

# THE RULE OF LAW

INSTITUTE OF AUSTRALIA INC.

ANNUAL REPORT 2010



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## THE INSTITUTE

Twelve months ago, in October 2009, The Rule of Law Institute of Australia Inc (RoLIA) commenced operations.<sup>1</sup>

RoLIA is an independent and not-for-profit body established under the *Associations Incorporation Act 1984* (NSW). It does not receive any government funding. It has no full-time staff and relies on support of donations of time and money from the community. RoLIA's conferences and events are largely self-funded and speakers give their time pro bono.

RoLIA is now an active participant in the national dialogue on rule of law issues and has already achieved positive successes.

The basis on which the Governing Committee has made decisions for RoLIA activities and projects is whether it will:

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

## THE RULE OF LAW IN AUSTRALIA

The rule of law in Australia does not mean rule by law.

Sir Ninian Stephen identified four of the principles which are embodied in the spirit of the rule of law when he said:

"The first of the four principles is that government should be under law, that the law should apply to and be observed by government and its agencies, those given power in the community, just as it applies to the ordinary citizen; the second is that those who play their part in administering the law, judges and solicitors and barristers alike, should be independent and uninfluenced by government in their respective role so as to ensure that the rule of law is and remains a working reality and not a mere catch phrase; the third is

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<sup>1</sup> Please note the initial name of RoLIA was the Rule of Law Association of Australia (RoLAA), with the name change taking place on 9 June 2010.

closely associated with the second, it is that there should be ready access to the courts of law for those who seek legal remedy and relief; the fourth is that the law of the land, which rules us, should be certain, general and equal in its operation."

*Source: 1999 Annual Lawyers Lecture St James Ethics Centre.*

The rule of law is not only under challenge in developing countries but also in developed countries, like Australia. Here the sheer volume and extent of legislation present the greatest threat to the rule of law.

#### ABOUT THIS REPORT

In reporting on the work of RoLIA, the doctrine of the separation of powers is a useful reporting approach. Under the traditional separation of powers the coexistence and independence of the three arms of government; the parliament, the executive and the judiciary is of critical importance. Today there has emerged a fourth arm of government, namely, government agencies. This report separately considers each of these four arms of government.

#### CONTACT US

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## RoLIA'S ANNUAL RULE OF LAW CONFERENCES 2009 AND 2010

### RULE OF LAW CONFERENCE 2009

The first RoLIA Conference was held in conjunction with the NSW Bar Association on 20 November 2009. It was on the topic ***Is the rule of law under challenge in Australia?***

The speakers were:

- *The Hon Robert McClelland MP, Attorney-General of Australia (via Government representative, Ian Govey from the Department)*
- *Senator the Hon George Brandis MP, Shadow Attorney-General*
- *The Hon JJ Spigelman AC, Chief Justice of NSW*
- *The Hon Justice Margaret Stone, Federal Court of Australia*
- *The Hon Justice David Hammerschlag, Supreme Court of NSW*
- *His Hon Judge Michael Bozic SC, District Court of NSW*
- *Mr Richard McHugh SC*
- *Professor David Weisbrot AM, President Australian Law Reform Commission*
- *Professor Martin Krygier, Professor of Law UNSW*
- *Mr Robin Speed, President, RoLIA*

## RULE OF LAW CONFERENCE 2010

RoLIA is currently organising its second rule of law conference, to be held on Saturday 6 November 2010 with lead speaker being Justice Dyson Heydon of the High Court of Australia.

The conference is again jointly organised with the New South Wales Bar Association.

The topic is ***The rule of law, the courts and constitutions***. The location is the James Cook Ballroom at the Intercontinental Hotel, Sydney NSW. RoLIA is pleased that our Patron, Chief Justice Spigelman AC of the Supreme Court of NSW will be chairing the conference.

The following are the speakers:

- *The Hon Justice J D Heydon AC, Justice of the High Court of Australia*
- *The Hon Justice P Brereton AM RFD, Justice of the Supreme Court of NSW*
- *Dr Melissa Perry QC*
- *Nicholas Cowdery AM QC, NSW Director of Public Prosecutions*
- *Professor George Williams, University of NSW*
- *The Right Honourable Lord Goldsmith QC PC, European Chair of Litigation, Debevoise & Plimpton LLP and the United Kingdom's Attorney-General from 2001-2007*

Robin Speed, President of RoLIA and Richard McHugh SC will chair the two panel sessions.

## ROLIA MEDIA AND PUBLIC RELATIONS ACTIVITIES

### WEBSITE

RoLIA operates its own website [www.ruleoflaw.org.au](http://www.ruleoflaw.org.au).

The website contains all of our published documents, videos and sound bites as well as those of others who have published important works on the rule of law. The two most important tabs are the Key Documents and the Media Centre tabs.

'Key Documents' contains RoLIA documents such as the Regulator Survey; RoLIA Submissions; RoLIA's rule of law 'Essential Reading' suggestions; and rule of law journal articles and speeches that RoLIA advises members to read.

The 'Media Centre' tab contains media clips, transcripts and letters which involve RoLIA and RoLIA press releases. During the year RoLIA published 10 media releases. In addition we posted on our website 33 media articles and electronic media clips in which RoLIA featured.

Our contact network is directed by email to view the website when a new document is posted. RoLIA sends out messages to our mailing list whenever we have news to report. At September 2010, we have sent a total of 17 newsletters out to our contacts since our inception in October 2009.

