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Abstract

On 20 September 2007, the Howard Government rushed through Parliament legislation which retroactively amended the Australian Crime Commission Act 2002 (Cth) ('the Act'). The reason the amending legislation was introduced can be traced to procedural bumbles by the Australian Crime Commission ('ACC') in undertaking investigations as part of Project Wickenby. According to a July 2006 release from the office of Federal Treasurer Peter Costello, 'Project Wickenby is a multi-agency taskforce set-up in 2004, with funding of \$305.1 million over seven years, to investigate internationally promoted tax arrangements that allegedly involve tax avoidance or evasion, and in some cases large-scale money-laundering'. Project Wickenby is a multi agency taskforce, involving officers from the Australian Taxation Office ('ATO'), the ACC, the Australian Federal Police ('AFP'), the Australian Securities Investments Commission ('ASIC'), and the Commonwealth Director of Public Prosecutions, supported by AUSTRAC, the Attorney General's Department and the Australian Government Solicitor

RETRO ACTIVE TAX LEGISLATION: A 'DEAF LEOPARD' AND HIS SPOTS

BY TIM JAY*

The album *Retro Active* by rock band 'Def Leppard' is familiar to most fans of hard rock music. To lawyers, however, the mention of the word 'retroactive' (or the often used, but less accurate 'retrospective') in the context of parliamentary legislation dealing with criminal law should send even more shivers down the spine than a full-volume hard rock guitar solo.

On 20 September 2007, the Howard Government rushed through Parliament legislation which retroactively amended the *Australian Crime Commission Act 2002* (Cth) ('the Act'). The reason the amending legislation was introduced can be traced to procedural bungles by the Australian Crime Commission ('ACC') in undertaking investigations as part of Project Wickenby.¹ According to a July 2006 release from the office of Federal Treasurer Peter Costello, 'Project Wickenby is a multi-agency taskforce set-up in 2004, with funding of \$305.1 million over seven years, to investigate internationally promoted tax arrangements that allegedly involve tax avoidance or evasion, and in some cases large-scale money-laundering'.² Project Wickenby is a multi agency taskforce, involving officers from the Australian Taxation Office ('ATO'), the ACC, the Australian Federal Police ('AFP'), the Australian Securities Investments Commission ('ASIC'), and the Commonwealth Director of Public Prosecutions, supported by AUSTRAC, the Attorney General's Department and the Australian Government Solicitor.³

The Federal Government decided to introduce the retroactive amendments to the Act as a result of a court victory by Melbourne solicitor Michael Brereton, one of the targets of the Project Wickenby investigation.⁴ Victorian Supreme Court Justice Smith ruled that the summons issued to Mr Brereton was invalid because an ACC official

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¹ Susannah Moran, 'Outrage over new tax probe powers', *Sydney Morning Herald*, 21 September 2007.

² The Hon Peter Costello, Press Release No. 072 'Project Wickenby Arrests', Melbourne, 20 July 2006.

³ Ibid.

⁴ *Australian Crime Commission v Magistrates Court of Victoria (at Melbourne) & Brereton* [2007] VSC 297.

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had not provided Mr Brereton with written reasons why it wanted to examine him, as required by s 28(1A) of the Act. The Government saw the ruling as a threat to the wider Wickenby investigation, because several other people had been issued with summonses and questioned by the ACC. If their summonses were also found to be invalid, much of the information gathered by the ACC as part of Project Wickenby may have been inadmissible.⁵

While one can understand the government's desire to avoid such an outcome, it is difficult to feel much sympathy towards an administration that appears ready to treat *any* taxpayer who is alleged or suspected of flouting the income tax laws with the hostility normally reserved for organised crime rings, drug syndicates, and the like. Certainly, the array of law enforcement resources assigned to Project Wickenby would not be out of place in a major racketeering investigation. Therefore, when the government agents responsible for an investigation of such aggressive intensity fail to comply with the law themselves, particularly where the non-compliance relates to provisions that provide procedural safeguards for those under investigation, Australian taxpayers might be forgiven for rejecting the Government's position in favour of wholehearted support for the decision in *Brereton's* case.

Nevertheless, neither the ATO nor the Federal Government was content to let the matter rest. The government's reaction was to propose amending the Act so that the written reasons for the issue of the summons required by s 28(1A) could be provided as soon as practicable after issue of the notice. To overcome the problems faced by the Project Wickenby team (and of their own making), the amendments were designed to be retroactive in nature.

