INTERNATIONAL CONFERENCE ON REGULATION REFORM, MANAGEMENT AND SCRUTINY OF LEGISLATION

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THE GROWTH OF LEGISLATION AND REGULATION

May I begin by adding my welcome to all of the delegates who are attending this Conference and, in particular, to those who are visiting Australia from other countries. I am honoured by your invitation to speak to you.

The subject matter of your deliberations is technical, and I am conscious that among you there is a high level of expertise and experience. I will try to avoid a recitation of matters about which you are at least as well informed as I am, and some of you, no doubt, a good deal better informed. Rather, I will make some observations about what to you is a familiar but important topic, from the point of view of a judge.

You do not need me to tell you about the ever-increasing volume of legislation, primary and delegated, and regulation, which governs the conduct and affairs of citizens in a modern democratic society. Each country has its own striking examples. In Australia, a comparison

between the size and complexity of the Income Tax Assessment Act of the Commonwealth and the legislation when originally enacted in 1936 makes the point simply and clearly. The current reprint of the 1936 Act, as amended, occupies four substantial volumes. The original Act would have occupied less than a third of one of those volumes. A similar comparison may be made between the legislation which embodies our current Corporations Law and the Companies Act of New South Wales which applied when I commenced practice 40 years ago. During my time in the legal profession there has been a vast increase in the sheer bulk of the information needed by a lawyer to advise clients as to their rights and obligations. Statutes, regulations, and by-laws are rarely made simpler. But games are not necessarily made fairer by multiplying the rules, and neither is life.

Legislation and regulation on this scale represents a major change in the role of government. To an extent this, in turn, reflects a change in community expectations. It also represents a change in the nature and understanding of law. In ancient times, legislative authority might be employed to clarify or codify the law, but rarely to change it. F A Hayek (*Law Legislation and Liberty*, Vol 1 p 81) pointed out that, in early times, "a legislator might endeavour to purge the law of supposed corruptions, or to restore it to its pristine purity, but it was not thought that he could make new law". The same author observed (p 124) that as late as the 17th century it could still be questioned whether the Mother of Parliaments, the English legislature, could make law inconsistent with the common law. In

the days when monarchs exercised personal law making power, a typical cause of complaint was that the laws they promulgated were different from the ancient laws and customs of the kingdom. Such a complaint is to be found in Magna Carta.

Even in the 19th century, and the early part of the 20th century, when parliaments embraced with enthusiasm the function of altering the law, and when executive governments and local authorities began to exercise extensive regulatory power pursuant to statutory delegation, the scope and reach of such activity was modest by current standards.

One consequence of significance to courts is the increasing complexity of the interrelationship between the common law and statute. The common law, developed by judicial precedent, involves an inductive technique. Principles of general application are derived from earlier decisions in particular cases, and then applied in turn to resolve the case at bar. I emphasise the words "general" and "principles". The characteristic judicial task, especially when performed by a court having the authority to modify and develop the common law, is to identify general principles appropriate to produce a just result in future cases where the detailed facts and circumstances are unknown and unknowable. A principle of common law does not legislate for a specific outcome regarded as individually just in a particular case. Discretionary decisions of courts exercising judicial power in particular cases may do that, and

such discretions are often conferred on courts by statute. But the concern of the common law is general principle.

Much legislation takes the same form as rules of common law, and is consciously modelled upon such rules. The express purpose of some legislation is to alter established common law principles. At the other extreme, a good deal of legislation, and much regulation, consists of detailed directions, at a high level of particularity, on matters which require regulation for the orderly conduct of what is regarded as the business of society.

A good deal of modern legislative activity is devoted to altering, extending, or modifying common law rules and principles. At the same time, when courts modify and develop the common law, they often need to take account of the way in which the common law will relate to legislation and regulation operating in the same field. Consider, for example, the matter of actions for damages for work-related injury. The rights and liabilities of employers and employees, relating to causes of action, defences, and measure of damages, are the product of a complex pattern of statutory provisions and rules of common law. Legislation now frequently limits or caps the damages to which an injured person is entitled at law. There is a constant inter-action between laws made by Parliament and principles developed and applied by courts.