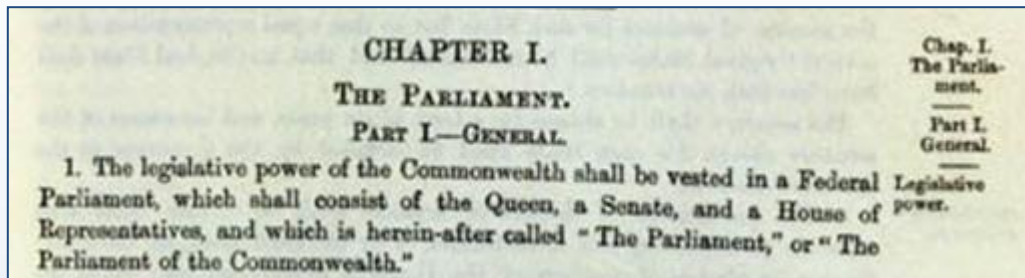
The RoLIA mailing list contains more than 1200 contacts in the community, the legal profession, parliaments, universities and the media.

### UNIVERSITY LAW SCHOOLS

RoLIA will be assisting in convening its first Rule of Law moot at Newcastle University Law School in 2011 in conjunction with the Newcastle Law Students Association. Students will be given a problem relating to the rule of law and then will present arguments in a mock courtroom setting. RoLIA looks forward to bringing rule of law issues to the students' attention and challenging them to apply it in a mock scenario.

RoLIA has also begun discussions with other universities with a view to ensuring law students are considering rule of law issues. RoLIA has plans to expand the Rule of Law moot to other universities and will make several announcements in the coming months of other initiatives.

# THE PARLIAMENT



## THE PARLIAMENT

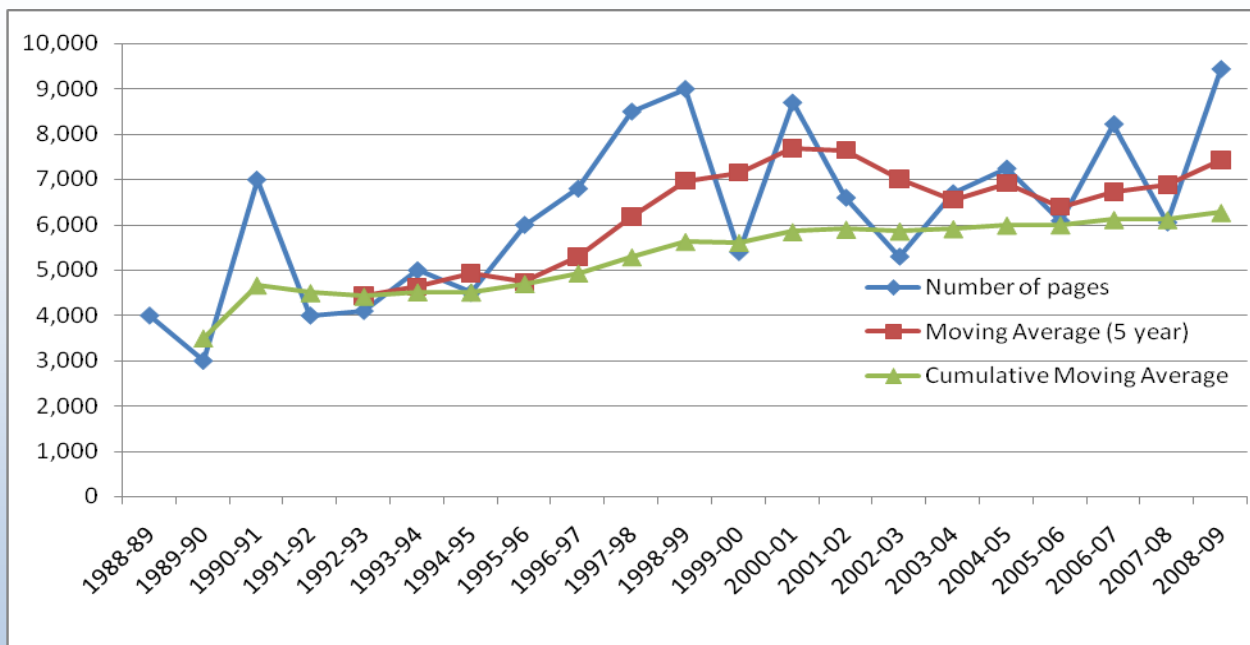
The greatest challenge to the rule of law in Australia is the sheer volume and extent of legislation enacted by Parliament. It is, therefore, Parliament which needs to address the issue.

During the nine months ended on 30 June 2010 RoLIA has engaged key projects designed to uphold and strengthen the position of the Parliaments throughout Australia. They were as follows:

### RoLIA HIGHLIGHTS THE SHEER VOLUME AND COMPLEXITY OF NEW LAWS

RoLIA published data on the sheer burden of laws and regulation which parliament passes each year, including that every three months the Federal Parliament passes more pages of legislation than it did for the whole ten year 1929-1939 period. RoLIA identified that 50,000 new pages of laws were enacted in 2009 at the Federal, State and Territory levels.<sup>2</sup> RoLIA made special mention of this in its submission to the Senate Scrutiny of Bills Inquiry into the future direction and role of the Committee.

NUMBER OF PAGES OF COMMONWEALTH BILLS INTRODUCED INTO COMMONWEALTH PARLIAMENT IN FINANCIAL YEARS 1988-89 TO 2008-09



\*Data source: Office of Parliamentary Counsel

<sup>2</sup> Article by Robin Speed, 15 January 2010, *The Australian*.

## RoLIA SENATE ESTIMATES REPORTS

RoLIA published two reports in 2010:

RoLIA published its first report on Senate scrutiny of the economic regulators Australian Competition and Consumer Commission (ACCC), Australian Prudential Regulation Authority (APRA), Australian Taxation Office (ATO), Australian Securities and Investments Commission (ASIC) and Fair Work Australia (FWA) at the Estimates hearings held by various Senate Committees. This report analyses scrutiny of these agencies; including the flow of questions for each and the timeliness of answers to the Parliament. In addition the report identifies exchanges which have implications for rule of law principles. The report received wide coverage with several newspaper articles discussing the report and all members of the RoLIA mailing list receiving a copy. RoLIA CEO Richard Gilbert was interviewed on Sky News Business Channel Law TV about the report.

