RETROSPECTIVE LEGISLATION IN AUSTRALIA: LOOKING BACK AT THE 1980s

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INTRODUCTION

Nothing is more certain to cause explosions of fear and loathing among some lawyers than the mention of the word "retrospectivity". Few topics can be better guaranteed to produce conflict without resolution, heat without light. The term "retrospectivity" is used in the loosest possible way to refer to just about any change that affects a client's interests, and while debate may seem to resemble philosophical disputation, terms like "human rights", "justice", "democracy" and "the rule of law" are used for effect rather than argument. But despite the lack of rigour with which the public debate is conducted, the issues do reflect and exemplify genuine philosophical and theoretical problems.

In this paper we look briefly at some of the problems involved in calling legal rules or other legal statements "retrospective" and some of the arguments that are, or could be, made for and against retrospective legislation. We also discuss, to a lesser extent, the retrospectivity of judicial decision-making. We argue that most of the arguments against retrospective legislation are unfounded, of little importance or reducible to the one real argument based on reliance. However, the reliance argument is neither overwhelming nor unequivocal. It weighs against retrospectivity in many cases, but actually justifies retrospective legislation in others. This has important consequences

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for traditional concepts of the rule of law and even suggests a complete re-conceptualisation of the ideal.[1]

Discussion of retrospectivity, however, often takes place in something approaching a vacuum: one or two notorious or outrageous examples of retrospectivity are cited, and the conclusion is then drawn that the features which make these particular examples objectionable are present in all retrospective laws. Because some retrospective laws are bad, it is assumed that all retrospective laws must be bad, even those called retrospective under the most tenuous of definitions. Because they are bad, it is also assumed that they must be rare. When one investigates the use of retrospective legislation, however, one finds not only that retrospective statutes are relatively common, but that they are usually deservedly uncontroversial.

The second part of this article, then, is intended to show when and why legislatures resort to retrospective legislation and to ask whether retrospectivity is justified in the circumstances in which it is actually used. This article thus presents a far more complete picture of the uses and abuses of retrospectivity than has been attempted before. Seen in the context of its actual use, retrospectivity appears to be a legitimate but limited tool for dealing with some of the problems which confront legislatures and governments — especially, but not exclusively, in non-criminal matters. Furthermore, while there are undoubtedly examples of unfair, even evil, retrospective legislation, such examples are reasonably rare and probably no more common than examples of unfair prospective legislation.

A THEORY OF RETROSPECTIVITY

Meanings of "retrospectivity"

The term "retrospective", and related terms like "retroactive" or "retro-operative" can be used in a number of ways and a range of definitions is on offer. Given this lack of definitional agreement, its strong negative connotations, and the political utility of describing a piece of legislation as "retrospective", it is not surprising that the term "retrospective" is often used very loosely. Thus any law that affects a client's interests and expectations may be branded retrospective. Like many other words commonly employed in political debate or conflict, its usefulness is actually increased by the lack of precision in its meaning.

In this section we will look at some of the definitions of retrospectivity and suggest one of our own. This is not an attempt to enforce a single correct definition. The purpose is to distinguish some of the ways in which "the law looks back" and hence may be described as retrospective because some of the arguments for and against retrospectivity apply to some conceptions of the term and not to others. Thus we shall see that the broader the definition, the weaker the arguments against its use may be.

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1 Unfortunately, there is insufficient space to explore this theme in any detail within this article. The theme will be more fully explored in C Sampford, *Retrospectivity and the Rule of Law*, due for completion during 1995.

"Impairing a Right or Obligation"

The first definition of retrospectivity considered here, and one of the broadest, is quoted by Pearce. A rule is described as retrospective if it "impairs an existing right or obligation".[2] One version defined as retrospective any legislation which altered the value of a pre-existing asset. Thus many of the tax reforms enacted in the United States during the 1980s were branded retrospective because they removed tax shelters and failed to "grandfather" existing investments in those shelters.[3] The problem with this definition is that it applies to virtually every law ever made. The whole purpose of laws is to create and vary rights and obligations — indeed, a case might be made that unless a right or an obligation is altered, no legal change has been made at all. Of course, those who do not like legal change might be consciously or otherwise attracted to this definition (in fact, opponents of retrospectivity are often opponents of legislation[4]). However, if all or most legislation is potentially defined as retrospective, the argument is essentially about legislation in general and should be stated and developed as such.

If some definitions make all legislation retrospective, some definitions appear to define away the problem. One of the ironies of the Australian debates over retrospectivity occurred in 1982 during the Senate debate on the "Bottom of the Harbour Legislation".[5] Senator Crichton-Browne[6] distinguished himself by becoming one of the few members of either House to quote a legal philosopher in aid of his case by quoting from Fuller's *Morality of Law* the view that retrospective rule-making was one of the ways not to make law. He failed to pick a number of the subtleties of Fuller's argument.[7] More importantly he, or his research assistant, failed to pick up the fact that a few pages after the quoted passage, Fuller insisted that none of his arguments against retrospectivity applied to tax legislation. Fuller argued that a law which imposes tax on past financial gains (which were tax free at the time they accrued) is not retroactive because tax laws always operate prospectively; they tell the taxpayer how much tax to pay in the future, although the amount may have been calculated by reference to past transactions.[8]

A similar argument was made by some ALP politicians in the parliamentary debates about the anti-Curran scheme legislation.[9] They suggested that because tax liability does not arise until the end of the year, there would be no retrospectivity involved if the Government changed the tax rules for the whole financial year at any

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2 D C Pearce, *Statutory Interpretation in Australia* (2nd ed 1981) at 149. It should be noted that this definition was deleted in the third edition.

3 To "grandfather" is to preserve the tax benefits accruing under previous laws by those who have already made investments.

4 For example, G de Q Walker, *The Rule of Law* (1988).

5 Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth).

6 Sen Deb 1982, Vol 96 at 2599.

7 Most notably that Fuller was not arguing that all retrospective legislation was necessarily bad, but that if *all* law were retrospective then there would be no law. It was only in an ideal world in which all laws were clear, well publicised, never changing and known in advance that laws would be, and could be required to be, entirely prospective. See L L Fuller, *The Morality of Law* (Rev ed, 1969).

8 Ibid at 59.

9 The Curran scheme is described below, 254-256.

time up to the end of the year.[10] The problem with this argument is that it could be applied to any law that might be called retrospective. Even criminal laws "only tell the courts what to do in the future". To take an extreme example, legislation might impose the death penalty for certain offences. As liability to punishment does not arise until conviction it could be argued that there would be no retrospectivity in executing those whose offences were committed prior to the commencement of the legislation.

As is so often the case, the argument which appears to prove too much in fact proves nothing. In this case it fails to address the reasons for people objecting to retrospective laws and the genuine arguments against such laws. These arguments may not, as we argue later, be conclusive and a good deal of retrospective legislation may be justifiable. But the concerns are real and should be addressed rather than defined out of existence by either side.

"Retroactive" and "Retrospective" Statutes

A much quoted distinction is formulated by Driedger. He contrasts "retroactive" and "retrospective" statutes, based on the different roots of the two words: retroactive means *acting* in the past while retrospective means *looking* to the past.[11] A retroactive law, according to this terminology, is a law which, in the words of Pearce and Geddes, "provides that, as at a past date, the law is to be taken to have been that which it was not".[12] Formulating retroactivity in such a way can make it appear extremely unreasonable, even nonsensical. However, this mis-states what even the most fully retroactive laws actually do. Legislatures are not attempting to change or relive the past. In the normal course of events, when a dispute arising out of events that occurred in the past comes to court to be adjudicated, the legislation which the court uses to decide the dispute is the legislation that was current at the time of the events out of which the dispute arose. Because the legislation was passed before the relevant events, it could be called prospective. However, if legislation that was passed subsequent to the relevant events is used, then that legislation is retrospective. The legislature is not telling courts to pretend that the law was different from what it "really" was. It is telling the courts to use the new legislation in the future if particular past events are brought to court.

Past events and future legal consequences

This leads to another way of understanding retrospectivity. Retrospective legislation can be seen as altering the future legal consequences of past events. This is the case of those laws that would be classically called retrospective, such as the Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth) and the War Crimes Amendment Act 1989 (Cth) (insofar as it created a new Australian statutory offence). In the first case, a combination of transactions occurring in, say, 1978 had the legal consequence that liability for taxation was avoided. After passage of the relevant legislation in 1982, the legal consequences were that a new liability to pay tax accrued. In the second case, an action done in, say, Eastern Europe in 1944 followed by a sea voyage to Australia had

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10 See speeches by Shadow Treasurer Willis, H Reps Deb 1978, Vol 109 at 1902; and by Senator Peter Walsh, Sen Deb 1978, Vol 77 at 2417.

