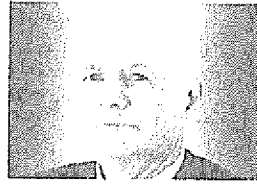


Keneally fails the test of fairness, equality

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THE decision of the NSW government to not support the uniform national workplace safety laws does not sit well with that state's long history of legislative and judicial practice built on the foundations of the Westminster system of government and the rule of law.

From the media reports on the new national system of occupational health and safety regulation there appear to be two key sticking points for Premier Kristina Keneally.

Her government supports maintaining a reversal of the onus of proof for employers in OHS cases.

It also supports allowing unions that institute OHS actions to keep half of the fine proceeds when courts find against employers.

The NSW government's position conflicts with the February decision of the High Court in the case of *Kirk v NSW WorkCover* where the court found an employer operating

under the current OHS regime in NSW had been prosecuted for criminal offences he did not commit, had been denied a fair trial and been found guilty when he was innocent.

The Rule of Law Institute of Australia takes a principle-based approach in its examination of the law and administration of the laws which impinge on fundamental rights and liberties.

Some of the long-standing features of Australian and British law include the right to remain silent, the presumption of innocence, the obligation of the crown to prove that a citizen has broken the criminal law beyond reasonable doubt, the right of accused people to know the particulars of the offence on which they are charged, the right to associate and form a union, the right of free movement and the right of free speech.

Interestingly, the NSW Premier acknowledged the presumption of innocence and invoked it in support of a colleague against whom misconduct allegations had been levelled.

On February 12 she said: "There must be due process, there must be a presumption of innocence for members of parliament and senior public servants."

An argument against the stand which the NSW Premier

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has taken might be interpreted as being anti-union and pro-employer. However, the application of the rule of law stands tall above partisan politics as well as labour and capital struggles.

In this regard, the Rule of Law Institute of Australia has criticised federal laws applicable to the building and construction industry that prevent unionists and others from exercising their right of silence when summonsed to answer questions before the Australian Building and Construction Commission.

The onus on the crown to prove a charge beyond reasonable doubt is reflected in Article 11 (1) of the UN Declaration of Human Rights: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for

his defence." It is easy to mount a logical explanation on the correctness of this principle. First, if the state wishes to limit one's liberty then it needs to explain why — otherwise there exists a potential for arbitrariness.

Second, the state will always have sufficient resources both in its administration and funding to develop a case against a single citizen. Another long-held rule of law principle is that everybody should be equal before the law, which is also found in the UN Declaration at Article 7.

It is very difficult to justify why employers should be singled out to forgo the presumption of innocence, but to allow it to apply to every other class of defendant.

If it is good enough to reverse the onus of proof for OHS then why not do it for unions that fall foul of the Trade Practices secondary boycott provisions or enter work places illegally under FWA?

The notion of giving a non-government party a right to commence criminal proceedings and then to collect 50 per cent of the fine as a bounty is a novel one.

In a practical sense this arrangement is akin to allowing officers of the NSW Police to keep half of the traffic fines that are imposed by the courts.

It gives rise to seemingly unmanageable conflicts of interest.

It is difficult to imagine that this arrangement would stand the test of prosecutorial fairness which is another key element of the rule of law that governments incorporate in their model litigant provisions and prosecutorial systems.

The NSW model litigant provisions require state agencies to be more than "merely acting honestly and in accordance with the law and court rules".

Perhaps the final word on this battle should be given to Justice Dyson Heydon in the *Kirk* case in

the High Court where the judge quoted from Professor Geoffrey de Q. Walker's seminal text on the rule of law:

"History teaches us to be suspicious of specialist courts and tribunals of all descriptions.

"They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants.

"From the Court of Star Chamber to the multitude of military courts and revolutionary tribunals in our own century, this lesson has been repeated time and time again."

The proposal for a national OHS system, which abides by the rule of law, is certainly an attractive proposition.

Richard Gilbert is chief executive of the Rule of Law Institute of Australia