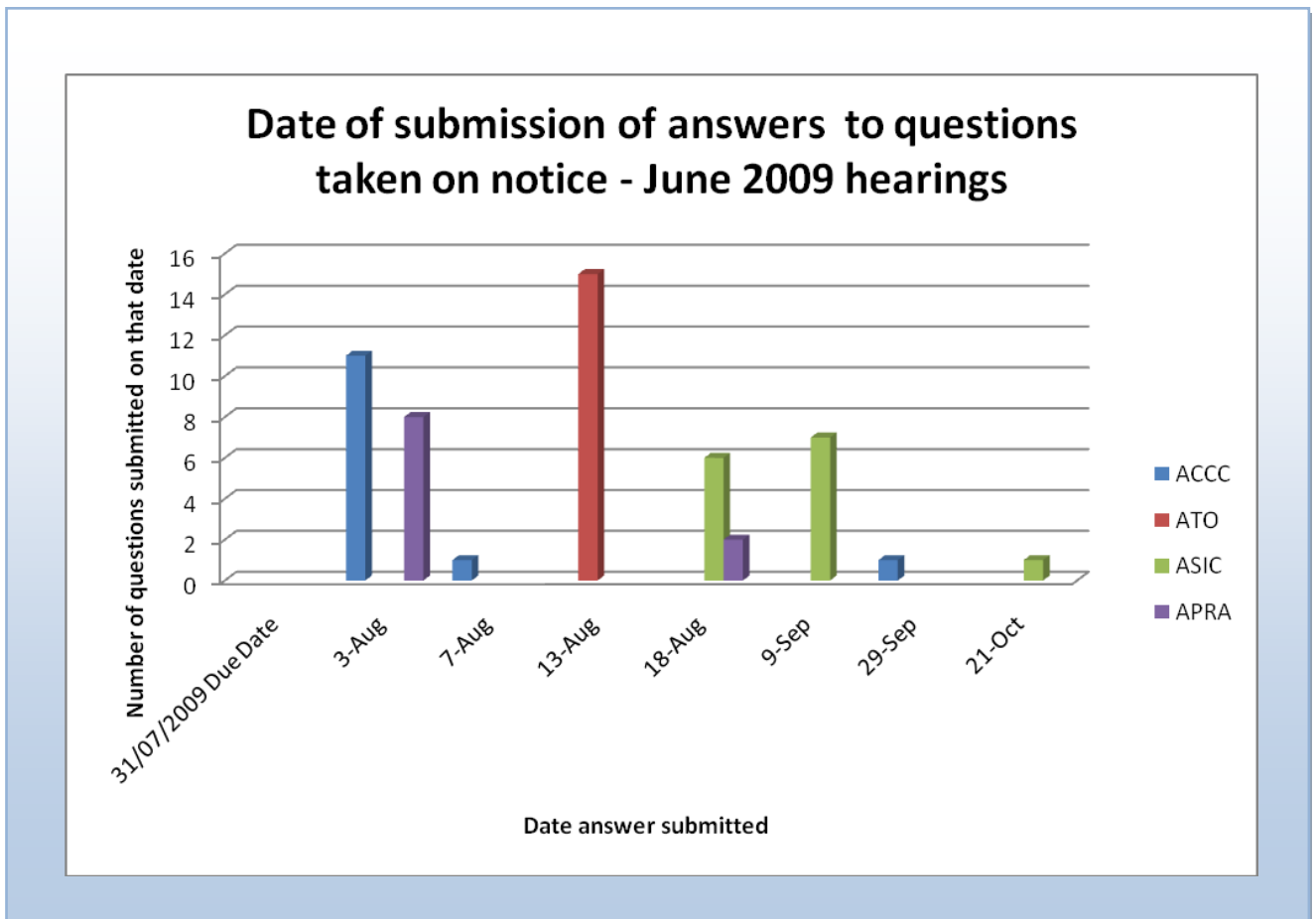
A second report including the data on the June 2010 Estimates hearings was published in August 2010. The federal regulator Australian Building and Construction Commission (ABCC) was added to the analysis as was the Australian Crime Commission (ACC). That report was discussed in an article by Mike Taylor in *Money Management* on 25 August 2010.

This report made three key recommendations, viz:

### 1. TIGHTENING TIMEFRAMES FOR ANSWERS FOR QUESTIONS TAKEN ON NOTICE

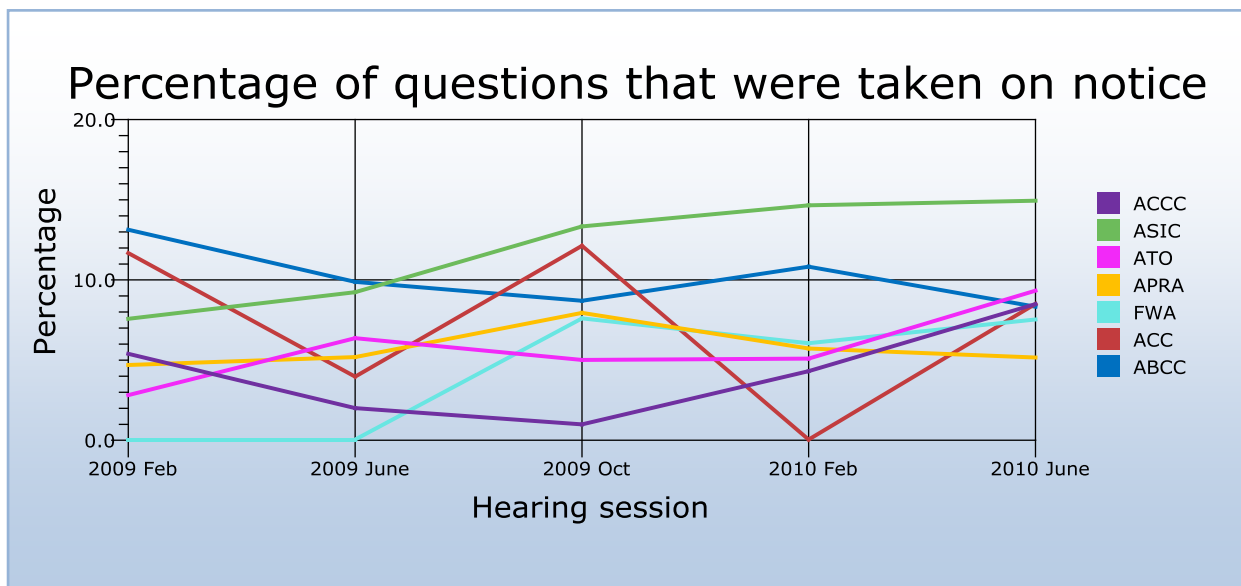
Regulators have more than enough days to answer questions on notice. The Economics Committee gave agencies it examined approximately two months to answer questions, and Standing Order 76(5), which allows Senators to require an explanation for lateness, only comes into force another 30 days from the due date.