11 E A Driedger, "Statutes: Retroactive Retrospective Reflections" (1978) 56 *Canadian Bar Rev* 264 at 268-269 and 276.

12 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (3rd ed 1988) at 181.

no legal consequences in Australia at the time they occurred. However, the passage of the War Crimes Amendment Act 1989 added the substantial legal consequence of liability for conviction and sentencing in an Australian court.

Such legislation is clearly retrospective. Each example conforms to Driedger's definition of a retrospective law as one that "attaches new consequences to an event that occurred prior to its enactment".[13] Each involves discrete events occurring at specifiable times and often over a short time-span. The legislation specified a direct legal consequence of that action: a liability to pay tax in one case and a criminal penalty in the other. They are reasonably close to the classic example of retrospective legislation which imagines a person performing a discrete and completely lawful action on one day, and on the next having criminal sanctions attached to his or her action despite the fact that it is already in the past. They are the sorts of examples that are frequently used to demonstrate the shocking nature of retrospective legislation.

However, neither the law nor the lives it is intended to regulate are always so simple. Human life is not necessarily episodic. Some transactions take time. Even more significantly, human action is frequently (by some accounts definitionally) purposive. In order to achieve our purposes it is typically necessary to plan and to carry out a series of related actions and the intended consequences of those actions may take years to unfold. Such is the case with important decisions with regard to the actions we take, the careers we follow and the investments we make. Similarly, the law does not attach consequences only to discrete events. Often a combination of events is necessary to trigger a legal liability. The relevant law may be enacted during the course of events which achieve an individual's purposes and it may be unclear whether the final event which triggers the liability occurs before or after the law is enacted. This creates difficulties in determining whether a rule is retrospective or not. Even in the apparently straightforward war crimes example given above, it is the combination of the war-time actions and the voyage to Australia that was necessary to trigger the legal liability. If the person came to Australia *after* the passage of the Act then the legislation is, in an important sense, prospective in relation to them.

This kind of problem is particularly common in the areas of taxation and economic regulation. Many investments, and virtually all of those that are recognised as particularly worthwhile, are long-term. Those who decide to buy a bond or build a factory do so in order to achieve future profits. The future profits will be the intended consequences of the original investment (with or without subsequent decisions) and investors are frequently committed once they make the original investment. Obviously a retrospective change in the taxation of those profits will alter the consequences of the investment.

However, purely prospective legislation can also alter the future consequences of such past events in ways that can be just as significant. The consequences which were reasonably expected to follow from an action, and which were the very reason for the action, may not eventuate because of an intervening change in the law; instead of the desirable consequences which were planned and expected, undesirable consequences may flow from the action. Furthermore, there may be no opportunity for the person to avoid the new unexpected and undesired consequences because the action which gave rise to them is in the past. For example, a manufacturer might build a factory when the tariff on the goods it will produce is 45 per cent. If the tariff is subsequently lowered to

13 E A Driedger, above n 11 at 276.

10 per cent or if a change in monetary policies leads to a sharp rise in the value of the Australian dollar, it may be impossible to compete with imports. The manufacturer's ability to make a profit from the factory is thus eliminated.[14] Other examples include cases where factories are constructed during times of lax emission controls and cannot be made to operate at a profit when those controls are tightened. The final event which triggers the liability or the legally induced effect may well occur after the enactment of the legislation. But it may be the result of actions that were taken many years before the enactment. Accordingly, prospective laws, as much as retrospective laws, can wreak havoc with the expected consequences of past actions. Indeed, some commentators put both kinds of cases into the single category of "transition problems" which is discussed below.

Another version of this problem arises from the way that the law does not only attach legal consequences to actions but also to statuses which are generally the result of past actions and events. A pair of cases that illustrate this point and the difficulty courts have in dealing with it are *Re a Solicitor's Clerk*[15] and *Bakker v Stewart*.[16] In the first case, a solicitor's clerk was convicted of larceny at a time when no order could be made under the Solicitors Act 1941 (UK) prohibiting a person so convicted from being employed by a solicitor. The Act was subsequently amended to allow the making of such an order, and the clerk argued that to allow it to be applied to him would be to give the statute retrospective operation and to increase the effective penalty he suffered. The court disagreed. This may be contrasted with *Bakker*, where the court held that a statute which removed the court's right to release a person convicted of certain drink-driving offences on a bond did not apply to persons who committed their offence before the date of enactment; to do otherwise, it said, would be retrospectively to increase the penalty for the offence. Pearce and Geddes attempt to reconcile the two cases by the "interconnection between the offence and the penalty".[17] However, in doing so, they take a very important step in the analysis of retrospective legislation. They do not see retrospective legislation as raising a straightforward issue of timing. The issue becomes one of degree and of the relationship between those actions and events occurring before the legislation and those occurring afterwards. The cases and examples mentioned in this section demonstrate the intertwining of past causes, future consequences and the timing of law-making. Later we will return to these cases and suggest a distinction based on purpose rather than timing and connections.

It would be possible to treat all of these as examples of retrospective law-making because the future events are so dependent on decisions already made. However, this could make most legislation retrospective and, like the first definition, turn arguments for and against retrospectivity into arguments for and against legislation. Instead of labelling these laws retrospective, the authors believe it is more helpful to adopt a version of Driedger's purely temporal approach to retrospectivity: retrospective laws alter the direct legal consequences of past events or statuses. If a law only alters the direct legal consequences of future events, actions or statuses, it is prospective, even if

14 As happened during the first three disastrous years after the 1979 British General Election when high interest rates drove up the British pound despite inflation which at one stage reached 22%. This led to significant reductions in manufacturing output that took until 1987 to return to the pre-inflationary levels (and incidentally trebled unemployment).

15 [1957] 1 WLR 1219.

16 [1980] VR 17.

17 D C Pearce and R S Geddes, above n 12 at 182.

those future events are determined by past actions, events or statuses. However, the arguments for and against laws which alter the legal consequences of past events or statuses may also apply for and against laws which alter the legal consequences of future events, actions or statuses. Accordingly, the discussion will focus on those laws of the former kind which are retrospective in our sense, while touching on some laws of the latter kind.

Arguments about retrospective laws

Many arguments have been raised against the use of retrospective laws, both in general and in specific cases. They are said to be unjust, undemocratic, unreliable and contrary to human rights, individual autonomy, the rule of law and the Constitution. Some even say that they are not law at all. Few run general arguments in favour of retrospective legislation, but proponents of particular examples of retrospective legislation naturally raise many arguments in favour of their own chosen course. One of the most common is the rather half-hearted view that it is a "necessary evil". Other more positive arguments are that it may protect important institutions or maintain confidence, and that it is the most economically efficient transition policy.

We will deal with five of the most cited general arguments against retrospective legislation in this section and then look at some of the others in the contexts of particular debates. We will be suggesting that one of them, the reliance argument, is at the heart of all the good arguments against retrospective law-making, but that it does not hold universally and that it sometimes provides reasons in favour of retrospective rule-making.

Is it law?

Walker has claimed that:

> A retrospective enactment does not fall within any accepted definition of "law", whether in antiquity or in modern times; to regard it as a "law" involves at least as much artificiality as any tax avoidance scheme.[18]

The claim is not substantiated by any examples of "accepted" definitions of law, or indeed any definitions of law, outside of which retrospective legislation supposedly falls, so its plausibility is difficult to assess. The only citation Walker gives for this sweeping assertion is a twenty-page section of Julius Stone's *Legal System and Lawyers' Reasoning*.[19] To the present writers it appears to offer no such support, especially as it does not use the term retrospectivity. Furthermore, like virtually every legal philosopher writing since H L A Hart's inaugural lecture,[20] Stone eschews the exercise of defining law. Given Walker's attack elsewhere on Stone as the father of the Australian "clerisy" and the jurisprude responsible for introducing realism into Australia,[21] it is strange that he should cite Stone at all and even stranger given that the book does not support his assertion.[22]

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18 G de Q Walker, above n 4 at 322 (footnote omitted).

