in secret (if a court is closed to the media as in the case of Stern Hu, it cannot be called "open" by being by invitation only).

Australians have a right to criticise China's legal system as it is applied to an Australian. But by criticising it one can expect a crescendo of criticisms of, and alleged comparisons to, Australia's legal system.

So let it first be said that while Australia was ranked in the top 10 per cent in the latest World Bank Institution Rule of Law Survey, its own system is not perfect. This association was formed to point out defects and seek improvements to the operation of the rule of law in Australia.

But it is no response to objective criticism (whether at home or abroad) to shoot the messenger.

The fact that Stern Hu may have made an admission of guilt is not necessarily a recognition that he was guilty, or more importantly, that he has received a fair trial. Those who believe they would not make a confession, while languishing in an overseas jail should look to those who, safe and smug in Australia, are too intimidated to make any public criticism of China (no matter how justified).

Robin Speed
President
Rule of Law Association of Australia
Sydney NSW

Published in The Australian Financial Review, Wed 24 March 2010

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Jerome Cohen and Yu-Jie Chen on the Stern Hu trial

"The Chinese Government's refusal to allow Australian Government consular officials to observe the secret portion of the Rio Tinto trial was supposedly based on the alleged superiority of Chinese domestic law over China's international obligation under the Sino-Australian Consular Convention. On March 19 MOFA spokesperson Qin Gang said the case would be handled according to Chinese laws. In rejecting the Australian Government claim to have the right of consular attendance even at the closed portion of the trial, Qin said:"We should not confound the consular agreement with sovereignty, especially judicial sovereignty.…The decision of a closed-door trial was made based on Chinese law…"

This was a dangerous assertion that China's formal international binding obligations cannot be relied upon if the Chinese Government later decides that the demands of sovereignty override them.

Yet it now appears that MOFA's position and the decision of the Shanghai Intermediate Court No. 1 to exclude the Australian consuls violated existing Chinese law, which since 1995 has explicitly instructed China's courts to permit foreign consular representation even at non-public trials. "

Source – Chinese Law Prof Blog:

http://lawprofessors.typepad.com/china_law_prof_blog/2010/03/jerome-cohen-and-yujie-chen-on-the-stern-hu-trial.html

Relevant sections of the agreement

Agreement on Consular Relations
Between
the People's Republic of China
And
Australia

THE PEOPLE'S REPUBLIC OF CHINA AND AUSTRALIA,

DESIRING to develop further their consular relations in order to facilitate the protection of the rights and interests of their nations and nationals, and desiring to promote friendly relations and cooperation between the two countries,

HAVE DECIDED to conclude the present Consular Agreement and have agreed as follows:

Article 11

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(*a*) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(*f*) in the case of a trial or other legal proceeding against a national of the sending State in the receiving State, the appropriate authorities shall make available to the consular post information on the charges against that national. A consular officer shall be permitted to attend the trial or other legal proceedings;

(*h*) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him or her, and to arrange for his or her legal representation. They shall also have the right to visit, to converse and correspond with any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Access to detained nationals of the sending State shall be guaranteed by the competent authorities of the receiving State to a consular officer of the sending State within two days of initial notification of arrest or detention as specified in paragraph 1(*e*) of this Article, and at least once a month thereafter. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he or she expressly opposes such action.

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Student questions

- Do you think the Australian Government did the right thing?
- Do you think Stern Hu had the benefit of the presumption of innocence?
- What more could they have done?
- Discuss the reason the trial was unfair.
- Why should a trial be open for all to witness?
- Compare this situation to the arrests of the Shen Neng 1 crew after their tanker collided with the Great Barrier Reef and caused massive damage in 2011
- What does the Universal Declaration of Human Rights say about trials?
- Would this happen in Australia?

