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Retrospectivity

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EDITORIAL: RETROSPECTIVITY

Blackstone¹ stressed that a legislature must draft its laws carefully. For it can require citizens to obey only rules that were already 'prescribed'.

Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never properly be a law. It is requisite that this resolution be notified to the people who are to obey it.

And that most tyrannical of all Roman emperors Caligula, adds Blackstone,

wrote his laws in a very small character, and hung them up on high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action ... is committed, the legislator then for the first time declares it to have been a crime, and insists a punishment upon the person who has committed it.

Blackstone condemns retrospective legislation. He expresses a widely held view. No one should dare – even for the purposes of the Treasury – tell you that today's lawful practices might later be declared unlawful.

It must not be forgotten, especially in an urgent age, that advance notice of the law is a vital component of a steady law-abiding community. Joseph Raz stresses that the very first component of the rule of law is:² '1. All laws should be prospective, publicised and clear.'

Some 25 years ago, the Commonwealth parliament enacted its 'bottom of the harbour' tax legislation.³ This 1982 statute enabled the recovery of tax avoided at a time when the schemes had not been declared illegal. Indeed, the Barwick High Court had stated that arranging one's affairs to pay less tax – and relying on the plain meaning of the tax law words in your arrangements – was not only not unlawful, it was your right.

In his second reading speech on the 1982 Bill, the Treasurer was unconvincing: 'Our normal and general reluctance to introduce legislation having any retrospective element has, on this occasion, been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden'.⁴

Unfortunately, the Australian constitution does not specifically prohibit retrospective legislation. The United States' Constitution does. The Swedish Constitution does.⁵ Sweden says that a tax statute must be passed before the circumstances that constitute a taxable transaction occur. Article 28I(1) of the 1945 Indonesian Constitution proclaims that 'the right

¹ *Commentaries*, (1830), vol I, pp 45-46, cited by Deane J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 50, at para 27 of his judgment. Oxford's Clarendon Press published William Blackstone's mighty *Commentaries on the Laws of England* in four volumes between 1765 and 1769. They were the first major English law textbooks and, remarkably, are still standard references in law. Blackstone, 'who wielded an elegant pen', was one of the first to devise general principles of the law from the welter of cases.

² Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.

³ See A Freiberg, 'Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud' (1988) 12 *Criminal Law Journal* 136, 159.

⁴ Commonwealth, Parliamentary *Debates*, House of Representatives, 1982, Vol. HR129, p. 1866 (John Howard, Federal Treasurer).

⁵ See Ch 2 para 10 *Rogeringsformen* (the Swedish Constitution).

not to be prosecuted under retrospective laws [is a] basic human [right] that must not be diminished under any circumstances'.⁶

Silence on the issue in the Constitution does not, of course, give carte blanche. The common law rejects retrospectivity. '[U]nless there is some declared intention of the Legislature - clear and unequivocal - ... we ought to presume that an Act is prospective and not retrospective'.⁷ Also Dixon CJ in *Maxwell v Murphy*:⁸

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred ...

Before the 1982 legislation, the *Australian Tax Review* had attacked the practice of using retroactive legislation and its footmen, ministerial announcements of possible changes to the law.⁹ 'It is not only those who are directly affected by the retrospective legislation who are harmed. The whole society is fundamentally affected; general uncertainty is produced because it becomes impossible to rely upon the law as it is known and published in any particular time'.

There are apologists for these legislative assaults on this element of the rule of law.¹⁰ But our general feeling is the one that inspired the most famous of tax rebels, the US founding fathers, to insert a constitutional barrier to retrospectivity in the US Constitution.¹¹

Citizens really do have the right to know their obligations as taxpayers – to have them 'prescribed' as Blackstone put it - so they can arrange their affairs. In a society that honours the rule of law, they cannot be punished for arranging them in a way which is subsequently declared to be invalid.

In this issue of the *Journal*, Tim Jay writes on a recent instance of retrospective legislation.

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⁶ This provision was applied to free a Bali Bomber who had been investigated, charged, prosecuted and convicted under an unconstitutional - ie, retrospectively-operating - law. The law did not exist at the time he committed the crime: see *The Masykur Abdul Kadir Case*: Indonesian Constitutional Court Decision No 013/PUU-I/2003.

⁷ Lord O'Hagan in *Gardner v Lucas* (1878) 3 App Cas 582, 601.

⁸ (1957) 96 CLR 261, 267.

⁹ [1978] *Aust Tax Review* 165.

¹⁰ For example, Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford UP 2006) 147 ff.

¹¹ Article 1, § 10, of the United States' Constitution provides: 'No State shall . . . pass any . . . ex post facto Law.'