19 J Stone, *Legal System and Lawyers' Reasoning* (1968) at 165-185.

20 Published as "Definition and Theory in Jurisprudence" (1954) *LQR* 37.

21 G de Q Walker, above n 4 at 175. The problems with this accusation are dealt with in Sampford's review of Walker in (1989) 17 *MULR* 174 at 178.

22 The assertion is made as a preliminary to an argument that the Commonwealth Parliament may lack constitutional power to enact retrospective legislation. This argument is, to say

In reviewing the definitions of law that are taught in jurisprudence classes as a prelude to the disowning of legal definition, we would have thought that most positivist, realist, content and sociological definitions of law would be able to comfortably accommodate retrospective laws. Certainly, the judiciary who have had to interpret them do not seem to have had too much trouble recognising retrospective laws as laws.

However, if we look at some of the simpler definitions and theories of law, we can see how an assertion such as Walker's might be made. If one were to accept an Austinian command theory in which law was seen as orders backed by threats, then it does seem strange, as it is unfair to punish for the breach of an order that was not given. However, it must be said that this "definition" of law was dealt a mortal blow by Hart in *The Concept of Law*[23] and is almost universally rejected by other writers (including Walker![24]). Most importantly, even those positivists who still see law in terms of ought statements see it as addressed to officials for use in their decisions.[25] Such rules must be passed before the official makes his or her decision, but not necessarily before the citizen acts. If one moves to the legal realists and Holmes's definition or dictum that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law"[26] (which is quoted in the Stone passage cited by Walker), it is doubly clear that retrospective rules are law.

The two most important reasons why very few jurisprudes would contemplate excluding retrospective laws from a definition or concept of law is that laws are not confined in nature to norms or commands stating what people should do, nor are they confined in purpose to guiding behaviour. Laws operate in many ways; for example, they establish institutions, authorise or require payment, distribute wealth and define statuses[27] and it is the attempt to push them all into a single mould of ought statements directed to individuals that involves the distortion and artificiality.

However, there is one theory which might at first glance be thought to support Walker's contention. Fuller claims that there are eight ways in which an aspiring legislator might fail to make law and, corresponding to these eight paths to failure, are eight forms of excellence toward which a system of rules may aspire.[28] One of the ways in which, according to Fuller, a legislator might fail to make law is through "the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat

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the least, a bold one, given its lack of support in both the United States Supreme Court and Australian High Court. Walker naturally did not have the benefit of the argument in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (discussed below) in which Deane and Gaudron JJ made a similar argument in relation to criminal retrospective legislation. The rest of the Court did not adopt this argument and no Justice appeared even to contemplate a view as broad as Walker's.

23 H L A Hart, *The Concept of Law* (1961).

24 It is, in fact, one of those theories that Walker blames for the problems identified in his book (Walker above n 4 in ch 5).

25 H Kelsen, *The Pure Theory of Law* (1970).

26 O W Holmes, "The Path of the Law" (1897) 10 *Harv L Rev* 457 at 461.

27 For a very good account of the range of rule types, see A M Honoré, "Real Laws" in P Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of H L A Hart* (1977).

28 L L Fuller, above n 7 at 41.

of retrospective change".[29] In the legal utopia in which each of the eight desiderata is achieved, no law would ever be retroactive; the law would also, among other things, be perfectly clear, known to every citizen, and never changing.[30] Obviously these goals are not achieved in the real world, and Fuller does not claim that failure fully to achieve the desiderata results in there being no law. This applies to retrospective laws as well. In a real legal system, according to Fuller, "situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality".[31] Fuller does not therefore claim that a retrospective law is not a law at all; nor does he deny that there is a place in a legal system for the operation of retrospective laws. His argument is directed at the *abuse* of retrospective rule-making, rather than at retrospectivity *per se*.

Democracy

It is not uncommon for lawyers to say that it is "undemocratic" for Parliament to pass retrospective taxation laws. To do so, however, is to fall into the trap of subsuming everything one likes about our kind of regime under the most uncontroversial aspects of it. The arguments against retrospective law-making emphasise human rights, human autonomy and the ability of individuals to plan their lives. As such they are quintessentially *liberal* rather than *democratic*. Indeed, to the extent that such arguments are valid they would impose restrictions on democratic values that place the ultimate rule-making power in the hands of the majority. For example, the Hawke Government was popularly elected in 1983 on a platform which promised further retrospective anti-bottom-of-the-harbour legislation: assuming that the Australian electoral system is "democratic"[32] it can hardly be claimed that there is anything undemocratic about the Government's attempts to meet their promise.[33] To the extent that it is possible to say such a thing in our political system, the "people" had authorised precisely such action. If the general arguments against retrospective legislation are valid, they trump such claims to democracy rather than reflect democratic claims.

However, there is a more limited argument — based on a concept of democracy — against some retrospective rule-making. The argument is that a democratically elected government's mandate has temporal limits, and that the government should not attempt to determine the legal consequences of actions taking place outside those temporal limits, whether before or after their period of office, because to do so involves overriding the mandate of previous or subsequent governments.[34] This argument could be applied to the Hawke Government's attempt to recoup bottom-of-the-harbour tax despite their popular mandate. The argument applies equally to retrospective and entrenching legislation, the former attempting to change the legal consequences of actions taken before the mandate commenced, the latter attempting to prevent a future government from determining the legal consequences of events occurring within the

29 Ibid at 39.
30 Ibid at 41.
31 Ibid at 53.
32 And if it is not, then the "undemocratic" objection applies with equal force to all Commonwealth legislation, whether retrospective or not.
33 It would be at least as valid to argue that the Opposition parties' attempt to block the Government's Bills in the Senate was undemocratic.
34 See J N Eule, "Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity" (1987) *American Bar Foundation Research Journal* 379.

period of their own mandate. But as Eule points out, this argument does not apply to retrospective legislation which only reaches back in time to a point within the legislature's temporal mandate.[35]

Furthermore, the argument does not apply at all if the previous legislature had itself no democratic mandate, as is the case, for example, in new or newly restored democracies. Indeed, one might argue that the later democratic government is not only entitled, but also obliged, to remedy the iniquities inflicted by its non-democratic predecessor. In a sense this merely involves the absence of the restraints that the democratic theory would place on retrospectively altering the rules imposed by non-democratic governments.[36] There is also, however, a more positive argument that rules passed by democratic governments quite simply have greater moral standing than those passed by non-democratic ones. The question is then reduced to the following: "Which of the alternative rules should cover this instance?" The democratic foundation of a later rule is a very strong reason for preferring it, even if the rule is applied to a time before the legislature's election to office.[37]

Finally, the argument that it is undemocratic for a legislature to alter the legal consequences of actions which occurred outside the temporal limits of its mandate assumes that a mandate does have the kind of temporal limits Eule suggests. It is perfectly obvious that a government elected to office for a specific term has a mandate to govern for that term and for that term only. But it does not necessarily follow from this that the government's mandate allows it to determine the legal consequences of events occurring only within its term of office. Eule's argument is that:

> Each set of elected officials ought to be viewed as endowed by their sovereign [the electorate] with the mandate to make policy choices only within a bracketed temporal zone ... [T]he delegation of authority ... does not contemplate contravening the sanctity of time past.[38]

Perhaps, but does this mean that the legislature can attach legal consequences only to actions taking place within its term of office, or rather that it can attach, within its period of office, any legal consequences to any events whensoever occurring, provided that the consequences are confined to its term of office?[39] Shortly after the election of the Hawke Government in 1983, the then Finance Minister, John Dawkins, made the following statement:

> I now affirm that the Government will, as necessary, employ retrospective legislation to ensure that tax sought to be avoided under any blatant tax avoidance scheme *that comes to light during our term of office* will be collected, *irrespective of when the scheme was entered into.*[40]

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35 Ibid at 455-456.

36 Alternatively it could be seen as a restatement of the argument that people should be discouraged from relying on the rules of non-democratic governments — see below.

37 This does not mean that there are not many good reasons for newly elected governments to retain existing laws. Many of the existing laws might be good or at least only marginally unobjectionable; any change of the law is disruptive and retrospective laws may be more so and there are (admittedly weaker) reliance arguments in favour of retaining laws.

38 J N Eule, above n 34 at 445.

39 The continuation of those consequences to cease, unless endorsed by the next government.

40 "Retrospective legislation against tax avoidance", press release of 28 April 1983, reprinted in (1983) 17 *Taxation in Australia* 1006 at 1006-1007. Emphasis added.