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File 5: Martens and the right of defendant to view prosecution evidence

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martens* [2009] QCA 351
PARTIES:	**R** **v** **MARTENS, Frederic Arthur** (petitioner)
FILE NO/S:	CA No 85 of 2009 SC No 83 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 672A Criminal Code
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	13 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2009; 10 September 2009
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, Muir and Chesterman JJA concurring as to the orders made, Fraser JA dissenting
ORDERS:	**1. Appeal allowed** **2. The conviction is quashed** **3. The order for imprisonment is set aside**

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Martens – right of defendant to view prosecution evidence/Police must not conceal evidence

- Fred Martens, a millionaire working in Papua New Guinea, served more than 2½ years in prison after being convicted under Australian child sex tourism laws
- A girl alleged Mr Martens had twice - in March and mid-September 2001 - flown her to the capital, Port Moresby, where she applied for a passport and visa to attend school in Australia, with an alleged sexual assault occurring on the second visit
- Soon after his arrest in August 2004 he had asked investigating AFP agents to obtain various records and documents about his flights and her passport application, which he said would prove the girl's statement was wrong
- But many of these documents, which could prove the flight was in August, were never produced at his trial. He was convicted and lost an appeal, but was later granted a second review. He was exonerated

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Rule of law issue – improper evidence use

- Immigration records showed Mr Martens was not in PNG at the time of either of the flights and the alleged rape. Typed records supplied by the AFP at the trial had said he was in PNG.
- A doctor who certified the passport application photos was not called as a witness. He could have given the dates she was in Port Moresby.
- PNG police approached the wrong fuel company about the plane's refuelling records so these were not in evidence.
- The AFP officer swore PNG's Civil Aviation Authority had advised it had not kept records of the flight. But Mr Martens's partner later obtained records of the plane's take-offs, movements and landings over the counter from the authority.

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Excerpt from judgment

[164] That leaves for consideration the CA Authority flight records. These are crucial to the petitioner's case. The respondent submits they should be disregarded, or discounted, because they are not fresh evidence. The records could, the respondent argues, have produced them at his trial had he and his solicitors made reasonable efforts to obtain them.

[165] The submission does little credit to the Commonwealth Director of Public Prosecutions. The records are of critical importance. The petitioner, and his advisors, have asserted that fact ever since his arrest in 2004. The evidence, some of which I will mention shortly, indicates that the petitioner has consistently requested the prosecutor to obtain the records which he claimed would exonerate him by establishing that GN's complaint is unreliable. The prosecutor did not provide the records. Instead it told the petitioner that they did not exist. They were found after the petitioner's conviction as a result of efforts made by his wife.

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Student questions

- Do you agree with the AFP behaviour?
- How would you feel if you knew evidence was denied to a client?
- What would you do?

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File 6: The ACCC, Heinz and s 18 of the Australian Consumer Law

The pineapple cans

Before

After correction

ACCC & Heinz

- Heinz, whose parent company is incorporated in the USA, purchased Golden Circle.
- Golden Circle used "Proudly Australian owned" and "100% Australian owned" in their advertising and on packaging.
- Heinz continued to sell products bearing this packaging even 12 months after the acquisition.
- The ACCC alleged that this was misleading and deceptive behaviour as the products were no longer Australian owned.
- Heinz struck a deal with the ACCC to donate $1.8million worth of pineapple cans to charity in lieu of prosecution. The cans donated still bore the misleading labels.
- The ACCC did not ensure the labels were altered before the donation to charity. The matter was not determined by a court.
- Everyone should be equal before the law and subject to the same range of penalties fixed by Parliament as determined by a court.

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Misleading or deceptive conduct

- Section 52 of the *Trade Practices Act* 1974, now contained in s 18 of the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act* 2010, prohibits the following conduct:

18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

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Questioning of ACCC at June Senate Economics Committee hearing – 2 June 2010

Senator XENOPHON—Mr Samuel, I have so many questions and so little time. I will start off with Golden Circle. Thank you for alluding to that. As I understand it, the company Golden Circle misled consumers because its cans said 'proudly Australian owned' when in fact it was taken over by Heinz back in 2008.

Mr Samuel—Correct.

Senator XENOPHON—As part of the penalty agreement with the ACCC, as I understand it, it was agreed that the company would donate about $1.8 million worth of fruit and vegetables to charities.

Mr Cassidy—That is correct.

Senator XENOPHON—That is a fair summary. That $1.8 million worth of produce that was given to charities probably would have been good PR for Golden Circle in itself. Did those cans have a label either crossing out or saying 'no longer Australian owned' so that consumers were not under misapprehension about that produce? The minister is smiling. It is an innocent question. Senator Sherry—You are tough, I have to say.