In June 2010 the Economics Committee gave the Treasury a further 20 days to submit answers because the Government is in caretaker mode. A graph from RoLIA's first Estimates Survey amply demonstrates the tardiness problem:



Two observations have come from the report. First, when regulators call for information from the regulated they impose time frames that are far less generous than those embodied in Senate procedures (and they can impose fines and/or institute criminal proceedings for the failure to lodge on time). Second, it is important that Parliament be in receipt of information which is contemporaneous – stale information does little to assist transparency and accountability. The flow of information to the Parliament from the executive arm of government should be consistent with community and business information flows which in the internet age take place on a daily, if not weekly basis. Waiting four months for key Estimates information to be tabled in Parliament is a sad reflection on democratic parliamentary government.

The graph below illustrates the percentage of total questions asked that each regulator takes on notice, derived from the second RoLIA Senate Estimates report:



RoLIA calls for regulators to disclose in their annual reports the length of time it takes them to respond to any question from Senators, in Estimates and other hearings.

RoLIA notes that the third Committee considered, the Senate Standing Committee on Legal and Constitutional Affairs, ran the Attorney-General's Department hearings on 24-25 May 2010 and required answers by 9 July 2010. Those answers are now all published. RoLIA applauds the Legal and Constitutional Committee for its efficiency and its commitment to enhanced parliamentary scrutiny.

RoLIA calls for the due date to answer questions to be set at 28-30 days from the date of hearing. Additionally, RoLIA calls on all Senators to use Standing Order 74(5) to require an explanation if the regulator has not provided an answer within 30 days of the due date. As seen in the table above, many answers are not submitted before the 30 day limit. Also, RoLIA calls on Departments and Agencies to include in their annual reports a report card on their compliance with Estimates procedures, with special reference to any material breaches.

## 2. LIMITED RECOURSE TO CALLING PUBLIC EVIDENCE

Senate Estimates Committee procedures do not provide for the public to submit evidence or potential questions for the hearings. RoLIA believes that this is a disadvantage to the Estimates and a matter which the Senate should review. Submissions from the public could result in enhanced scrutiny of our regulators and instil greater levels of public confidence. The public has only limited opportunities to question regulators and their actions, other than to take part in judicial and quasi-judicial proceedings. This can be both time-consuming and expensive compared to an opportunity to make a simple submission to an Estimates Committee. Accordingly, RoLIA recommends that the Senate review its Estimates procedures with a view to allowing Estimates Committees to receive submissions as well as possible questions from the public.

## 3. CARETAKER PROVISIONS AND SENATE ESTIMATES QUESTIONS

The Caretaker Conventions provided by the Department of Prime Minister & Cabinet do not specifically mention that answers to questions on notice taken at Estimates hearings must still be provided when a government goes into caretaker mode. It is mentioned that during a caretaker stage ministers can still request information from agencies and in most circumstances regulators still have to provide them.<sup>3</sup> It stands to reason that requests for information that came before the caretaker period began should still be answered. RoLIA does not accept the caretaker period as an excuse for not answering Estimates questions.

Accordingly RoLIA calls on the Department of Prime Minister & Cabinet to review the Guidance on Caretaker Conventions with a view to requiring that answers to Estimates questions taken on notice be provided during the caretaker period in accordance with Senate procedures. In this regard RoLIA has written to the Head of the Department of Prime Minister & Cabinet alerting him to the report and its recommendations. In addition it has circulated its report to all current Senators.

In the 43<sup>rd</sup> Parliament, given the focus on accountability that has been brought by the three rural independent MPs, RoLIA looks forward to positive developments in respect of Estimates procedures.

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<sup>3</sup> Guidance on Caretaker Conventions 2010, Department of Prime Minister and Cabinet, Pg 7

## ANTI PEOPLE SMUGGLING AND OTHER MEASURES BILL 2010

RoLIA made a submission to the Senate Legal and Constitutional Committee pointing out that issues with fairness of legislation and separation of powers existed in the Bill and should be remedied. The two main issues the submission covered were that the Bill granted significant powers to the Attorney-General that should remain the powers of the courts; and the Bill also defined a minor crime of harbouring as a 'serious offence', exposing those caught to serious penalties which were too harsh a punishment for this offence.

The Committee did not adopt our recommendations, although a dissenting report by Senator Sarah Hanson-Young of the Greens did make similar recommendations.

### THE COMMITTEE REPORT MENTIONED RoLIA ON PAGE 30:

"The Rule of Law Association of Australia expressed reservations about both the existing and proposed provisions relating to foreign intelligence warrants on the basis that these warrants should be issued by a member of the judiciary rather than the Attorney-General."

## QUEENSLAND GOVERNMENT AND PROPOSAL TO INTRODUCE RETROSPECTIVE LEGISLATION

RoLIA expressed concern over the decision of the Queensland Government to legislate retrospectively going back eight years so as to overrule a decision of the Appeal Court in that state concerning the land tax regime.