The temporal nexus between the act of avoidance and the term of office suggested by this statement is simply that the act of avoidance must be discovered in the relevant time frame. According to Eule's argument, this nexus is insufficient and any legislation passed in accordance with the statement would be illegitimate in a democracy. This would be so even if the previous legislature was completely unaware of the schemes which were being entered into during its term of office and was not therefore in a position to make a decision about whether or not to recoup the avoided tax. Such a distinction is hardly appropriate as it discriminates in favour of those for whom action and detection fall on either side of an election at which the government changes. It would also lead to an unseemly rush for schemes immediately before such an election campaign.

What, moreover, if the people actually authorise the taking of retrospective action by the legislature: do the principles of majoritarian democracy require that previous expressions of "the will of the people" should be respected for all time? Or can the people declare that the previous majority was wrong and that their work should be undone? An argument used by Eule to support the entrenchment prohibition can be turned around to show that the people should be allowed to exercise hindsight in this way. Eule argues that "to permit entrenchment prevents those with the greatest knowledge of societal needs from acting".[41] In other words, the decision is taken by those attempting to exercise foresight rather than by those with actual knowledge of societal needs. To prohibit retroactive legislation, however, prevents those with the superior form of knowledge, hindsight, from taking the decision. Why should the electorate be incapacitated in this way?

In the 1983 Federal election, for instance, the ALP claimed that the Fraser Government had not done enough during its term to deal with the problem of tax avoidance, and promised both to stamp out the industry for the future (within the temporal limits of its term of office) and also to recover tax from those who had avoided paying it in the past (outside the temporal limits of its term of office). To the extent that it was an issue,[42] the electorate can be assumed to have agreed that too little had been done to counter tax avoidance and that too many people had been allowed to evade their tax liabilities. Can it be said that in a democracy the people cannot exercise hindsight in this way and have no power to authorise the kind of action promised by the ALP? It could perhaps be objected that this kind of "second-guessing" by the electorate could embitter politics and make the state of the law uncertain, but such arguments are not founded on notions of democracy but on the other kinds of arguments discussed in this part.

The ideal of the rule of law is often hazy and unclear, liable to take on any features of law which the writer finds attractive. However, this should not allow us to ignore some of the key ideas it incorporates. One such idea is that decisions about the use of state power should be made in advance for the guidance of officials and citizens. If the latter know what rules will be applied to their behaviour, they can plan their lives and conduct their affairs in that knowledge. Raz sees this goal as being concerned with the effectiveness of law.[43] If citizens are planning their lives according to law and

41 J N Eule, above n 34 at 387. The point is derived from Jeremy Bentham, and contained in H Larrabee (ed), *Handbook of Political Fallacies* (1952) at 55.

42 It is notoriously difficult to determine what issues affected what voters.

43 See, for instance, J Raz, "The Rule of Law and its Virtue" (1977) 93 *LQR* 195 at 198.

moulding their activity according to what they may or may not do, those citizens are making the law effective in the most efficient way, by self enforcement. If law is incapable of providing guidance, it is unlikely to achieve its purpose. The use of retrospective law undermines the effectiveness of law in two ways; firstly, the specific piece of retrospective legislation will be ineffective in terms of guiding the behaviour of citizens, simply because the law did not exist at the time the actions targeted by the law were taken. Secondly, it sets a bad example and makes citizens more apprehensive about trusting and relying on the law generally; to use Fuller's words, it puts all laws "under the threat of retrospective change",[44] and if citizens perceive such a threat they may no longer be willing to be guided in their behaviour by the law as it stands.

The effectiveness argument is, however, crucially dependent on what effects the law is intended to achieve and how it attempts to achieve them. Not all laws are concerned solely, or even principally, with providing a guide to behaviour. For example, one of the prime purposes of the new rule in *Re a Solicitor's Clerk* was presumably to protect the public from the dangers of dishonest clerks; this goal would best be served by applying the new rule to all dishonest clerks. If the purpose of the new rule was to punish or deter, then these goals would probably not be served by applying the rule to those whose offences had already been committed. The rationale for taxation — where the use of retrospectivity seems to excite the most controversy — is, at the very least, the raising of revenue for government purposes. Many would add the purpose of redistributing wealth and those who did not would add a procedural value of raising the revenue in a fair manner taking into account ability to pay and the needs of the economy. Retrospective rules may be more effective in raising taxation from those who are determined not to pay it and may also help to ensure that the burden of taxation is spread more fairly.

In any case, it should not be assumed that laws which are subject to retrospective change cannot provide guidance. If guides are fallible it does not mean that they are useless. We still take heed of weather forecasts despite their legendary unreliability. The common law is subject to retrospective change and all statutes are subject to re-interpretation that is effectively retrospective. Yet we do not abandon these as guides. Of course, where we know that something is an imperfect guide, we pay attention to contrary indicators. In considering the likely effect on us of the weather we take note of storm clouds even on a day which the Bureau of Meteorology has forecast to be fine. In considering the common law or the interpretation of statutes, we look at trends in court decisions and try to weigh up their likely effects on the matter in hand.[45] In so doing, we should be aware of community concern and political controversy over taxation schemes.

Of course, the kind of guidance that an area of law subject to change gives is different from the kind of guidance offered by a settled and unchanging area of law. It cannot provide a precise guide to the exact rule which will be applied and how it will

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44 L L Fuller, above n 7 at 39.

45 We note that with several of the new taxation decisions, some tax practitioners complain that the courts are overturning the interpretation that was commonly held in the tax profession. Although we do not follow the taxation decisions closely, the sorts of decisions never cause us any surprise. We wonder whether someone who continues to read taxation legislation as if it were being interpreted by the Barwick Court is really doing the client good service.

be interpreted by officials. The guidance it provides is in the form of a warning: "Be careful! Do not try to rely too much on existing detail, especially where it has effects that were probably unknown to, and unintended by, the legislature." The more the law seems to say that you can avoid paying tax by some manoeuvre or another, the less certain you should be that it will actually be applied that way. This is not so different from the kind of guidance that can be provided in an area of common law that is undergoing change or development. The good legal adviser warns clients about such areas of law. The adviser does not try to advise a precise course that will narrowly avoid liability, she advises the client to give contentious activity a wide berth. To use a classical metaphor, in such cases the adviser does not plot a course between Scylla and Charybdis but advises the client to take the long way around Sicily! This is, in fact, typical of most legal advice. It is rarely the case that the client is best served by choosing to rely on either legislation or case law that is subject to change or uncertainty. Most legal advice is about how to keep the client's activities secure from challenge. But there are some areas of law, of which taxation is one, where there are real economic incentives to sail close to the wind because the benefits of successfully doing so are so great.

Thus the uncertainty in taxation law engendered by potential retrospectivity provides guidance to citizens to steer clear of attempts to find and exploit unintended loopholes. The irony of this is that this kind of uncertainty makes the law more effective in achieving its purposes of collecting revenue, redistributing income and providing a level playing field in which the tax costs on different activities are similar.

The rule of law — reliance

The ideal of the rule of law goes beyond effectiveness of legislation. The most important argument against retrospective laws is that they defeat the expectations of citizens formed in reliance on the existing state of law. This shifts the focus from the effectiveness of legislation to the interests of citizens. A stable framework of rules allows citizens to plan their affairs or to make what Rawls refers to as "plans of life".[46] The provision of such a framework respects human autonomy and dignity by making it possible for persons to make choices and thus exercise some control over their future. Looking at it from the citizen's point of view enables us to say that the vice of retrospective legislation is that it defeats the expectations of those who have been guided by the law. Such persons have an interest in the continuance of the laws upon which they relied in making their choices; if this does not happen, the results their choices were intended to achieve may not in fact be achieved. They argue that they reasonably relied upon their expectation that the law that would be applied to their actions would be the same as the law that was in force at the time they did the relevant action.[47] The question then, is whether, and if so when, it is justifiable to defeat these expectations and disappoint those who have relied upon them.

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46 J Rawls, *A Theory of Justice* (1973) S 63 at 407-416.