- Mr Cassidy—Are you suggesting, Senator, that the charities would have given it back had it been not owned here?
- Senator XENOPHON—No, I am not suggesting that at all. All I am saying is that the whole idea of penalising—
- Mr Samuel—No. We did not require that. This is an issue that was raised with me by a couple of sections of the media at the time we announced this. They said, 'Well, you've given them a chance to get some good publicity.' I have to say to you that I doubt that Golden Circle actually relished the publicity they got over this matter. It was widely publicised that they had been engaged in misleading and deceptive conduct. As I read it—forgive me, but one can only read the take that you get from the media—I think people generally took the view that this was a pretty good outcome. We got the $1.8 million worth of cans given to charity and Golden Circle got some pretty bad publicity out of their misleading and deceptive conduct. Senator
- XENOPHON—Just on this—and I have a couple more questions along this line—it is misleading because when the consumer goes into a supermarket they see a can that says 'Golden Circle, proudly Australian owned' when it was not the case. Consumers or those who have sought the help of a charity got a can as part of the penalty, and it is a Golden Circle can without a little sticker that would have said it is part of a penalty because it is not Australian owned any more. It could have been stuck on these cans. The whole idea of it was to penalise Golden Circle for misleading consumers. But then by distributing their cans as part of the penalty without any corrective labelling, was that unhelpful, do you think, in the context of consumers being continually misled as a result of that? There is a bit of irony.

RoLIA response

ACCC oversteps line in Heinz case

It does not get much more embarrassing to an administrator than the slip-up in the deal done by the Australian Competition and Consumer Commission under which it "extracted" from the owner of Golden Circle, HJ Heinz Co Australia, a donation of $1.8 million in canned food to a charity.

Heinz agreed to the deal to save itself from prosecution for having supplied cans with false or misleading labels.

Last week before the Senate Economics Committee (June 2) under questioning from Senator Nick Xenophon, the ACCC revealed that it had not required that the labels on the cans donated to charity be corrected.

Accordingly, Heinz donated further cans which had the same false or misleading labels which had been the subject of the earlier inquiry and deal done with the ACCC. To some this is like the police agreeing with a counterfeiter that rather than be prosecuted, he make a $1 million donation to a charity, and then subsequently finding out that he paid the charity with forged bank notes.

The slip-up exposes the dangers of an administrator taking upon itself the role of prosecutor, judge and now executioner.

Not only is this a fundamental breach of the rule of law, but it exposes the practical difficulty of trying to have more than one of those roles. There is a fundamental defect in the ACCC or any other administrator "persuading" a wrong-doer to "give" to charity in lieu of a prosecution.

It is corruptive of the legal system and makes a mockery of donations.

More and more administrators would become above the law. It is the administrator that would decide whether the law should be dispensed in favour of a charitable donation.

It is the administrator that would decide whether it is an "appropriate" case for such a treatment.

These dangers become clear from what was said by the ACCC to the Senate Economics Committee that, in effect, it should be congratulated for extracting the $1.8 million donation from Heinz when, on any reasonable basis, the ACCC considered that it would not have been possible to obtain such an order from a court in any litigation against Heinz.

Everyone should be equal before the law and subject to the same range of penalties fixed by Parliament as determined by a court.

Richard Gilbert
Chief executive
Rule of Law Association of Australia
Sydney NSW

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Student questions

- Do you think it is fair that a court did not determine the punishment? Keep in mind court time saved, litigant's time and money saved vs the need for the court to mete out justice.
- How significant is it that the ACCC allowed Heinz to distribute misleading cans?
- Do you think Heinz's behaviour in selling misleading cans is significant?

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File 7: The Director of Military Prosecutions & the Afghanistan Charges

The Australian Financial Review
www.afr.com • Friday 12 November 2010

'World of woe' in store for military

James Eyers

The government should reconsider its decision to establish a Chapter 3 court for military prosecutions and the system of court martial should be preferred in cases that were essentially professional disciplinary matters, NSW Supreme Court judge Paul Brereton, an Australian Army Reserve commander, said.

Speaking in a personal capacity at the Rule of Law Institute of Australia's conference at the weekend, Justice Brereton described preoccupation with the supposed benefits of a Chapter 3 court as "misconceived". He also defended director of military prosecutions Lyn McDade after she was criticised for charging three Australian soldiers with military offences following operations in Afghanistan where six civilians, including four children, were killed.

The trials will take place under the court martial system, following the decision of the High Court in 2009 to strike down the Australian Military Court as unconstitutional. The government is preparing to introduce legislation to create a new Chapter 3 military court, administered by the Federal Court.