The RoLIA view was that, under the rule of law, legislation should be prospective in nature so as to respect the certainty principle. Also, RoLIA stated that the law offended Queensland's own parliamentary legislative standards enshrined in the *Legislative Standards Act 1992* which makes express reference to both the rule of law and the need to uphold individual rights by inter alia by not imposing obligations retrospectively. On 25 February 2010 RoLIA welcomed the decision of the Queensland Government not proceed retrospectively.

## SENATE BILLS SCRUTINY

RoLIA submitted to the chair of the Senate Scrutiny of Bills Committee that it was time for the Committee to review its charter and operations so that it could better perform its scrutiny function of all laws that pass the Parliament.

The Committee was subsequently given a reference by the Senate to conduct a review inquiry, with the title of the inquiry being 'Inquiry into the future direction and role of the Scrutiny of Bills Committee'.

RoLIA made two submissions to this inquiry. The first was focused upon the Committee taking a more specific role in enforcing rule of law principles and the second was in response to an interim report that the Committee was to continue its inquiry after the introduction of a Bill to create a Human Rights Committee. RoLIA found a need for a second submission as the inquiry had been stalled by the introduction of a Bill to create a Human Rights Joint Committee, and RoLIA wanted to draw focus to the fact that the rule of law is separate to human rights and should not be overlooked.

The Committee recommended in its interim report that it would set a reporting date after the introduction of legislation to form the Human Rights Committee. The *Human Rights (Parliamentary Scrutiny) Bill 2010* was introduced into parliament by the Attorney-General on 2 June 2010. The Bill lapsed at dissolution of the parliament and RoLIA expects it to be reintroduced when the new parliament sits.

# THE EXECUTIVE

## CHAPTER II.

### THE EXECUTIVE GOVERNMENT.

Chap. II.  
The  
Government.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. Executive power.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure. Federal Executive Council.

## THE EXECUTIVE

It is critical to the rule of law that the Executive establishes and maintains proper bodies to review the law and its administration. Unfortunately, Australia is increasingly falling behind the high standards previously observed by Liberal and Labor Governments.

### AUSTRALIAN LAW REFORM COMMISSION

RoLIA has been very concerned about the withdrawal of funding to the ALRC. The June Senate Estimates hearings revealed very significant problems being caused by this withdrawal, such as the ALRC being unable to pay its rent and the decline in number of staff members. The ALRC previously had three or four full-time commissioners, now it only has one with three part-time commissioners. The deputy president position has been vacant for most of the past ten years.

The ALRC's continuance is crucial for the rule of law in Australia. Reduced funding has led to it being able to undertake fewer inquiries. The ALRC previously has reported on its inquiries into important legal issues such as: Commonwealth laws and family violence; secrecy laws and open government; client legal privilege in federal investigations and sedition.

The ALRC has been led by such distinguished persons as former High Court Justice the Honourable Michael Kirby AC CMG, the Honourable Elizabeth Evatt AO, Alan Rose AO, the Honourable Murray Wilcox QC and Emeritus Professor David Weisbrot AM. It is now led by Professor Rosalind Croucher.

RoLIA welcomes the call by Senator George Brandis to refer the matter of coercive powers to the ALRC for inquiry and report. RoLIA encourages Attorney-General the Honourable Robert McClelland to also consider referring the matter of coercive powers to the ALRC. Law reform is an ongoing concern and one which should never be forgotten as the law must keep up with societal and economic change.

### ADMINISTRATIVE REVIEW COUNCIL

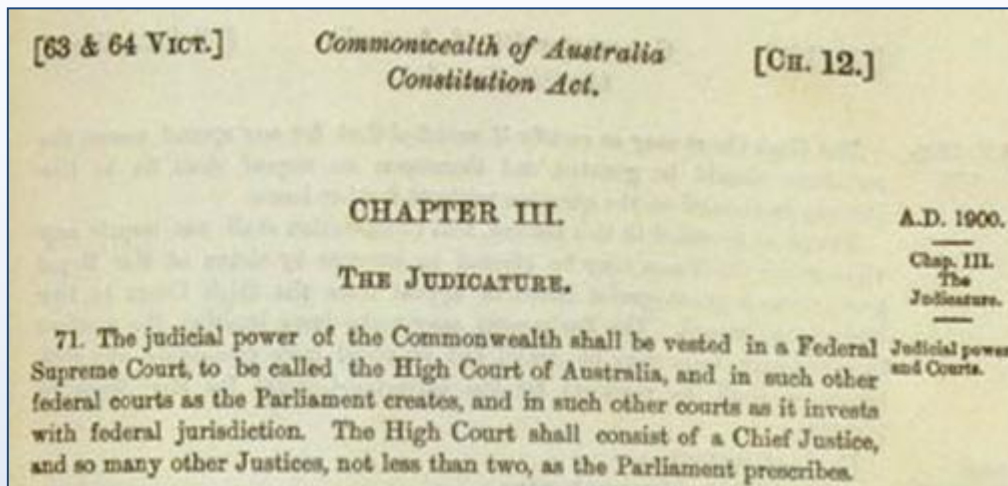
The Administrative Review Council (ARC) has gradually had its resources diminished over the years, at one stage in 2010 down to having no president and no dedicated secretariat. Their reports have gone from 3-4 per year to two or less per year. There has not been a report since November 2008 and its crucial 'Admin Review' report was not published for three years until May 2010. The ARC provides advice to government

departments and agencies, and in 2008-09, the Council provided only one formal letter of advice (compared to six in 2007-08).

The ARC is a key oversight body of federal regulators and issues of administrative law. In the past they have reviewed such important issues as regulators' coercive powers, constitutional and policy considerations relevant to the scope of judicial review and automated assistance in administrative decision making.