47 This is our formulation, but it is in line with those of other writers including N J McIntyre, "Transition Rules: Learning to live with Tax Reform" (1976) *Tax Notes* 7 at 8-9; A S Novick and R I Petersberger, "Retroactivity in Federal Taxation" (1959) 37 *Taxes* 499 at 509-530; and W D Slawson, "Constitutional and Legislative Considerations in Retroactive Lawmaking" (1960) 48 *California L Rev* 216 at 238-242. It is fairly close to the view put forward by G de Q Walker, above n 4 at 322ff.

Munzer suggests that only those expectations which are both rational and legitimate have a strong claim for protection.[48] Munzer defines a person's expectation as rational if the probability assigned by that person to the expected event, in our case the enactment of retrospective legislation, roughly corresponds to the actual probability that it will occur.[49] If persons start with the assumption that no retrospective laws will ever be enacted, or that a particular rule is unlikely ever to be upset by a court, then their expectations may be far from rational. Retrospective laws are sometimes passed and to ignore the possibility is more wishful thinking than rational expectation. Of course, the probability of retrospective legislation is generally small, and Munzer does not suggest that it should necessarily found a legitimate expectation. A rational expectation must be based on all the available information, including the attitudes of legislators, officials and the courts, and not just on the words of a statute. What is necessary, in effect, is that the individual pay some regard to the expectations of those who have drafted and enacted the legislation in order to meet certain objectives.[50] Citizens should be wary of cases where their expectations are different from those of the legislature. Munzer is directing us away from expectations that words and meanings of legal texts should remain unaltered and towards mutually expected institutional responses.

For Munzer, the legitimacy of an expectation does not depend on the exact words of a statute but on its underlying goals. An expectation is legitimate if it "is supported, first, by the underlying justifications of the law inducing it, and second, by the fundamental principles embedded in the legal system itself".[51] This enables us to distinguish, for example, an expectation that an unintended loophole would not be retrospectively closed (illegitimate) from an expectation that an intentionally-conferred tax concession would not be retrospectively removed (legitimate). Of course, it might be difficult to distinguish between a loophole and a concession. However, the advantage of Munzer's approach is that it depends on the expectations of the officials rather than on the nature of the provision. It is the sort of distinction that should be resolved by communication with the Australian Taxation Office (and provides an important argument for providing easy communication). If, however, one rejects Munzer's contention that an expectation is only legitimate if based on the underlying justifications of a law, it still does not mean that the expectation of a person exploiting a tax loophole should be respected. The expectation may fail the rationality test because it does not take account of the expectations of officials that the intended revenue will be collected or the likelihood that they may seek to have the loophole retrospectively closed once it is discovered.

Even if one accepts the notion that rational and legitimate expectations should *generally* be respected, this does not mean they should *always* be respected. Firstly, it should never be forgotten that the ability to plan and hence benefit from a stable and relatively predictable legal environment is not evenly distributed. Many people do not have the resources to live the autonomous lives idealised by those who praise reliance and condemn retrospectivity. Secondly, other people have expectations too: the clients of the solicitor's clerk, the welfare recipients and the farmers. Thirdly, even rational

48 S R Munzer, "A Theory of Retroactive Legislation" (1982) 61 *Texas L Rev* 425 at 433.
49 Ibid at 430.
50 Munzer refers to situations in which there are more than one set of expectations as "layering": ibid at 429.
51 Ibid at 432.

and legitimate expectations can be defeated by claims for justice. We explore this argument further below.

However, the main reason for doubting that reliance provides the full answer is that such reliance does not always carry moral force.[52] Sometimes it is undesirable for citizens to regard existing law as a stable framework for planning their affairs. The last thing we would want is for key actors to be able to rely on an expectation that the law will not change. Three examples should suffice — the case of the Southern murderer, the case of the South American torturer and the case of the South Australian tax lawyer.

Should a torturer be able to go about his business secure in the knowledge that the laws that will be applied to him if he is ever brought to account will be the same laws that applied when he attached the electrodes? Or would we hope that the possibility of retrospective applications of human rights law to his action might make him think twice about what he is doing? Encouraging the torturer to believe that retrospective laws may be passed to criminalise his conduct might reduce his willingness to carry out this task.

The case of the Southern murderer is based on a real case of a Tasmanian defendant accused of manslaughter.[53] He was arraigned at a time when guilty verdicts in manslaughter trials had to be unanimous. In between the arraignment and the trial, the rule was changed so that majority verdicts were allowed. In the actual case, the High Court of Australia decided that it was not intended that the legislation act retrospectively. However, the more interesting question is whether, if the provision had been intended to cover the case, such "retrospectivity"[54] would be justified. It is highly unlikely that the defendant would have taken this into account: "This is not the perfect murder but it is good enough to fool one or two of the average jury". If he did not rely on the requirement of unanimity, the reliance argument is irrelevant and we can go directly to the question, "What is the best law?" and apply it to all cases including those pending. If on the other hand he really did rely on it, then it makes the crime all the worse for being so clearly premeditated and calculating. This would be classically a case where the possibility of retrospective alteration of the procedures should be left open to discourage reliance.

The final example is that of a lawyer who discovers an unintended consequence of the Taxation Act. What kind of action should be encouraged and what kind of action discouraged? Would we prefer the lawyer to inform the ATO so that the oversight can be rectified or, if the consequence is intended or acceptable, confirm it so that the lawyer's clients can take advantage of it, legitimately, confidently and securely? Or would we prefer the lawyer to push as much of the client's money as possible through the loophole before it is discovered? Protecting reliance is likely to encourage the latter. Discouraging reliance by leaving open the option of retrospective legislation leads to more socially useful activity and more certain, effective and consistent laws. This is the point made by Senator Gareth Evans in debating the anti-Curran legislation:

> Of course it will create uncertainty to have the possibility of these schemes being struck down after the event. That, after all, is the very objective — to operate as a deterrent to

52 Ibid at 434.

53 *Newell v the Queen* (1936) 55 CLR 707.

54 Inverted commas are used to recognise that it is only a future procedure that is being affected.

> the future marketing of these schemes and not just a way of collecting lost revenue in the past ... The starting point in this kind of argument is the proposition that uncertainty in law is not itself an unmitigated evil. Its role in the front line in the war against tax avoidance schemes is such an eminently noble purpose and one which justifies the operation of fully retrospective tax avoidance laws.[55]

Justice

A claim of injustice is often made by those affected by retrospective legislation. Although this claim is essentially based on the argument that the expectations citizens form in reliance on the existing state of law should be respected, it is often couched in the language of justice. Those who object to retrospective legislation on the grounds that it is "unjust" are essentially, therefore, making a claim for procedural justice.

This is an important claim. However, it should be noted that exactly the same injustice is involved when a court makes a decision that tax is payable on a particular transaction.[56] A stark demonstration of this fact is that both the anti-Curran and bottom-of-the-harbour legislation were subsequently rendered unnecessary by judicial decisions. In *John v Commissioner of Taxation*,[57] the High Court overruled its decision in *Curran's* case, holding it to be clearly erroneous; and in *Federal Commissioner of Taxation v Gregrhon Investments Pty Ltd*,[58] the Federal Court distinguished the High Court's decision in *Slutzkin v Federal Commissioner of Taxation*,[59] the facts of which had provided the model for the bottom-of-the-harbour schemes.[60]

However, procedural justice is not the only form of justice known to law. Laws, and especially taxation laws, attempt to deal with distributive justice and remedial justice and also attempt to provide the necessary financial base for equality of opportunity and social minima.[61] This point was made by Isaacs J:

> What may seem unjust when regarded from the stand-point of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.[62]

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55 Sen Deb 1979, Vol 82 at 619-620.

56 This argument is advanced by Y Grbich, "Problems of Tax Avoidance in Australia", in J G Head (ed), *Taxation Issues of the 1980s* (1983) 413 at 426-427.

57 (1989) 166 CLR 417.

58 (1987) 87 ATC 4,988; 79 ALR 586.

59 (1977) 140 CLR 314.

60 The High Court refused special leave to appeal from the Federal Court's decision. For condemnation of this case see "Editorial" (1988) 17 *Australian Tax Rev* 1 and A J Myers QC, "The Federal Court Decision in the Gregrhon Investments Pty Ltd Case" (1988) 17 *Australian Tax Rev* 4. The *ALJ* Revenue Editor, noting Myers QC's outrage, argued that if the decision in *Gregrhon* was a surprise, it was only because "revenue practice tends to be so confining in its specialisation that its opinion formers may tend to lose touch with reality": "Revenue" (1988) 62 *ALJ* 470 at 471. Interestingly, the decision in *Gregrhon's* case means that Treasurer Howard's initial claim that the bottom-of-the-harbour legislation was not retrospective because the tax had always remained payable — a claim roundly rejected at the time — was in fact correct: see, for instance, I C F Spry QC, "Retrospective Legislation for Company Tax" (1982) 11 *Australian Tax Rev* 152 at 156-157.

