THE AUSTRALIAN - 15-01-2010

THE RISE AND RISE OF THE REGULATORS

We are moving from the rule of law to a state ruled by powerful administrators

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IN 2009, more than 50,000 pages of new laws were enacted at the federal, state and territory levels. These were in addition to the 100,000s of pages of existing laws.

The consequences are serious. The first is that Australia will cease to be a world leader in being governed in accordance with the rule of law, and instead become ruled by law (there being a fundamental difference). Secondly, the rule of law will be progressively replaced by the rule of the regulator, the antithesis of the rule of law.

As the number and complexities of laws increase, there is a corresponding decrease in knowing and voluntarily observing the laws by the community. And, as it becomes practically impossible for the community to know, let alone apply the law, ensuring compliance is passed to the persons charged with administering the laws — such as ASIC, ACCC, ATO — the regulators. However, it is not practical for the regulators to enforce the mass of laws against everyone, nor even against one person, all the time. They therefore announce how they will apply the law, impose penalties on those who act otherwise, and reward those who act in accordance with their blessings. A few are prosecuted as a warning to the rest of the community. In this way, the rule of the regulator begins.

The result is a fundamental shift in the relationship between the individual and the law. Increasingly, the relationship is not of the individual knowing and complying with what the law states, but of knowing and complying with what the regulators state the law states, and then knowing the extent to which the regulators will apply the law as stated by them.

For many, the new relationship focuses on not being seen by the regulators; keeping the lowest possible profile on those matters that the regulators prioritise for enforcement. What is of practical importance is the relationship of the individual with the regulators. For in such an environment few have the time, fortitude or money to be visible to the regulators and to apply the law in a way that differs from the one taken by the regulators. This new relationship can also be readily observed by the practical necessity of going cap in hand to the regulators for approval to carry out many transactions. For example, in the last eight years the ATO has issued more than 80,000 private rulings on what it says the law says (these rulings became law to the applicant, regardless of what the High Court might declare the law to mean for the rest of the community). No new law administers itself. More and more people are required to be employed by regulators to enforce an increasing number of laws. This becomes difficult, and the next stage in the shift to regulator rule begins.

One of the first signs of this shift is the conferral on the regulators of more and more powers of search, access to private property, detention, telephone tapping, together with the increase in penalties. This happens not because a material number of Australians have suddenly become terrorists or members of organised crime. Rather, the intimidation of existing powers is believed insufficient to obtain compliance, so greater powers and harsher penalties are deemed necessary. Yet the futility of forcing compliance in this way was seen centuries ago by the penalty of hanging for stealing a loaf of bread. Further, the regulators increasingly find it difficult before an independent court to obtain a conviction. The regulators know that a crime has been committed but are frustrated because they have not the powers to get the evidence or get the court to agree with their view of the law. For those who doubt whether Australia is at this stage, they need look no further than the recent unsuccessful prosecutions by ASIC.

One of the other signs of the rule of the regulator is the attempt to reverse the onus of proof so that the regulators can get convictions to send a clear message to the rest of the community. The Australian courts are a real impediment to regulators in this regard as they insist that no one is presumed to be guilty unless proved so. However, if an Act reverses the onus of proof a court can do nothing. The legislative attempts to reverse the onus of proof come in several forms, often behind a government announcement (regardless of political persuasion) that it is "streamlining" or "codifying" the existing laws. This is often accompanied by government publicity demonising the group to be subject to the new law. It is fundamental to the Australian way of life that everyone, whether an alleged terrorist or member of organised crime group, or an ordinary Australian, is presumed to be innocent until the prosecution proves otherwise. Any attempts to weaken that principle must be strongly and loudly resisted.

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