In those areas where there is an overlap between the activities of courts and legislatures or regulatory authorities, the need for conscious regard by each to the activities of the other is evident. What are sometimes euphemistically described as "unintended consequences" of legislation may be the result of a failure to advert sufficiently to the rules of common law that might be affected, directly or indirectly, by such legislation. Courts, equally, attempt to develop the common law in a manner which preserves the coherence of the entire legal system of which the common law is only a part. Cross-referencing between legislative and judicial activity is becoming more important, and more difficult.

Where a proposed statute under parliamentary consideration is the outcome of a report of a law reform commission, or of detailed consideration by a Minister's Department, it might reasonably be expected that such cross-referencing will have been undertaken. But not all Departments, which propose legislation are necessarily aware of, or concerned with, areas outside their own particular interest. And amendments made in the course of the passage of a Bill through Parliament may arise in circumstances where only a narrow range of considerations has been taken into account.

Similarly, courts rely upon the assistance of counsel, and upon their own knowledge and experience, but judges considering the development or refinement of common law rules may find difficulty in satisfying themselves that they are fully aware of all the statutes

and regulations that could affect the practical consequences of their decision.

As the law grows more and more complex, the task of comprehending all the consequences of particular changes in the law becomes increasingly onerous. The development of techniques to deal with this problem is a challenge confronting modern legislatives and modern courts.

The burden of compliance with modern regulatory regimes is well understood. There is, however, an aspect of that burden which is sometimes left out of account.

In a society in which citizens are subjected to such detailed regulation that it may be unreasonable to expect them to be aware of all the laws with which they have to comply, or where the cost of compliance is onerous, there arises the problem of selective law enforcement. When I speak of citizens being aware of the laws with which the must comply, I do not suggest that it ever has been, or ever could be, the case that ordinary people generally know the detail of all the laws that bind them. But access to legal information and advice is costly, and is not equally available across the community. And there are many areas in which the burden of compliance with regulations, both in terms of knowledge, time, and expense, is such that many citizens give up the attempt. The unfairness may be diminished by a policy of law enforcement which

tolerates non-compliance in cases regarded as worthy of benevolent treatment. But this has its dangers.

I am not intending to suggest that law enforcement authorities should be deprived of discretion. On the contrary, there are many circumstances in which it is appropriate and necessary that common sense and, from time to time, mercy, should prevail over blindly rigorous law enforcement. Even acknowledging that, it is a dangerous condition of society, potentially subversive of the rule of law, and demoralising, if officers of the executive government exercise a wide ranging power to decide which citizens will be required to obey the law, and which citizens will not. The more difficult it becomes for ordinary people to know their legal obligations, and to comply with them, the greater is the danger that practical relief will be found in the exercise of discretion by law enforcement agencies. Arming the executive with appropriate discretionary power to dispense with compliance, in advance of the need for compliance, may be one thing. Selective enforcement of the law after it has been broken is another.

The possible abuse that can result from a general tolerance, or even expectation, of selective law enforcement are too obvious to require elaboration. But the effect upon the morale of a community, and upon its respect for and willingness to obey the law, must also be taken into account. Law and regulations that are not seriously intended to be generally enforced may arm the executive

government or other authorities with a capacity to oppress individual citizens. Striking a proper balance between the preservation of a healthy discretion, and and opening the way to unhealthy discrimination, in law enforcement, is a difficult and sensitive matter.