61 The last two are chosen to make the point that Rawls's theory of justice could not be fulfilled without taxation. See Rawls's principles of justice, above n 46 at 60.

62 *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413 at 434.

It might be regarded as part of distributive justice to provide certain services to the community or to reduce the overall rate of taxation.[63] The ability of the legislature to do so could be threatened by the loss of revenue resulting from avoidance. Distributive justice might be seen as served by distributing the burden of tax through a progressive system or even via a "flat" tax in which the effective marginal rates of those on lower incomes were equal for all.[64] If the legislature were to set a higher store by substantive and distributive justice in taxation than the claims to procedural justice by tax avoiders, it would be a highly defensible position.[65]

It is interesting that the prominent liberal legal philosopher, Ronald Dworkin, who in some areas has been highly critical of retrospective law-making (he attacked the idea of judicial discretion because of its retrospectivity[66]), is prepared to justify retrospective tax legislation on just such grounds. His view was that "if they did not pay last year that is a good reason to pay more next year".[67] This robust, even cavalier, attitude to retrospective taxation by such prominent liberals as Dworkin and Fuller is surprising. It indicates an impatience with America's far older tax avoidance industry and its apologists there. This is not to say that we should adopt the rather simplistic views that arise from that impatience. We should respect and acknowledge the arguments from procedural justice that boil down to issues of reliance. But we must never forget the arguments from distributive justice which are essential to a fair and effective system of taxation. We should be neither as cavalier about reliance as Dworkin and Fuller nor as insensitive to distributive justice as some of the more robust defenders of tax minimisation.

One final point should be made before completing the discussion of justice. It is important to distinguish between the alleged injustice of the law and its retrospective operation. Many of the examples of retrospective legislation passed by the Nazis illustrate this point. The key problem with the parliamentary validation of the actions of the SS during the night of the long knives, for instance, was that what the Reichstag was authorising was the indiscriminate murder of a political faction without any examination of whether those killed had committed any crimes. Had the legislation been prospective it would hardly have been less evil, except in the sense that it would have been less effective because it would have given warning!

In summary, the key argument against retrospective laws is seen to be that of protecting the reliance citizens may reasonably place upon their expectation that the laws which will be applied to their actions and transactions by courts will be the same as the laws which applied at the time they acted or transacted. Retrospective laws cannot be defined out of existence, nor are they necessarily undemocratic or unjust in any sense other than that incorporated within the reliance argument. As we look back

63 This reason was cited by Treasurer Howard in his Second Reading Speech on the Income Tax Assessment Amendment Bill 1978, H Reps Deb 1978, Vol 108 at 1244.

64 See C Sampford, "Taking Rates Seriously: Effective Reductions as the Thirteenth Labour of Hercules?" (1991) 9 *Law in Context* 92 and "Cumulative Effective Tax Rates" (1991) 21 *Economic Analysis and Policy* 211.

65 However cynical citizens may be of any principles claimed by politicians, this reason was cited by Treasurer Howard in his Second Reading Speech on the Taxation (Unpaid Company Tax) Assessment Bill 1982, H Reps Deb 1982, Vol 129 at 1866, and was repeatedly relied on by the ALP.

66 R Dworkin, "Hard Cases" in *Taking Rights Seriously* (1977) 81 at 84.

67 Interview with Professor Sampford, August 1986.

into the recent history of Australian retrospectivity, we will see that the reliance argument lies at the heart of most debates, and does not always support the "no" case.

THE AUSTRALIAN EXPERIENCE

Categories and frequency of retrospective legislation

Source of examples

Locating examples of retrospective legislation, other than the few which excite controversy, is extremely laborious; no doubt this is why discussion of retrospectivity is usually confined to the controversial examples. Fortunately, from the investigator's point of view, there have been two innovations which have made the task of locating retrospective legislation far easier. The first was the establishment, on 19 November 1981, of the Senate Standing Committee for the Scrutiny of Bills (the SBC);[68] the second is the practice, since 1989, of including commencement dates in the Acts tables of the bound volumes of the Commonwealth and Victorian statutes.[69] For these reasons, the focus of this article is on the enactments of the Commonwealth Parliament from the years 1982 to 1990, supplemented by the Victorian retrospective statutes from 1989 and 1990. The choice is a fortunate one: the Commonwealth Parliament is Australia's most significant legislature, and because of its primary responsibility for taxation, has passed most of the more controversial recent pieces of retrospective legislation.[70]

This article thus describes and evaluates the use of retrospective legislation by a particular legislature, the Commonwealth Parliament, over a particular period, the nine years ending in 1990. In deciding what constitutes a retrospective statute, no definitional sleight of hand is attempted: the aim is to present as complete a picture as possible of the use of retrospective legislation, and to deal with the merits of any arguments about the unfairness of allegedly retrospective legislation rather than to attempt to define the problem out of existence. The examples discussed are not confined to laws which we would call retrospective because they attach new direct legal consequences to past events. They will also include those statutes which determine future rights and liabilities by reference to past events. Where the retrospectivity of a provision is itself dubious according to some definitions, particular attention will be paid to the strength of the arguments.

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68 The SBC reports to the Senate on Bills which, among other things, "trespass unduly on personal rights and liberties"; it includes in this category legislation which purports to have retrospective effect. Because, however, the SBC does not draw the Senate's attention to provisions which do not affect personal rights and liberties or obligations in any way, such as corrections of minor drafting errors, or to provisions which retrospectively remove obligations or confer benefits, or to situations where the retrospective imposition of taxes, charges and the like has been authorised by legislation, its reports tend to highlight only the potentially "bad" examples of retrospectivity. For an outline of the SBC's approach to retrospectivity see Senator Michael Tate, *The Operation of the Australian Senate Standing Committee for the Scrutiny of Bills, 1981-85* (Parliamentary Paper No 317 of 1985) at 23-25.

69 At the time of writing, the 1990 Commonwealth bound volumes had not been printed, and the Victorian bound volumes only included statutes passed on or before 30 June 1990.

70 It also appears to be a far more prolific enacter of retrospective legislation than the Victorian Parliament, and possibly therefore, State and Territory Parliaments in general.

Categories of retrospective legislation

There were several possible ways in which to classify all this legislation. One possibility was to adopt Driedger's distinction between statutes which are retroactive and retrospective in form; but while this distinction may be useful in terms of predicting when a court will apply the presumption of statutory interpretation against the retrospective operation of statutes, it tells us nothing about whether or not the statute is one which will defeat the reasonable expectations of citizens formed in reliance on the existing state of law. For instance, the Taxation (Unpaid Company Tax) Assessment Act 1982, arguably the most controversial piece of legislation in the entire period examined, was prospective in operation and retrospective in form, declaring that if at any time after the commencement of the Act there remained an amount of unpaid company tax, then the vendors of the shares in the company should be taken to have a tax liability equal to the amount of the unpaid company tax. This obviously does not mean that the Act would have been any more or less objectionable if it had been retroactive, declaring the tax always to have been payable, nor would any different arguments apply in respect of it. This way of classifying legislation has not, therefore, been adopted.

There is one category of statutes where the technique or form does seem to be important. This is where the statute is retrospective to the date of an announcement foreshadowing it, so-called "legislation by press release". Such statutes are clearly retrospective (often, in fact, retroactive in the Dreidger sense of the term) because the announcement itself does not change the law. Many of the arguments which can be made against other forms of retrospective legislation, however, do not apply to "legislation by press release", while many of the arguments which do apply are only relevant to this particular type of legislation. "Legislation by press release" has, therefore, been adopted as a category under the more accurate name of "retrospective to the date of announcement". A second useful category relating to the technique by which the retrospective rule is made is that of subordinate legislation. The examples placed in this category include statutes explicitly conferring retrospective regulatory powers: the conferral needs to be explicit to overcome the effect of s 48(2) of the Acts Interpretation Act 1901 (Cth). The category also includes examples of retrospective subordinate legislation, which are subject to the scrutiny of the Senate Standing Committee on Regulations and Ordinances and disallowance by Parliament.

