FREEDOMS AND LIBERTIES

Oration by

ROGER GYLES, BA, LLB, QC

delivered at St John's College,
The University of Sydney
on September 13, 1990

In this country there are no freedoms or liberties guaranteed by the Constitution, or, generally speaking, by statute. Both freedoms and liberties exist in the absence of rules which impinge upon them - whether by legislation or by judges in administering the common law. While the common law is developed by judges, this does not impinge greatly upon our freedoms. Therefore, it is legislation which effectively affects our freedoms.

We hear much these days about deregulation and smaller government - an important plank in the platform of the present New South Wales Government's campaign for election. I believe it is genuine in this objective.

The Parliament passed 137 Acts in 1988, 239 Acts in 1989 and 50 Acts have already been passed this year. Delegated legislation - that is, regulations, proclamations, rules, by-laws and the like - would multiply those figures many times. Virtually every piece of legislation and delegated legislation affects our freedom and liberty to live as we think fit. How is it that a government committed to deregulation can regulate so massively? Consider some recent legislation.

The Mental Health Act 1990 provides an elaborate scheme for the care, treatment and control of mentally ill and disordered persons, including the involuntary treatment of such persons, with various bodies given compulsory powers. The Real Estate Services Council is established by Act No. 14 of 1990 and is given various compulsory powers, including the power to compel people to give evidence at inquiries under the Valuers Registration Act. Act No. 23 of 1990 provides a series of draconian civil remedies (including restraining orders and confiscation of property) concerning drug-related activity, which apply whether or not the person has been charged with a relevant offence or, if charged, has been tried and convicted. The Passenger Transport Act 1990 is a licensing and regulation scheme including new compulsory obligations, as well as prohibitions. A whole new range of offences has been created. The Prisons (Medical Test) Amendment Act 1990 provides for the compulsory examination of prisoners and testing for evidence of exposure to or infection by HIV.

The year 1989 was also a vintage year for regulation. Thc Ozone Protection Act 1989 provides an elaborate licensing and regulatory system, including powers to require information from the public and of compulsory inspection. The Tow Truck Act 1989 is another licensing system with concomitant offences and ancillary powers given to the licensing authority. Even more striking is the Entertainment Industry Act 1989 which sets up an Entertainment Industry Interim Council with such powers as to require information, entry and inspection and the issue of search warrants. The Murray Valley Citrus Marketing Board Selection Committee is established by legislation with compulsory powers of entry and search, and power to compel the production of documents and to have questions answered about the sale of citrus fruit. The Telecommunications Interception Act 1989 extended phone tapping authority to the State Drug Crime Commission and the Independent Commission Against Corruption (ICAC).

This is not to speak of the compulsory powers bestowed upon officials and duties cast upon citizen by virtue of the Stock Medicines Act 1989, the Food Act 1989, the Friendly Societies Act 1989, the Trade Measurement Act 1989, the Dairy Industry (Amendment) Act 1989, the Building Services Corporation Act 1989, the Traffic (Road Safety) Amendment Act 1989, and the Fire Brigades Act 1989, among others.

So while there is considerable public and private debate about the Independent Commission Against Corruption and its operations, there is a virtual torrent of legislation and delegated legislation impinging upon our liberties as citizens going on around us, probably without our knowledge, much of it including provisions as intrusive as those of the Independent Commission Against Corruption.

No doubt a case was advanced in favour of all legislation to which I have referred, and the many other pieces, but my concern is whether the process ensures proper scrutiny for proposals for further restriction and regulation. The impetus for action can come from agitation outside government by political parties, the media, special interest groups and so on, or from within the Executive Government. Faced with a problem, the instinctive reaction is to ban or restrict. Ministers, and their departments, are noticed when they do something rather than when they judiciously stand aside from action. The electoral imperative of the press release and the photo opportunity favour action (for this read "regulation") rather than no action. The more draconian the action the more publicity is likely to be achieved, and the more the relevant interest group is likely to be appeased.

Who speaks for the "zero option" constituency?

In 1982, Mr Frank Costigan, Q.C., when conducting a Royal Commission into the Painters and Dockers' Union, uncovered what appeared to him to be a massive taxation fraud which came to be known colloquially as the "bottom of the harbour scheme". His investigations revealed a sorry tale of political and bureaucratic incompetence, if not worse, extending for many years. The amounts involved were massive by any standards, but extraordinary for the relatively small Australian economy. Mr Malcolm Fraser's Government announced that, because existing legislation was incapable of dealing with the problem, it would pass retrospective legislation taxing those involved. For a conservative government, this was a most remarkable decision. Retrospective taxation legislation has always been regarded as unacceptable, and I suggest that, if proposed by a government of the left, would have provoked an enormous and vociferous protest from conservatives.

It created a considerable storm but, as the legislation affected conservative voters rather than Labor voters, it was apparently judged politically feasible by a Liberal-National Party Government. The premise upon which the legislation was based was that the existing legislation did not catch the scheme which was, therefore, lawful at the time it was entered into.

Appointed Special Prosecutor by the Government to pursue those involved, I reflected upon the apparent inconsistency between the position being taken. While it was said the scheme was not caught by the existing Act and retrospective legislation to tax it was necessary, it was also said to be a fraud warranting criminal prosecution. After study, I came to the conclusion the scheme was caught by existing legislation and that, in particular, S.260 (the anti-tax avoidance provision) could be applied to recover all of the relevant tax. So the retrospective legislation (then not passed) was based upon a false premise. I immediately informed the Ministers but quickly became aware my views were an embarrassment and unwelcome. The legislation was duly passed.

