

THE ABCC AND THE RULE OF LAW

2010 Rule of Law Conference, NSW Bar Association

Sydney, 6 November 2010

As an academic, I spend a lot of time writing and thinking about basic principles of public law, such as the separation of powers judicial review and the rule of law.

Given this, I am particularly alert to contemporary statutes that may offend these principles, such as some aspects of Australia's new anti-terror laws.

One unexpected area that throws up a range of challenges is industrial law. In particular, the modern, said regulation provided for the building and construction industry in Australia represents some of the most challenging coercive powers thus far enacted by the federal parliament.

In this talk, I will cover:

- The ABCC and its powers
- Weaknesses in parliamentary scrutiny that all-out a law such as this to occur

I approach these questions not as someone who has ever worked in the construction industry, but as a public lawyer whose focus is on the use, and occasional misuse, of public power by Australian institutions since 1901.

SCOPE OF COERCIVE POWER

52 ABC Commissioner's powers to obtain information etc.

- (1) If the ABC Commissioner believes on reasonable grounds that a person:
 - (a) has information or documents relevant to an investigation; or
 - (b) is capable of giving evidence that is relevant to an investigation;

the ABC Commissioner may, by written notice given to the person, require the person:

(c) to give the information to the ABC Commissioner, or to an assistant, by the time, and in the manner and form, specified in the notice; or

(d) to produce the documents to the ABC Commissioner, or to an assistant, by the time, and in the manner, specified in the notice; or

(e) to attend before the ABC Commissioner, or an assistant, at the time and place specified in the notice, and answer questions relevant to the investigation.

Examples:

- Require all phone and email records, whether of a business or personal nature.
- Report not only on your activities but those of fellow workers.
- Force to reveal memberships of an organisations, such as a union.
- Report on discussions in private union meeting or other meeting of workers.

Applies to:

- Workers in the building industry not in any way suspected of wrongdoing
- Their families (including children)
- Journalists and academics (no protection for sources etc – could even require a priest to reveal what someone has told them in the confession box).

Not saying it has or will be used in this way, but the problem is that the law permits this to occur. Basic principle of the rule of law that a law should go no further than its justified use. The proper scope of the law should not depend on the discretion and goodwill of the holder of the power. Lest there was any doubt:

53 Certain excuses not available in relation to section 52 requirements

(1) A person is not excused from giving information, producing a document, or answering a question, under section 52 on the ground that to do so:

(a) would contravene any other law; or

(b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability [but *Use/derivative use indemnity*]; or

(c) would be otherwise contrary to the public interest.

Overrides:

- Protection of journalists sources
- All aspects of privacy law.
- Even Cabinet confidentiality.

Section 52(7) further overrides *secrecy* provisions in other laws, eg national security laws re ASIO. Even if must be kept secrecy to protect the community or national interest, must reveal here. Puts ABCC law higher than the national security laws themselves.

Low threshold

This must be set against the low threshold for the sue of the ABCC's powers. Broad definitions of key terms like 'building work' and 'unlawful industrial action'. And of 'investigation' itself in s 52(8):

investigation means an investigation by the ABC Commissioner into a contravention, by a building industry participant, of a designated building law.

designated building law means:

(a) this Act, the *Independent Contractors Act 2006* or the Workplace Relations Act; or

(b) a Commonwealth industrial instrument.

industrial instrument means an award or agreement ...

Power extends beyond criminal activity to the most minor or petty award breaches. In aid of this, confidentiality and secrecy overridden and can compel someone to provide incriminating evidence. And even then information sought need not be necessary for the investigation of the breach, just 'relevant to an investigation'.

Penalties

Fail to do any of these things and can be jailed under s 52(6) for 6 months. No option of a fine!

Elsewhere, such as for unlawful industrial action, civil penalties of up to \$22,000 (nearly half of average annual wage) for a person or \$110,000 for an organisation.

Big fines not just a union problem:

59(14) The occupier of premises must not refuse or unduly delay entry to the premises by an ABC Inspector exercising powers under this section.

Civil penalties apply not only to the person but under s 48(2) to 'a person who is involved in a contravention' This is defined to include a person who:

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

Plus, a person is defined to include 'an industrial association' (plus s 69).

WHERE ARE THE SAFEGUARDS?

Warrants

- Look for a warrant by a judicial officer (as in other areas like phone tapping) or even the Attorney-General as per some ASIO powers.

Review under the *Administrative Decision (Judicial Review) Act* (vs s 75(v) and *Plaintiff S157*)

- is excluded (vs even applies to decisions to ban terrorist organisations).