A second means of classifying statutes is on the basis of the substantive area of law of which they become a part — such as criminal law and/or taxation. The attraction of such categories is that criminal statutes do seem to raise distinct problems, as do retrospective anti-avoidance tax laws (such as the Income Tax Assessment Amendment Act 1978 or the Taxation (Unpaid Company Tax) Assessment Act 1982). These two categories aside, however, the substantive content of a statute appears to have little relevance to the question of whether or not the statute is objectionable. For instance, taxation statutes which have effect from the date of the announcement foreshadowing them have more in common with other such statutes than they do with retrospective anti-avoidance taxation laws. The four useful categories identified so far, statutes which are retrospective to the date of their announcement, subordinate legislation, criminal statutes and anti-avoidance tax statutes, are not a logical set of categories, but adopting them allows us to discuss the unique problems which each kind of statute raises. Nevertheless, they clearly do not cover the field; indeed, the vast majority of retrospective statutes fall outside these categories.

The largest group appears to be what we have called "curative" statutes. Such statutes are part of the complex interaction between legislation and administration in a modern state. The Government introduces legislation to achieve certain policy or administrative goals. Sometimes the legislation fails to achieve those goals, and the Government decides to introduce further legislation to ensure, not only that the goals are achieved for the future, but also that the legislation achieves its goals from the outset by retrospectively curing defects. We have broken this category down further to reflect the fact that the statutes in this category often raise distinct reliance issues. The first sub-category we have called "routine revision": this appears to raise no reliance issues. The second sub-category we have called "restorative legislation": this is where the defect is unintentionally to have allowed a legislative scheme to lapse and a person may have reasonably relied upon the scheme continuing. The third sub-category we have called "validating legislation": this is where someone, usually the executive arm of government, has acted in reliance on an erroneous view of the law, which action the retrospective statute is intended to validate. The final sub-category we have called "overturning judicial decisions". This is where the executive's reliance on an erroneous view of the law has been successfully challenged in the courts, and the legislation is intended to give statutory validation to the executive's originally erroneous view (but not usually to validate the specifically impugned actions).

There are still some statutes which do not fall into any of the above categories. Some of these remaining statutes can be described as procedural: the fact that courts treat retrospective procedural statutes differently from non-procedural statutes provides a justification for adopting this as a residual category. The final remaining statutes all share the characteristic that they are beneficial to the persons affected by them; as no-one could have had an expectation that the benefit would be conferred upon them they are in effect the legislative equivalents of *ex gratia* payments.

Frequency of retrospective legislation

The least controversial categories of retrospective legislation are by far the most numerous. Within the period examined there were at least[71] seven restorative Commonwealth statutes, 24 validating, and eight which overturned judicial decisions, while for the year 1989 alone, there were at least 11 routine revision statutes. If this latter figure is typical, one could assume that there were approximately 80 to 100 such statutes during the period as a whole. There were at least three arguably procedural statutes, 11 beneficial ones, and five conferring retrospective regulatory power. There were at least 34 statutes which were retrospective to the date of the announcement foreshadowing them. There were only two retrospective criminal statutes (as well as one which retrospectively increased a non-criminal penalty), however, and only one retrospective anti-avoidance statute, the Taxation (Unpaid Company Tax) Assessment Act 1982. In addition to the statutes falling into our categories, there were two tax statutes which arguably involved a small degree of retrospectivity, and one statute by which the Commonwealth retrospectively imposed an obligation on two of its authorities. Excluding the routine revision statutes, this gives us a minimum of 99 retrospective Commonwealth statutes for the nine years of the period examined.

71 The reason for saying "at least" is because the SBC is unlikely to have reported on all such Bills.

Including the estimated number of routine revision statutes, one arrives at a minimum figure of at least 180 retrospective statutes for the period, or approximately 20 per year.

Turning to the Victorian statutes, in the 18 month period examined there were at least[72] 20 routine revision statutes, eight validating, one procedural, and one beneficial statute. This gives a minimum figure for the period of 30 retrospective statutes, or approximately 20 per year. Although this figure is comparable to the Commonwealth figure, if one removes from the two totals routine revision statutes, one arrives at a figure of 10 statutes per year for the Commonwealth and only six or seven for Victoria. Interestingly, these figures accord with anecdotal evidence provided by Mr Alan Hunt, former leader of the Liberal Party in the Victorian Legislative Council, who in an *Age* editorial on the Taxation (Unpaid Company Tax) Assessment Act 1982 was reported as having stated "that in 21 years in Parliament he had supported more than 150 pieces of retrospective legislation with a clear conscience".[73]

Curative legislation

Lon Fuller has made the following observation:

> It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.[74]

Legislation is enacted in order to achieve certain goals; we often describe the achievement of those goals as the legislature's intention. Sometimes, however, legislation fails to achieve its goals; curative statutes are statutes which retrospectively amend the legislation to enable it to achieve those goals, or to make it conform to the legislature's original intention. Many and varied are the legislative defects cured by retrospective statutes, from the correction of typographical errors, to the overturning of a judicial decision or the validation of an unlawful administrative practice. As we shall see, there is generally little to be objected to in such statutes, because although they may affect a person's legal rights, they will seldom defeat his or her expectations and may often in fact be necessary to ensure that those expectations are fulfilled.[75]

Routine revision

Included in this category are retrospective amendments of a minor or technical nature; that is, the sort of changes which are commonly contained in the "Statute Law Revision" part of Victorian legislation. This is probably the largest single category of retrospective legislation; in 1989 for instance the Commonwealth Parliament passed at least 11 Acts[76] containing provisions falling into this category while the Victorian

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72 The reason for saying "at least" here is because the only source for these statutes was the Acts table of the bound volumes; this means that only those statutes which are retrospective by virtue of their commencement dates have been discovered.

73 *Age* 22 November 1982.

74 L L Fuller, above n 7 at 53.

75 See S R Munzer, above n 48 at 468-470.

76 Including Community Services and Health Legislation Amendment Act 1989, Customs and Excise Legislation Amendment Act (No 2) 1989, Defence Legislation Amendment Act 1989, Social Security and Veterans' Affairs Legislation Amendment Act 1989, Social Security and Veterans' Affairs Legislation Amendment Act (No 2) 1989, Social Security and Veterans' Affairs Legislation Amendment Act (No 3) 1989, Social Security and Veterans'

Parliament passed 14.[77] Examples of routine revision include the correction of typographical errors,[78] changes consequent on previous amendments[79] and the routine updating of statute law.[80] Sometimes the revisions carried out are of a slightly more significant nature, as, for instance, with the National Parks (Amendment) Act 1989 (Vic), which varied the boundaries of a National Park.[81]

It would no doubt be desirable if typographical errors were never made, if the persons responsible for drafting major amendments to legislation could be aware of all the consequential amendments which would be necessary, and if routine changes were always made prospectively. Given the pressure under which parliamentary counsel and draftspersons operate, however, these goals are unlikely ever to be achieved, and failure to achieve them does not appear to affect anyone's rights or liberties in any way. Failure to make the necessary changes would, on the other hand, in many cases render existing legislation nonsensical or unworkable. This sort of retrospectivity must therefore be excused as an inevitable by-product of the legislative process and of human fallibility. Certainly, this kind of retrospective legislation does not arouse controversy because there is no likelihood, or generally even a possibility, of reliance, reasonable or otherwise.

Affairs Legislation Amendment Act (No 4) 1989, Taxation Laws Amendment Act (No 3) 1989 and the Taxation Laws Amendment (Superannuation) Act 1989.

77 Including Accident Compensation (General Amendment) Act 1989, Adoption (Amendment) Act 1989, Agricultural Acts (Miscellaneous Amendments) Act 1989, Conservation, Forests and Lands Acts (Amendment) Act 1989, Crimes Legislation (Miscellaneous Amendments) Act 1989, Education (Work Experience) Act 1989, Extractive Industries (Amendment) Act 1989, Fisheries (Abalone Licence Charges) Amendment Act 1989, National Parks (Amendment) Act 1989, Planning and Environment (Amendment) Act 1989, Racing (Amendment) Act 1989, Transport (Amendment) Act 1989 and the Water Act 1989.

78 For example the Racing (Amendment) Act 1989 (Vic) substituted the word "section" for "secton" in the Principal Act; the Fisheries (Abalone Licence Charges) Amendment Act 1989 (Vic) substituted "5000" for "500" in the very recently enacted Fisheries (Abalone Licence Charges) Act 1989 (Vic); the new charges had been announced before the commencement date of both Acts.