Later I discovered the Commissioner for Taxation had briefed Mr Murray Gleeson, then an eminent Sydney Queen's Counsel and now Chief Justice of New South Wales, to advise upon the point and he had advised S.260 was applicable. As rational members of the community you might think the Commissioner for Taxation, having received this advice, would immediately take steps to issue assessments and enforce the law, but no, the Solicitor General was asked and he came to a different view. Even granted there may have been room for argument, surely the Executive Government was obliged to test the existing legislation before proposing to Parliament, and using the party majority to pass, retrospective legislation affecting the citizen.

The tenacity, not to say obstinacy, of the bureaucracy upon this point was underlined by what happened thereafter. The retrospective legislation did not catch all of the tax which would have been caught by an assessment pursuant to S.260 of the Act.

As I had the role of co-ordinating civil remedies in relation to the fraud, I proposed that assessments based upon S.260 be issued, even in cases where the retrospective legislation had been applied, to pick up the extra tax which always should have been paid. The amounts involved were to be measured in hundreds of millions, indeed, more than one billion dollars. Successive Commissioners for Taxation, supported by successive Treasurers of both political persuasions, refused to do this, quoting the Solicitor General's opinion. One would have thought the proper course was to test the matter, even to the High Court, but it took continued pressure by myself, with support from the Attorney General, to have the matter resolved at Cabinet level in favor of starting test cases. Those ultimately were fought, and the courts resolved that S.260 did catch the fraud. In what can only be described as a scandal of monumental proportions, the failure properly to test and apply the existing law for 10 years must have cost the community hundreds of millions of dollars, even allowing for recoveries.

We might ask why it was that a piece of unnecessary restrictive legislation was passed. I can understand, if not approve, the bureaucratic position. My deduction is the taxation authorities did not regard S.260 as a convenient anti-avoidance provision, as it depended upon a court decision. They wanted a provision that gave them discretion so it was in their interests to exaggerate the difficulties of applying S.260 and seek to justify a more draconian provision. Any suggestion that S.260 had teeth and could apply was thus to be avoided. Also, the fraud had been known for at least seven years but nothing had been done about it. The bureaucracy needed some explanation for such spectacular inaction.

More difficult to explain is the political acceptance of the proposal. It might illustrate the inability of Ministers to scrutinise advice or it might illustrate the de facto alliance between senior bureaucrats and senior politicians. With an election pending it might simply have reflected a desire to be seen to be doing something, rather than relying upon the law to take its course. The even more cynical would suggest the passing of the legislation might have enabled a pre-election budget to be framed on the basis that the tax could be regarded as having been received. Whatever the true explanation, this cautionary tale should cause all to be very sceptical of the claim that restrictive legislation is necessary.

When you read of proposals for changes to laws to catch corporate crooks (as they are now called) arising out of recent corporate collapses - which will surely continue - once again we hear the cry legislation and court processes are inadequate, the cases are too complex, juries cannot understand them, and so on. The source of these statements (so uncritically repeated by the media) is usually a member of the bureaucracy responsible for enforcing the laws. Whilst I do not doubt the need for fine tuning and adjustment of corporate law from time to time, the civil and criminal remedies provided by them and the powers of investigation are adequate, if properly administered, to deal with events of recent years. I recognise and deplore the lack of funds devoted to enforcement, but I cannot accept that as the explanation for inaction. These excuses were pushed in relation to the bottom of the harbour scheme, yet, without any amendment to the law, dozens of those involved were charged and convicted. There is much that could and should have been done to enforce corporate laws which has not been done.

In another area of corporate law enforcement, there appears to be almost a complete breakdown of the liquidation system . It seems now accepted that company directors and insolvency accountants are free to devise all manner of wonderful schemes to avoid the appointment of a liquidator who has the duty to conduct proper investigations and bring civil and criminal proceedings against former directors and officers . I particularly deplore the use of provisional liquidation as such a device. The major creditors have permitted this to happen and courts have been inadequate in their supervision of this area of law. The paucity of civil actions for recovery of monies from directors and officers of insolvent

companies by liquidators is particularly regrettable and assets apparently still available to such delinquents are an affront to the public.

Then there is the role of the institutional investor. Company law provides a range of remedies to disgruntled shareholders, the simplest being removal of the board of directors. Another is voting against resolutions giving special privileges to directors and officers, or sanctioning suspect deals. Others involve court action. Institutional investors, individually and collectively, have had the power, by exercising the range of remedies available to them, to prevent much of what is now complained about. They have deliberately chosen not to do so, and, even now, appear to adopt a virtually passive role. It is these bodies, the effective shareholders of our public companies, who have the means and the expertise to step in. Do they fear shareholder action against themselves or do they not wish to be seen to be breaking "club" ranks?

This week I read a report of a speech by the chairman of one of our largest institutions in which he said Australians were looking for leadership, for the sense of purpose that would see them through hard times but that such leadership was hard to find, and that the situation had been magnified by the lack of business ethics among a disreputable minority of Australian businessmen. He is reported as saying: "AMP has taken a firm position on this issue, and we have called for the better enforcement of the law, and for the unrelenting prosecution of those who have betrayed their responsibilities and tarnished our nation's business reputation". What he is doing is to call upon others to enforce the laws and prosecute those responsible. His institution, and those like it, have not, I suggest, exercised the leadership which lay in their own hands.

To illustrate how these questions continue I noticed these three headings in a Sydney Morning Herald this week:

"New rules limit building on New South Wales beaches, coast"

"Yabsley cracks down on prison property"

"New powers for ASC - Government to tighten controls on trusts".

Each of these proposals may be entirely appropriate, but I wonder who, in the counsels of Government, is espousing the zero option?