Grounds of review excluded include:

- a breach of the rules of natural justice
- procedures required by law not observed
- making of the decision an improper exercise of power
- fraud has taken place
- power exercised in bad faith
- abuse of power

Powers balanced against democratic rights

- Eg, freedom of speech and the right to silence (vs 5th in the US). No backstop in Australia because we, alone among all democratic nations, lack a national bill or charter of rights. While that is another story, it does mean that we lack the mechanism that other nations have to ensure that the worst excesses of power are blunted. We may like to talk about ‘our rights at work’, but the reality is that until these rights are put into law they are merely rhetoric, and, as this law shows, can be too easily taken away.

It is bad enough to ever give such unchecked powers to a government minister, it is even worse to confer them on an unelected body that is not even answerable in Parliament. This represents a concentration of executive power of the worst kind.

Each of these elements is, by itself, legally objectionable. But, taken together, they are of even greater concern.

The ABCC has been given extraordinary powers that exceed even those given to the police in investigating major crimes like murder or drug trafficking. The ABCC's powers cannot even be described as police powers because they go far beyond what the police have been given.

LIKE POWERS ELSEWHERE?

It has been said that the law copies powers found elsewhere. Indeed, there are similarities to powers given to bodies like the Australian Competition and Consumer Commission and Australian Securities and Investments Commission.

However, the context is of vital importance. A power appropriately given to ASIC to corporate criminals may be inappropriate when given to a body dealing with industrial disputes. In any event, the ABCC regime is different, and more problematic, because:

- Other regimes do not suffer from the same problems of over-wide definitions and low thresholds for the use of power, let alone absence of oversight under the *Administrative Decision (Judicial Review) Act*.
- It applies a criminal investigatory model to a non-criminal, industrial context.
- Normalises extraordinary powers whose use should not be taken out of their criminal context (only crime in the Act is for not complying with the ABCC's powers). It creates a precedent that may make common place what should be limited and exceptional. Model could be extended to other industries and out of the industrial context to other fields.

These powers have no place in a body directed at preventing unlawful industrial action and minor award breaches. The powers could not be justified when policing breaches of the criminal law, let alone industrial disputes.

Ironically, the ABCC was established for the stated purpose of ‘promoting respect for the rule of law’ in the building and construction industry. However, the investigatory powers conferred on the ABC Commissioner in fact undermine the rule of law in Australia. The ABC Commissioner has largely unchecked powers to compel a person to provide him or her with information or documents or to give evidence where this may be ‘relevant to an investigation’.

The breadth of these powers is extraordinary. They may be exercised in relation to any person, regardless of their age or culpability, who may reasonably be thought to possess relevant information or documents. They may also be exercised in relation to any contravention, regardless of how trivial, of a federal industrial law or award. The exercise of these powers by the ABCC has serious consequences, both in the abrogation of industrial and other rights and in the imposition of a term of imprisonment for non-compliance. Making this situation even more disturbing is the absence of meaningful safeguards.

PARLIAMENTARY SCRUTINY

Laws such as this can be passed too easily by Parliament because of a lack of adequate safeguards and processes around basic values such as the rule of law and human rights:

Processes

- Inadequate scrutiny, especially when one side of politics controls both houses
- Human rights not considered in a systemic and effective way. Under Senate Standing Order 24 the Senate Standing Committee for the Scrutiny of Bills is charged with reporting whether Bills and Acts: ‘trespass unduly on personal

rights and liberties'. Nothing lists the extent to which government can trespass upon our core rights or what these rights are. Ignored anyway in many key debates, eg, anti-terror laws.

- Human rights and rule of law arguments can lack legitimacy (eg ASIO Senate inquiry and Dennis Burke). In the absence of a charter, human rights language and concepts can lack political and legal legitimacy in parliaments and the community. As a consequence, Australia is an example of a country where people and parliaments do not always take human rights as seriously as they should.
- Speed and volume at which new laws are made (Fred Chaney point). Eg, one of the most contentious laws of recent times, the 2007 NT Intervention Legislation, which, for eg, suspended Racial Discrimination Act. It required a robust debate to get the law right (a prime function of Parliament). Instead, *Northern Territory National Emergency Response Bill* introduced into House of Representatives on 7 August 2007 (first viewing that day of package of five Bills of 480 pages!). Debate on Bill commenced at 9:02pm and Bill passed at 9:15pm. Better in the Senate where 19 pages of debate. Many other examples, eg on some anti-terror laws, plus volume too much anyway to read, let alone also for regulations and the like.

Outcomes

- ABCC
- detention of children seeking asylum (and the mentally ill, the aged and people with a disability)
- Suspension of RDA twice in last decade
- Anti-terror laws – 44 (1 every 7 weeks) – consider:
 - Attorney-General can issue certificate to close court from public view and restrict evidence a defendant can see.
 - Reverse the onus of proof for critical aspects of some offences.
 - Detention of non-suspects by ASIO for intelligence gathering, with up to 5 years jail if do not co-operate and ban on publishing information about the detention for 2 years (inc. for torture).