The retroactive nature of the amendments, and the accelerated procedure with which they were rushed through Parliament, resulted in scathing criticism of the Federal Government by Senator Natasha Stott Despoja of the Australian Democrats:

[W]hat does the government do? It attempts to legislate retrospectively to remedy the ACC's problems and incompetence. This is a big deal in this place, and I am sure that most senators, in dealing with a range of legislation – let alone legislation that deals with issues of criminality – find legislation dealing with retrospectivity is controversial generally.⁶

Later, the Senator added:

the situation is quite dire. The right to certainty before the law and to not be subject to retrospective criminal sanction is a fundamental legal right. It is

⁵ Moran, above n 1.

⁶ *Australian Crime Commission Bill 2007* – Second Reading Speech by Australian Democrats Senator Natasha Stott Despoja, Parliament House, Canberra, 18 September 2007.

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actually a basic human right. Article 7 of the European Convention on Human Rights provides that no-one shall be held guilty of a penal offence made so retrospectively.⁷

She also referred to Article 15 of the International Covenant on Civil and Political Rights, which Australia has signed and ratified, and which provides:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.⁸

Senator Stott Despoja stated that the Australian Democrats agreed with the following comment from the Law Council of Australia:

The Law Council believes that the Australian Crime Commission Amendment Bill, which the government intends to pass in haste, is specifically designed to perpetuate an injustice. The government is inviting the parliament to be complicit in this act. The parliament should reject the proposals.⁹

The principle that no-one should be penalised by retroactive law appears to have its roots in Continental Europe.¹⁰ The idea is expressed (with several variations) by the latin maxim *nullum crimen, nulla poena sine praevia lege poenali* ('no crime [can be committed], no punishment [can be imposed] except under a prior penal law').

As Professor LJM Cooray says:

Laws should apply prospectively and not retrospectively. A person should never be made to suffer in law (criminal or civil) for an act which was not unlawful when he committed it. Retrospective legislation destroys the certainty of law, is arbitrary and is vindictive (being invariably directed against identifiable persons or groups). Such laws undermine many characteristics of the rule of law.¹¹

Professor Jim Corkery puts it thus: 'Retrospectivity is the handmaiden of incompetent or mischievous governments'.¹²

So important is freedom from retroactivity as a fundamental element of democratic rights that the constitutions of certain countries (for example, the United States and

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ James Pople, 'The Right to Protection from Retroactive Criminal Law', (1989) 13 *Criminal Law Journal* 251, 252.

¹¹ LJM Cooray, 'The Australian Achievement: From Bondage to Freedom', The Australian Achievement Project, 1988, at p. 91.

¹² JF Corkery, *Starting Law* (2nd edn, 2002) 153.

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Sweden) prohibit retroactive legislation. The Australian Constitution, however, has no such prohibition.¹³ Retroactive legislation has resulted in criminal convictions in Australia,¹⁴ though such cases may be decided differently today, following Australia's ratification of the International Covenant on Civil and Political Rights.¹⁵

In an oration entitled 'Freedoms and Liberties',¹⁶ Roger Gyles QC discussed the last, memorable occasion on which an Australian government enacted retroactive tax legislation. This occurred in the 1980s, when John Howard was treasurer in Malcolm Fraser's Coalition government. The Costigan Royal Commission into the Painters and Dockers' Union had uncovered a 'massive tax fraud which came to be known colloquially as the "bottom of the harbour scheme"'.¹⁷ According to Gyles QC, the legislation:

created a considerable storm but, as [it] affected conservative voters rather than Labor voters, it was apparently judged politically feasible by a Liberal-National Party Government. The premise on which the legislation was based was that the existing legislation did not catch the scheme, which was, therefore, lawful at the time it was entered into.¹⁸

Appointed Special Prosecutor by the government to pursue those involved, Gyles QC reflected on the inconsistency:

While it was said the scheme was not caught by the existing Act and retrospective legislation to tax it was necessary, it was also said to be a fraud warranting criminal prosecution. After study, I came to the conclusion the scheme was caught by existing legislation and that, in particular, s 260 (the anti-tax avoidance provision) could be applied to recover all of the relevant tax. So the retrospective legislation (then not passed) was based on a false premise. I immediately informed the Ministers but quickly became aware my views were an embarrassment and unwelcome. The legislation was duly passed.¹⁹

It should be noted that the operation of s 260, the anti-avoidance provision on which Gyles QC would have preferred to rely, would have involved no criminal sanctions

¹³ Ibid.