But Justice Brereton said: "There is a risk that retrospective forensic analysis of an incident that required an immediate decision and response by soldiers in the urgency, danger and fog of battle, undertaken years later over days in a courtroom, may give insufficient weight to the pressures of the circumstances in which the soldiers were operating."

The military justice system was fundamentally a disciplinary, not a criminal, jurisdiction.
NSW judge Paul Brereton

The military justice system was "fundamentally a disciplinary, not a criminal, jurisdiction", he said.

"Most of our professional disciplinary systems have tribunals which are dominated by members of the relevant profession," he said, pointing to the NSW Medical Tribunal and the Legal Services Division of the Administrative Decisions Tribunal for lawyers.

"They bear many similarities to the court martial, from which they might well be historically derived. I would suggest that such a court martial is better equipped to judge prosecutions for service offences than a judge of a Chapter 3 court without operational military experience."

Neil James, executive director of the Australia Defence Association (ADA), said the government should re-adopt the court martial system, given it had been working well and was a critical part of maintaining discipline in an armed force. "Court martials aren't courts — they are disciplinary tribunals," he said. Changing their name to "defence force disciplinary tribunals" may overcome any perception they are acting as Chapter 3 courts, he added.

Mr James said the ADA was yet to find a senior lawyer or judge with military experience who supported the government's bill for a new military court. "Justice Brereton is merely the latest one," he said.

"But all the civilian lawyers in the A-G's Department and Parliament are wedded to a solution that won't actually work. They are going to create a world of woe."

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The Director of Military Prosecutions & the Afghanistan Charges

- On 12 February 2009, soldiers of the Australian Special Operations Task Group undertook a compound clearance in Uruzgan province, Afghanistan. What is known is that six Afghan civilians, whose protection is the fundamental purpose of our presence in Afghanistan - of whom one who may have been a combatant, but also a woman and four small children - were killed, and another four injured.
- Following an investigation by the Australian Defence Force Investigative Service, the matter was referred to the Director of Military Prosecutions in November 2009. The DMP requested that further investigations be undertaken, and these proceeded through 2010.

Source: Justice Paul Brereton AM RFD, Address to the 2010 Rule of Law in Australia Conference: **"The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law"**

The Director of Military Prosecutions & the Afghanistan Charges

- After receiving further information as a result, and after seeking and obtaining representations on behalf of the Defence Force as to the service interest in relation to the charges under consideration, the DMP on 27 September 2010 announced that she had decided to prosecute three soldiers: one for manslaughter and alternatively dangerous conduct, with a second count of dangerous conduct; the second for failure to comply with a lawful general order and alternatively prejudicial conduct; and a third, who is currently overseas, who will be charged upon his return

Source: Justice Paul Brereton AM RFD, Address to the 2010 Rule of Law in Australia Conference: **"The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law"**

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The Director of Military Prosecutions & the Afghanistan Charges

In his Introduction to the Study of the Law of Constitution (10th ed, 1959 –first edition 1885), Dicey wrote:

> *A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to the orders (say) of the commander-in-chief. Hence the position of a soldier is in theory and may be in practice a difficult one. He may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.*

Source: Justice Paul Brereton AM RFD, Address to the 2010 Rule of Law in Australia Conference: **"The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law"**

Rule of law issues

- The raid was during the night and during wartime, with an insurgent allegedly firing upon the soldiers from the compound.
- It is believed to be the first time Australian troops have been charged with killing civilians in a combat situation.
- Participants in litigation should be protected from vilification and reprisals, in order that there be free access to the courts – the Director of Military Prosecutions has been the subject of criticism not limited to critique of her decision and the associated process, but personal attacks on her background, competence and personality.
- Appropriate rules to be applied during wartime activities. What standards should they be held to? What standards do we expect from enemies?
- Is a Chapter III Constitutional Court the suitable venue for these charges as opposed to a military court martial?

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- Justice Brereton suggested that "perhaps one positive outcome of these unhappy events may be reconsideration of whether a Chapter III Court is really the ideal tribunal for our military justice system, or whether indeed the traditional use of specialist service tribunals does not remain a superior mode of maintaining disciplinary standards in the services, as it evidently does in other professional fields – with an appropriate right of appeal to a court, as is characteristic also of other professional disciplinary tribunals."