RoLIA considered that the potential loss of the ARC was a blow to the rule of law in Australia and identified the need for the government to bolster resources and leadership within the ARC. The RoLIA CEO Richard Gilbert sent a letter to *The Australian Financial Review* detailing the treatment to the ARC. Since then a President, Mr Colin Neave AM, has been appointed. Much more needs to be done.

# THE COURTS & THE LEGAL PROFESSION



## THE COURTS AND THE LEGAL PROFESSION

The Courts and the legal profession in Australia performed strongly in 2009/2010 in the observance of the rule of law. However, court cases only represent a small percentage of matters which expose infringements of the rule of law and even when exposed, the power of the courts to intervene is very limited.

### NATIONAL LEGAL PROFESSION

RoLIA has issued a press release objecting to the removal of the independence of the legal profession which the proposed regime would introduce. Independence of the legal profession is very important for the rule of law, as identified by Chief Justice French and former Justice Kirby of the High Court of Australia.

RoLIA followed the press release by preparing a submission on the need for independence of the legal profession. This was submitted in August to the Council of Australian Governments Legal Profession Reform Taskforce. Public submissions closed on 13 August 2010 and RoLIA looks forward to the final report upholding the principle of independence.

### MR STERN HU

RoLIA has expressed concerns relating to the Chinese legal system, especially in relation to closure of courts for criminal trial. Mr Stern Hu is an Australian citizen and employee of Rio Tinto who was charged with various bribery offences in China, and later imprisoned for a 10-year stint. When an Australian citizen is involved with the criminal legal system of any foreign country, we have an obligation to press that he receive fair and proper treatment. The presumption of innocence was not afforded to Mr Hu, nor was appropriate consular assistance or legal representation.

RoLIA CEO Richard Gilbert was interviewed on the *Sky News Business Channel* about the treatment of Mr Hu, the video of which is available on our website.

### JOINT STANDING COMMITTEE ON TREATIES

On Monday 10 May 2010 RoLIA wrote to Mr Kelvin Thompson MP, the Chairman of the Joint Standing Committee on Treaties, to ask the Committee to seek a briefing from the Department of Foreign Affairs and Trade on the issue of Stern Hu and implications for the rule of law.

RoLIA has identified that the treatment of Mr Hu may have breached the Australia-Chinese Consular Agreement, and compared his mistreatment with that of the Chinese sailors whose ship ran aground on the Australian Great Barrier Reef Marine Park. The Joint Standing Committee on Treaties replied that they had decided to seek a briefing from the Department of Foreign Affairs and Trade on the issues RoLIA raised in our correspondence.

### KIRK V WORKCOVER

In this crucial employment law case the rule of law issues were:

- The defendant was not provided with proper particulars of the charge, so was in an unfair position unable to properly prepare a defence. The prosecution must now identify the particular act or omission which is the basis of the charge and the particulars of how an employer could have avoided the incident in question.
- The onus of proof was on the defendant, a reversal of the usual onus. It is an evidentiary principle of law that a defendant not be called as witness by the prosecution; especially where they bear the onus of proof and this occurred with Mr Kirk being called. This rule cannot be waived.
- The legislation provided that there was no right to review by a higher court from the Industrial Court which heard the case. The High Court read this down to provide that as the decision was jurisdictionally incorrect it could be reviewed.
- The legislation, as interpreted by the trial judge to require employers on farms to conduct extensive supervision of employees, imposed obligations impossible to comply with and burdens impossible to bear and so was offensive to the rule of law (per Heydon J).

An article published in *The Australian* contained the opinion of Mr Malcolm Stewart, Vice-President of RoLIA, that occupational health and safety law in NSW was in need of an overhaul and that consideration should be given to whether the Industrial Court of NSW retain jurisdiction over these cases.

## RULE OF LAW CASES

RoLIA has identified several cases which were important for the rule of law in Australia in the 2009-2010 financial year.

### *LANE V MORRISON* (HIGH COURT OF AUSTRALIA, 26 AUGUST 2009, [2009] HCA 29)

This High Court case determined that the legislation creating the Australian Military Court is constitutionally invalid. That legislation stated that the Court was not a court under Ch III of the Constitution, but the High Court found that it was exercising judicial power of the Commonwealth. Under the Constitution only Ch III courts can exercise Commonwealth judicial power so the Military Court was not a constitutionally valid court. On 24 May 2010 the Australian Federal Government announced a new Ch III Military Court would be created and would be closely involved with the Federal Court. The Coalition called for a Federal Circuit Court which would deal with military as well as tax and family matters, replacing the Federal Magistrates Court.

### *KIRK V WORKCOVER* (HIGH COURT OF AUSTRALIA, 3 FEBRUARY 2010, [2010] HCA 1)

The High Court read down a provision protecting decisions of the Industrial Court from review, paving the way for review by the High Court. The appellants had not been informed specifically of the charges, which was a defect of sufficient basis to be quashed. There was also a breach of evidence rules, with Mr Kirk being called as a witness for the prosecution, in breach of s 17(2) of the *Evidence Act*. Their Honours noted that the parties could consent to dispense with some provisions of the *Evidence Act* but this was not one of them.

His Honour Justice Heydon stated at [120]:

“...The trial judge there concluded that Mr Kirk “did not supervise the daily activities of employees or contractors working on the Farm”. The suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors — even the owners of relatively small farms like Mr Kirk’s — is, with respect, an astonishing one...The suggestion reflects a view of the legislation which, if it were correct, would justify many of the criticisms to which counsel for the appellants subjected it as being offensive to a fundamental aspect of the rule of law on the ground that it imposed obligations which were impossible to comply with and burdens which were impossible to bear.”