¹⁴ For example, *R v Kidman* (1915) 20 CLR 425; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501.

¹⁵ M Bargaric and T Lalic, 'Victorian Sentencing Turns Retrospective: The Constitutional Validity of Retrospective Criminal Legislation after Kable' (1999) 23 *Criminal Law Journal* 145, 157.

¹⁶ Delivered at St John's College, Sydney University, 13 September 1990.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

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being imposed on any of the taxpayers involved in the 'bottom of the harbour schemes'.

In recent times, the governments of both Australia and Canada have practised 'legislation by announcement' in respect of taxation laws. This parliamentary procedure, whereby the laws are deemed to take effect from the date of announcement (usually in the Treasurer's budget speech), even though the legislation will not pass through Parliament for weeks or months, is yet another means of retroactively introducing legislation.²⁰

John Howard's public statements regarding retroactive legislation are inconsistent and contradictory, giving the impression that the government's position is either ill-considered or motivated by political expedience. In 2004, Mr. Howard refused to support retroactive Australian anti-terrorism laws to deal with terrorism suspects David Hicks and Mamdouh Habib. Speaking on ABC Television, Mr Howard acknowledged that tax laws were sometimes changed retrospectively to close loopholes, but that it was fundamentally wrong to make a criminal law retrospective.²¹ This statement ignores the fact that breach of taxation laws may (and, increasingly, does) involve the imposition of criminal sanctions on the taxpayer. Retroactive amendment of taxation laws in such cases is just as 'fundamentally wrong' as for any other criminal law.

In 2007, the Howard Government apparently was happy for the United States to charge David Hicks under retroactive legislation, while maintaining its earlier unwillingness to pass retroactive anti-terrorism laws for Australia.²² This approach was at best, unprincipled, and at worst, hypocritical.

Legislation that retroactively imposes a criminal sanction on a specific individual or group of individuals is known as a 'bill of attainder' or a 'bill of pains and penalties'. While there is some uncertainty regarding the exact meaning of, and difference between, bills of attainder and bills of pains and penalties, the High Court has held that both types of legislation violate the doctrine of separation of powers.²³ In the words of Toohy J: 'Legislative acts of this character contravene Ch III of the Constitution because they amount to the exercise of judicial power by the legislature.'²⁴

²⁰ Corkery, above n 12.

²¹ 'Howard rules out retrospective terrorism laws', *Sydney Morning Herald*, 23 February 2004.

²² C Banham and P Coorey, 'Retrospective law all right for Hicks: Howard' *Sydney Morning Herald*, 5 February 2007.

²³ Bargaric and Lakic, above n 15, 152.

²⁴ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 685-6.

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Since the 'bottom of the harbour' legislation²⁵ was without doubt targeted specifically at those taxpayers and promoters who were involved in the schemes, then insofar as that legislation imposed criminal penalties on those affected, it constituted 'bills of attainder' or 'bills of pains and penalties'. Likewise, the recent amendments to the Act may also constitute such unconstitutional legislation. This is because breaches of the relevant provisions of the Act²⁶ constitute offences under the Commonwealth *Criminal Code*,²⁷ and because the amendments were specifically introduced in respect of the information sought to be obtained from Mr Brereton and the other Project Wickenby targets.

It seems that, in respect of retroactive tax legislation, the executive is indeed a 'deaf leopard' who has difficulty in 'changing his spots'. It will be interesting to see whether those targeted elect to raise a constitutional objection to the legislative amendments, and if so, whether the High Court will be prepared to stand behind the principled statements made in *Polyukhovich's* case and draw the line against this latest infringement of democratic freedoms and the separation of powers.

²⁵ *Crimes (Taxation Offences) Act 1980* (Cth), *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth) and related legislation.

²⁶ For example, *Australian Crime Commission Act 2002* (Cth) s 35 'Obstructing or hindering an examiner, etc.'

²⁷ *Ibid*, s 6A.