Source: Justice Paul Brereton AM RFD, Address to the 2010 Rule of Law in Australia Conference: "**The Director of Military Prosecutions, the Afghanistan Charges and the Rule of Law**"

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Comparisons

- Five US soldiers are accused of murder in a war-crimes investigation of the 5th (Stryker) Brigade, 2nd Infantry Division, which served in Afghanistan for one year beginning in the summer of 2009. There was an alleged plan and kill an unarmed Afghan man they met while on patrol in a village in southern Afghanistan. They are facing court-martial.
- Australian Breaker Morant was executed after the Second Boer War, where Morant participated in the summary execution of several Boer (Afrikaner) prisoners and a German missionary, Daniel Heese, who had been a witness to the shootings.
- In the Gaza flotilla raid of 31 May 2010, Israel intercepted six ships carrying humanitarian aid and construction materials, as well as ballistic vests, gas masks, night-vision goggles, and large sums of money, intent on breaking Israel's blockade of the Gaza Strip. Five of the ships were apprehended without loss of life or severe injuries. On the last, clashes broke out after activists allegedly violently resisted the Israeli forces. Nine activists were killed (Eight Turkish nationals and a Turkish-American), and dozens of activists and seven Israeli commandos were wounded, with debate over whether commandos fired before or after boarding the ship. Widespread international condemnation of the raid followed, Israel-Turkey relations were strained, and Israel subsequently eased its blockade. Israel's inquiry into the raid found that it complied with international law. In its preliminary findings released the same day, a Turkish investigation said Israeli troops had used "disproportionate" force in boarding the flotilla of ships to prevent them from reaching Israeli-blockaded Gaza.

Student questions

- Do you think it is fair that the media and private citizens have been able to vilify the Director of Military prosecutions?
- Do you agree it is appropriate that because of military secrecy the details of the alleged crimes are not widely available?
- Do you think soldiers should be held to the same standards as private citizens?
- Do you think there has been a situation of "trial by media"?

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File 8: The Australian Building and Construction Commission, coercive powers & Ark Tribe

MAGISTRATES COURT OF SOUTH AUSTRALIA

(Criminal)

COMMONWEATLH DIRECTOR OF PUBLIC PROSECUTIONS V TRIBE, ARK

Judgment of Mr D Whittle SM

24 November 2010

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The Australian Building & Construction Commission

- Mr Ark Tribe is an Australian construction worker and unionist
- He attended an unauthorised safety meeting on his worksite about serious safety issues at the site
- The ABCC has the power to compel someone to attend an interview and answer questions:

125 Section 52 of the Act provides the ABC Commissioner with significant and intrusive powers and functions, which can be employed to issue a notice requiring a person to attend at a hearing and give evidence, regardless of whether such evidence may incriminate the person in the commission of an offence. A penalty of up to six months imprisonment is prescribed for disobedience to the notice or failing to co-operate during such a hearing.

Source: Magistrate Whittle, CDPP v Tribe, Ark (Magistrate's Court of South Australia 24 Nov 2010), [125]

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The *Building & Construction Industry Improvement Amendment Act* 2005

Senator Penny Wong on the ABCC coercive powers (Second reading speech for Bill introducing above Act, Thurs 18 August 2005 – Bill later passed without amendments):

> "…They were very substantial coercive powers—powers that Labor still says are inappropriate. They certainly give very substantial rights to the task force, arguably rights far greater than police have, so you have the bizarre situation where building union officials and employees in the construction industry actually have fewer rights in relation to investigation by the task force than a criminal might have in relation to investigation by police. However, there were ameliorating provisions put in place by this chamber by Labor and the Democrats. What we have before us is a bill which simply does not include any of those ameliorative mechanisms or any of the protections that were put in place and insisted on by the Senate in relation to the previous legislation."

Ark Tribe – the right to silence?

- A notice to attend interview was issued by the ABCC to Mr Tribe RE the safety meeting
- Mr Tribe did not attend the interview
- The ABCC instructed the DPP to begin proceedings against Mr Tribe for failing to attend interview, a charge which carries a potential penalty of six months imprisonment
- South Australian Magistrate David Whittle dismissed charges against Ark Tribe on 24 November 2010, citing, among other reasons, that the ABCC deputy commissioner had exercised powers that were not properly delegated to them by the ABCC Commissioner

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RoLIA response

Published in The Australian Financial Review, Fri 24 Sept 2010

Un-Australian powers of ABCC

It is disappointing that the debate on the Australian Building and Construction Commissioner has become whether it should be abolished ("Gillard faces first test on unions", September 22).