Of course, the fact that offences against some law may frequently go undetected and unpunished does not of itself mean that the law is being selectively administered. It may be, for example, that despite the best efforts of the authorities, many Customs offences go undetected. That is not the result of any failure to attempt to enforce the law. It is the result of the nature of the offences in question, which may be difficult to police. Many similar examples could be given. But if a certain kind of law is widely seen to be disregarded, or even publicly flouted, and the authorities responsible for enforcing the law appear to behave capriciously in its enforcement, then respect, not only for that particular law, but for the entire system of law and justice, is placed at risk. And citizens who are lulled into a false belief that non-compliance will be tolerated may find themselves embarrassed, or even oppressed, by an unfavourable exercise of administrative authority. The result may be not only injustice, to an individual, but also a gross disturbance of the balance between legislative, executive and judicial power.

This is an area where over-simplification is dangerous. We can all think of laws which are necessary for the protection of public safety or morals, but which the public would be alarmed to see

comprehensively enforced. Part of the solution is found in establishing an independent prosecuting authority, armed with appropriate discretions, but manifestly free of political influence and separate from the police service. Some statutes expressly provide that certain kinds of prosecution may only be instituted in the consent of the Attorney-General. The principles according to which decisions not to prosecute alleged seriously breaches of the law may be made are, in Australia, generally made available to the public.

I referred earlier to the cost of compliance. It is necessary also to remember the cost of enforcement. Law enforcement authorities and regulatory agencies have finite resources, and often have to set priorities, which result in some, perhaps many, possible, offences going unpunished. Again, this problem is magnified by the increasing volume of regulation. Part of the solution is sometimes found in legislative provisions for private law enforcement, which may include action for damages or injunctive relief. Working out the proper role of private enforcement of public law is a challenge facing both parliaments and courts. In courts, the issue usually arises in relation to the standing of plaintiff to bring an action, but such issues normally turn up statutory construction. This is a matter with which many of you, I am sure, are familiar.

Another consequence of the proliferation of regulation is what is sometimes called the democratic deficit. Of course, the theory that, in a representative democracy, all legislation is an expression of the

will of the majority, is true only in a somewhat remote and formal sense. Occasionally, at parliamentary elections, a single issue emerges which so dominates political debate that a government, once elected, can fairly claim to have a mandate to implement certain legislation. In such a case it may be said that the law, when enacted, accords with the wish of the majority of voters. Such cases are rare. The issues at elections are more complex, and outcomes are determined by influences which usually make it impossible to identify most legislation with the will of an electoral majority. As a rule, it is more accurate to say that the legislative process is democratic than it is to say that a particular legislative outcome is desired by a majority of the people. But this problem is increased when what is under consideration is not a statute enacted by a parliament, after a process of public debate and political conflict, but a regulation made pursuant to authority delegated to the executive government, or to a local authority, by statute. No doubt it is in an attempt to diminish this democratic deficit that your Conference is giving attention to the important matter of parliamentary scrutiny. You are all familiar with the problem, but there is an aspect of it, affecting the work of the courts, that should be mentioned.

I referred earlier to the role of the courts in modifying and developing the common law. As you may be aware, there is a lively debate about the extent to which it is appropriate for courts to engage in law making activities in current circumstances. There is no single or

simple answer to the question. But those who seek to encourage courts to engage in what is sometimes, and perhaps misleadingly, called judicial activism, put the argument that so many laws are now made in an undemocratic fashion that it is a fantasy to regard parliamentary legislation as the only, or even the principal, alternative to judicial law making. Those who counsel judicial restraint on the basis that, in a representative democracy, it is for parliament to make and change the law, are sometimes met with the response that modern parliaments have largely abandoned their law making role to the executive government. This is not an argument that I find attractive, but the fact that it is made at all shows the importance of the task upon which you are engaged in your Conference. The democratic deficit, where it exists, is not only a threat to the legitimacy of the institutions of a democratic government; it may be something that feeds upon itself.

Political legitimacy, in a representative democracy, is the proper basis for legislative activity. If the absence of a democratic process in the manner in which many laws and regulations are made became a justification for legislative activity on the part of authorities which lack political legitimacy, then the theory of democracy would become even more remote from the practice.

I thank you for the opportunity to join you for a brief time this morning, and I wish you well in your deliberations.