*AON RISK SERVICES V ANU* (HIGH COURT OF AUSTRALIA, 5 AUGUST 2009, [2009] HCA 27)

Several days into the hearing at first instance ANU applied to significantly amend its statement of claim. The court has a discretion whether to allow this and the trial judge exercised the discretion to allow it. The High Court overturned *Queensland v J L Holdings*' limit on considering case management principles to hold that allowing ANU to alter its statement of claim was contrary to the case management objectives set out in Rule 21 of the *Court Procedure Rules 2006* (ACT). *JL Holdings* had held that attainment of justice was the ultimate aim so allowed pleadings to be amended subject to appropriate costs & sanctions. This aim is important for the rule of law, but it caused difficulty with the principle that Courts must operate with minimal delay and expense. The Court considered that other litigants may be unjustly compromised by delays; speed and efficiency are required for 'just resolution' of litigation and public confidence in the courts; and an award of costs thrown away was not enough for a 'just resolution' and did not compensate for inconvenience of prolonging proceedings.

*HABIB V THE COMMONWEALTH* (FEDERAL COURT OF AUSTRALIA, 25 FEB 2010, [2010] FCAFC 12)

The Court found that the separation of powers doctrine is not undermined by an Australian Court exercising jurisdiction over a claim relating to the alleged conduct of Australian officials overseas acting in breach of international law or infringing human rights. The act of state doctrine does not apply where the allegations concern Commonwealth officers acting in excess of Commonwealth law.

*ZENTAI V HONOURABLE BRENDAN O'CONNOR (No. 3)* (FEDERAL COURT OF AUSTRALIA, 2 JULY 2010, [2010] FCA 691)

The Federal Court refused to extradite suspected war criminal Charles Zentai as he had not been charged with a crime, he was only a suspect. There was also no war crimes offence in Hungary at the time of the alleged offence. A fair trial was also an issue as witnesses were no longer alive or available for examination; however the Court found proper consideration of this requirement had been made. Proper consideration had not

been given to the applicant's ill health and age resulting in surrender being oppressive and incompatible with humanitarian considerations.

*AUSTRALIAN CRIME COMMISSION V OK* (FEDERAL COURT OF AUSTRALIA, 2 JUNE 2010, [2010] FCAFC 61)

Justice Spender dissented from the majority to say that continuing questioning of the respondent would be inconsistent with the witness's right to trial by jury, and would result in prejudice and contempt of court. 'OK' had refused to answer questions at an ACC examination on the ground that the questions interfered with his right to a fair trial and the conduct of his defence and that the examination constituted a contempt of court. Spender J said that merely because steps can be taken to ensure that a prosecutor or an investigator of a criminal offence does not become aware of the answers given by the witness in the examination does not mean that there is no interference in the administration of justice. The inquisition by the executive of a witness who is subject to compulsory questions constitutes the interference.

*INTERNATIONAL FINANCE TRUST COMPANY LIMITED V NEW SOUTH WALES CRIME COMMISSION* (HIGH COURT OF AUSTRALIA, 12 NOVEMBER 2009, [2009] HCA 49)

The High Court by majority determined that *Criminal Assets Recovery Act* 1990 (NSW), s 10 was invalid. Section 10 allowed the Crime Commission to make an ex parte application to the Supreme Court for restraining orders. Under section 10(3) of the Act the Supreme Court must make the order if the application for the order is supported by an affidavit of an authorised officer which deposes to the grounds upon which the officer suspects the property is serious crime derived property, and, having regard to the matters raised in the affidavit, the Supreme Court considers there are reasonable grounds for the suspicion.

Gummow & Bell JJ held: Section 10 of the Act engaged the Supreme Court in an activity repugnant in fundamental degree to the judicial process, in so far as it substantively required the court to mandatorily make an ex parte sequestration of property upon suspicion of wrongdoing by an authorised officer of the commission, for an indeterminate period, with no effective judicial enforcement of the duty of full disclosure on ex parte applications.

French CJ held: Section 10 of the Act was constitutionally invalid insofar as it conferred power on the commission to effectively choose to require the Supreme Court to hear and determine an application for a restraining order without notice, which thereby directed the court as to the manner of the exercise of its jurisdiction and distorted the institutional integrity of the court, which affected its capacity as a repository of federal jurisdiction.

Heydon J held: In so far as the Act did not permit a defendant to apply for the speedy dissolution of the ex parte restraining order, either expressly or impliedly, s 10 was repugnant to the judicial process in a fundamental degree.

Hayne, Crennan and Kiefel JJ (dissenting) held: Section 10 of the Act was not invalid in so far as neither the grounds nor the procedure for making a restraining order denied either the reality or appearance of the impartiality of the Supreme Court.

# GOVERNMENT AGENCIES



## GOVERNMENT AGENCIES

The power and control exercised in Australia by Government agencies such as the Australian Building and Construction Commission, the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission and the Australian Taxation Office to name a few, is such that they now occupy their own position in the separation of powers.

In practice, Government agencies are frequently perceived as making the law and being unaccountable.

### AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

RoLIA CEO Richard Gilbert had a letter published in *The Australian Financial Review* on 11 June 2010 concerning the ACCC and their punishment of Heinz, which required Heinz to donate cans of pineapple to charity as recompense for misleading and deceptive conduct. Those particular cans still displayed the misleading labels and the ACCC failed to prevent the further propagation of the misleading conduct.

Mr Gilbert's letter pointed out that it was dangerous for a regulator to take the role of prosecutor, judge and executioner when they made a deal with Heinz to avoid a court case. The ACCC's deal offended the rule of law principles of equality before the law and separation of powers.

Mr Gilbert stated in the letter:

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

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ASIC

ASIC in 2009-2010 has had a string of failed very expensive prosecutions, including those against Jodee Rich and Andrew Forrest. Robin Speed expressed concern about ASIC's prosecutions in a letter to *The Australian* dated Thursday 14 January 2010. He mentioned their string of failures and court criticism for abuse of process.

Mr Speed followed this with a letter to *The Australian Financial Review*, published 3 February 2010, again pointing out ASIC's apparent enthusiasm to prosecute without sufficient evidentiary backing, finishing with a quote that "...the regulator should act in accordance with the rule of law and administer the law reasonably and responsibly. Respect for ASIC is required, not fear or contempt."

### AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER (ABCC)

The powers the ABCC has under s 52 of the *Australian Building and Construction Industry Improvement Act 2005* give an ABC Commissioner the ability to require a person to give information, produce documents or attend an interview. The penalty for non-compliance is a maximum of six months imprisonment.

### TAX LAWS AMENDMENT (CONFIDENTIALITY OF TAXPAYER INFORMATION) BILL 2009

On 2 March 2010 RoLIA made a submission to the Senate Economics Committee inquiry into the *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009*. RoLIA discussed the privacy implications of the Bill as well as the rule of law issues, concluding by making several recommendations to amend the Bill to better fit the rule of law.

On 10 March 2010 RoLIA issued a joint press release with the NSW Council for Civil Liberties calling for amendments to the Bill including: notification to taxpayers that their information may be disclosed, decision-making on disclosure to be made by a senior staff member and the ATO being required to produce a statement of the practices they will use to disclose information.

The Senate Economics Committee produced a report which unanimously amended the Bill to provide authorisation procedures for the release of data. RoLIA published a press release commending the Committee for its report.

#### THE COMMITTEE'S REPORT MENTIONED RoLIA ON PAGE 13:

"3.1 Submissions received to this inquiry and during the earlier consultation process were generally supportive of consolidating the existing privacy and secrecy provisions into a single legislative framework:

*...we applaud the consolidation of the various secrecy and disclosure provisions into the one subdivision...*" [Footnote attributing quote to Rule of Law Institute of Australia]

THE COMMITTEE ALSO MENTIONED RoLIA ON PAGE 15:

“The Bill in its current form is silent as to who will make the determination that a specific disclosure is required on the basis that the public benefit of the disclosure outweighs a taxpayer's privacy. In their submission to the inquiry, the Rule of Law Association of Australia (RoLAA) suggested that such a decision should rest with a senior Tax Officer with at least the classification of Assistant Commissioner. RoLAA further suggested that the officer responsible for making this decision should be required to be independent of the particular business line area which is seeking to disclose the information to ensure impartiality.”

The Senate Privileges Committee conducted a separate inquiry into the Bill with a focus on the Parliament's rights and immunities in accessing information from the executive arm of government in accordance with Section 16 of the *Parliamentary Privileges Act* 1987.

RoLIA made a submission to the Senate Privileges Committee's inquiry. RoLIA raised two key issues in its submission, first, whether it was appropriate for the Executive to dictate to Parliament whether evidence to a parliamentary Committee should be treated as in camera evidence and, second, the need for legislation to be clear and unequivocal and not to give rise to uncertainty for those who are the subject of the law. The Committee agreed with the points which RoLIA made and recommended changes to the legislation. The Bill was in the House of Representatives when the Parliament was prorogued for the 2010 Federal Election and consequently has lapsed.

THE COMMITTEE REPORT MENTIONED RoLIA ON PAGE 17:

“The Rule of Law Association of Australia (RoLAA), an association which has as one of its objectives a reduction in the complexity, arbitrariness and uncertainty of Australian law, also submitted to the committee that the need for the provision had not been made out:

*...as far as RoLAA is aware no parliamentary committee has ever sought any information on the affairs of individual taxpayers, and properly left such matters to the Australian Tax Office. It should be left to the good sense of parliamentarians to determine what matters should be reviewed by them and how, without limiting the fundamental right of parliamentary privilege which is there to benefit all those whom they represent.”*

On 21 June 2010 RoLIA made a submission to the Senate Economics Committee expressing concerns with clarity of legislation and over-delegation of powers in a Bill to introduce a 'public benefit test' for charities who want to claim a tax exemption.

RoLIA pointed out the rule of law problems with the Bill, including issues with uncertainty and retrospectivity. The Bill targeted a specific organisation, which was abhorrent to the principle that the law applies to all. There was also too much delegation planned for important issues that required and deserved debate in parliament.

The Committee published its report on 7 September 2010 and recommended a charities commission for Australia to be introduced, that would regulate charities utilising a public benefit test, recommending legislation to be introduced no later than 11 June 2011.

#### THE COMMITTEE REPORT MENTIONED RoLIA ON PG 8:

"1.20 The Rule of Law Institute of Australia (RoLIA) suggested that delegating the test to regulations is an over-delegation of powers and brought the following concerns to the attention of the Committee.

*The separation of powers principle requires the Parliament, not the Executive, to determine the laws...the Bill allows the Executive to determine the substantive test with no effective guidance from the Parliament. RoLIA believes that any test must be comprehensively and substantively enunciated in clear and unambiguous terms...It must be determined by parliament and subject to the same scrutiny and debate as any other law."*

#### WHISTLEBLOWER SUBMISSION

On 9 December 2009 RoLIA lodged a submission with the Treasury Working Group examining reform of the whistleblower provisions of the Corporations Law. The Treasury had sought submissions on stakeholder views on possible reforms to the legislative protections provided to corporate whistleblowers under Part 9.4AAA of the *Corporations Act 2001*.

The submission detailed the lack of disclosure of operation of whistleblower provisions by the Federal Regulators and then discussed the 'bona fide' requirements continuing usefulness and the problems of malicious informants.

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ROLIA'S RESEARCH OFFICER IS LYDIA GRIFFITS

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ROLIA THANKS THE ADVISORY COMMITTEE FOR THEIR ASSISTANCE FROM TIME TO TIME DURING ROLIA'S FIRST YEAR OF OPERATIONS.

## ACKNOWLEDGEMENTS

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RoLIA would also like to acknowledge all of the numerous supporters who wrote letters and emails encouraging us to continue our work and submitting issues for our consideration.

## COMMENTS

RoLIA would be happy to comment on any part of this report. Please contact RoLIA CEO Richard Gilbert on (02) 9251 8000.



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