Put simply, it is un-Australian and un-rule of law like to give a regulatory agency power over a single industry that in effect removes the right of an individual to remain silent.

The powers that reside in ABCC are similar to those that have been given to royal commissions that have particular matters to inquire into, and there has always been a sunset clause for the cessation of the extraordinary information-gathering powers.

If the building industry requires particular and continuing regulatory attention, then establish a dedicated division in Fair Work Australia that addresses the industrial relations matters.

In addition, in relation to any alleged criminal activities, the Australian Federal Police should be sufficiently resourced to do its job. Essentially, this was the pathway recommended in the Wilcox report of April 2009.

Richard Gilbert
Chief executive, Rule of Law Institute of Australia
Sydney NSW

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Wilhelm Harnisch responds to RoLIA letter

Published in The Australian Financial Review, Mon 27Sept 2010

Rule of law v rule of the jungle

The Rule of Law Institute of Australia's letter was disappointing ("Un-Australian powers of ABCC", September 24) on a number of levels.

First, because the accusations made are inaccurate. Powers that reside in the Australian Building and Construction Commissioner are similar to those held by other investigative bodies such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Australian Taxation Office. While the letter focuses on the fact that right of an individual to remain silent is taken away by laws that underpin the building and construction industry workplace reform, it ignores that a person placed under examination is provided with the right of legal representation and immunity from prosecution. The work of the ABCC is not unfair and does not undermine liberty.

The Cole royal commission in 2003 recommended establishment of a special regulatory authority to oversee restoration of the rule of law in the industry. That task is still under way and attacks on the ABCC detract from maintenance of the rule of law.

Workplace relations reform is not an end in itself but a catalyst for creating economic efficiencies, particularly at the enterprise level, for the benefit of building industry participants but also in the creation of community infrastructure.

The specific reforms for the building and construction industry permit parties to negotiate in a system governed by the rule of law rather than the rule of the jungle. The reforms are essential to proper regulation of the workplace and essential to proper interaction of building industry participants. Master Builders believes retention of a well empowered building industry watchdog is essential for the prosperity of the sector and of the nation. Focusing on a minutia and labels such as "un-Australian" in relation to the industry watchdog ignore the harsh realities of the sector. It is violence and thuggery that are un-Australian.

Wilhelm Harnisch
Chief executive,
Master Builders Australia
Yarralumla ACT

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RoLIA responds to Wilhelm Harnisch

Builders must go back to spirit level

"The rule of law v rule of the jungle" is an apt heading for the letter from Master Builders Australia (September 27).

The letter proceeds on the false assumption that the means justify the ends and that any criticism of the means is a criticism of the ends.

Here the very desirable objective of the rule of law in the building industry is not justified by means that do not accord with the rule of law. Master Builders Australia wants to close its eyes, and everyone else's, to two questions. Whether the particular coercive power in question is absolutely necessary and, if so, what safeguards should exist in its exercise. Rather than clinging to the past, it would obtain much more credibility if it addressed those two questions with hard evidence and a balanced approach.

Richard Gilbert
Chief executive
Rule of Law Institute of Australia
Sydney NSW

Published in The Australian Financial Review, Thurs 30 Sept 2010

Student questions

- Do you think the ABCC should continue to have these powers?
- Do you think the right to silence is important?
- Do you agree with what Ark has done?
- Should the law be changed?
- Compare and contrast the points of view in the Australian Financial Review letters.

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RoLIA Activities

- Scrutiny of Bills and the amount of new Legislation being passed
- Australian Law Reform Commission downsizing
- Administrative Review Council downsizing
- Regulator Accountability and the RoLIA Senate Estimates Surveys & Reports
- Annual Rule of Law Conference

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RoLIA Submissions

- ALRC and its diminished funding
- Corporations Law Amendment giving ASIC more powers
- Privacy of Australians online
- Senate Scrutiny of Bills committee future
- National Legal Services Board
- Stern Hu
- Public Benefit Test for Charities
- Anti-People smuggling Bill
- Tax Laws amendments conflict with Parliamentary Privilege
- Confidentiality of Taxpayer information
- Whistleblowers

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