79 For instance, the retrospective alteration of a reference to "Family Benefit" to "Family Allowance".

80 Such as where an Amending Act substitutes one year for another in the title of an Act referred to in the Principal Act.

81 Similar examples are the Administrative Services Legislation Amendment Act 1989 (Cth), which added work on Parliament House to the definition of "public works" contained in the Public Works Committee Act 1969 (Cth); the Banking Legislation Amendment Act 1989 (Cth), which substituted a new schedule listing banks in the Banking Act 1959 (Cth) and repealed a section of the Commonwealth Banks Act 1959 (Cth) which required that the profits of the Commonwealth Development Bank go to the credit of the Commonwealth Development Bank Reserve Fund; the Health (General Amendment) (Amendment) Act 1989 (Vic), substitution of a new definition of hospital in the Health Act 1958 (Vic); the Cultural and Recreational Lands (Amendment) Act 1990 (Vic), addition of MCG, National Tennis Centre and other sporting facilities to the definition of "cultural and recreational lands" in the Principal Act; and the National Parks (Further Amendment) Act 1990 (Vic), which amended the description of an easement which had been granted to the Commonwealth by the National Parks Act 1975 (Vic).

Restorative legislation

Sometimes legislative schemes or provisions are allowed to lapse, creating a sort of legislative lacuna. The cause of this happening is, no doubt, some degree of negligence on the part of the Department responsible for the legislation. Nevertheless, retrospective restoration of the relevant scheme or provision is often in the interests not only of the Department concerned, but also of the persons affected by it. This is most obviously the case where the effect of the lacuna is that a liability to tax or some other charge arises, or the right to some government payment ceases. In such cases the government has either become entitled to revenue which it was never intended should be payable, or has ceased to be obliged to make a payment which the legislature always intended that it should make. In passing restorative legislation, the government will be forgoing revenue to which it has become legally entitled, or incurring expenditure which it was not obliged by law to make; but it will also be acting to ensure that people's expectations about these matters are respected.

The Customs Tariff (Coal Export Duty) Amendment Act 1989 (Cth), for example, restored an exemption from duty which had been allowed to lapse; duty would have been payable if the restoration of the exemption had not been retrospective.[82] An example of the retrospective imposition of an obligation to make a payment was the extension of the Commonwealth Export Market Development Grant Scheme; the scheme lapsed on 1 July 1982, but was retrospectively restored and prospectively renewed by the Export Market Development Grants Amendment Act 1982 (Cth).[83] Where the effect of the lapse of the scheme is that liability to tax ceases, then it is clearly not in the interests of the person affected that the liability be retrospectively restored.[84] It cannot, however, be said that the retrospective restoration of the liability will upset the expectations of persons acting in reliance on the law, who would probably remain unaware that the legislation had lapsed, and if they were aware of it, would probably realise that it was due to a mistake rather than to a change in government policy.

Validating legislation

This sub-category includes statutes designed to overcome more significant legislative defects than those considered in the routine revision category; often there are complicating factors such as a person's reliance on the defective scheme. Provided that no new, in the sense of unexpected, obligations are imposed on anyone, there is little

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82 On other occasions changes to legislation may have unintended effects, perhaps creating an anomaly which may take some time to discover, and which might in fact be practically undiscoverable by the person affected. The Customs Tariff Amendment Act 1986 (Cth), for instance, restored duty-free entry to certain parts used in the construction or modification of bountiable vessels; the parts had lost their duty-free status as an unintended result of amendments to some Customs by-laws.

83 A similar example of this is the Bounty (Injection-Moulding Equipment) Amendment Act 1985 (Cth), which continued a bounty scheme from the date on which the previous scheme expired.

84 For example, the Tobacco Charge (No 1) Amendment Act 1986 (Cth), Tobacco Charge (No 2) Amendment Act 1986 (Cth), and Tobacco Charge (No 3) Amendment Act 1986 (Cth), re-established legal rates of charge from the date on which the previous rates had expired; the new rates were the same as the old.

that can be objected to in the retrospective curing of the defect.[85] Where there has been reliance, it is usually the bureaucracy which has been acting on what has transpired to be an erroneous view of the law.[86] The legislation concerned is used to make the law retrospectively conform to that which the person acting in purported reliance on it believed it to be, and to thus validate any actions taken by that person. Although the validation of those actions may detrimentally affect an individual's actual legal rights, it is very seldom that it will defeat expectations as to rights and liabilities.

There are many reasons why validating legislation may be thought necessary. Regulations may have been beyond power,[87] technical requirements may not have been observed,[88] or a question mark may hang over the validity of a piece of legislation. Perhaps the best recent example of the last of those situations is provided

85 Examples of the retrospective correction of a legislative scheme which proves to have been flawed are provided by Liquefied Petroleum Gas (Grants) Amendment Act 1984 (Cth); Australian Meat and Live-Stock Legislation (Consequential Amendments and Transitional Provisions) Act 1985 (Cth); the Defence Service Homes Amendment Act 1989 (Cth), which amended the Defence Service Homes Act 1988 (Cth) to ensure that home loan approvals could not be given without the Minister's approval (although those whose loans had already been approved were allowed to keep them); the Aged or Disabled Persons Homes Amendment Act 1989 (Cth), which listed the persons to whom capital grants for hostels can be made, this provision having been omitted from an earlier amending Act; the Commonwealth Borrowing Levy Amendment Act 1989 (Cth) and Commonwealth Borrowing Levy Collection Amendment Act 1989 (Cth) which retrospectively freed the Australian Capital Territory Electricity and Water Authority from a requirement to pay the Commonwealth Borrowing Levy from the date of ACT self-government; Industry, Technology and Commerce Legislation Amendment Act 1989 (Cth), "clarification" of a Capital Gains Tax provision; Veterans' Affairs Legislation Amendment Act 1989 (Cth), which restored a right unintentionally lost through previous amendments; Social Security Legislation Amendment Act 1990 (Cth); Taxation Laws Amendment Act (No 5) 1990 (Cth); the Health Acts (Amendment) Act 1989 (Vic); the Health Services (Amendment) Act 1990 (Vic), which retrospectively deemed any decision of the Cancer Institute Board made before the appointment of the Peter McCallum Cancer Institute Board to be a decision of the latter so as to ensure a continuity of authority between the demise of the Cancer Institute and the transfer of its duties to the Peter McCallum Cancer Institute, with similar provisions in relation to the Fairfield Hospital and the Tweddle Baby Hospital.

86 Sometimes the fact that the person's view of the law was erroneous comes to light as a result of a judicial decision; such cases are considered separately below.

87 For example the Customs and Excise Legislation Amendment Act (No 2) 1989 (Cth) retrospectively validated certain regulations which may have been beyond power. The Transport and Communications Legislation Amendment Act 1989 (Cth) allowed for the making of retrospective regulations which were necessary to validate routine telex and zonal changes dating back to 1980; Telecom asserted that most people would have benefited from the changes: see SBC, *First to Twenty-first Reports of 1989* (Parliamentary Paper No 466 of 1989) at 73.

88 For example, the Live-Stock Slaughter (Export Inspection Charge) Validation Act 1984 (Cth) validated certain charges which, because the responsible Department had failed to prescribe "abattoirs" as required by the Principal Act, had been collected without statutory warrant for over a year; the Quarantine (Validation of Fees) Act 1985 (Cth) was necessary because the Department had failed to table certain notices in Parliament; and the Food (Validation) Act 1990 (Vic) removed doubts about the validity of the Food Standards Code and the Food Standards Regulations 1987 which had arisen as a result of the failure to table in Parliament certain materials adopted in the Code.

by the Constitution (Supreme Court) Act 1989 (Vic). Section 18 of the Constitution Act 1975 (Vic) provides that an absolute majority of the Parliament is necessary for the enactment of Bills which, among other things, repeal, alter or vary provisions in the Constitution Act which deal with local government or the Supreme Court's jurisdiction. Because of this section, doubts arose as to the validity of certain legislation enacted between 1 December 1975 and 1 July 1989, and, in particular, as to the validity of the Retail Tenancies Act 1986 and the Planning and Environment Act 1986. The 1989 Act provided that the validity of any legislation passed in the period in question could not be challenged on the basis that the requirements of s 18 were not complied with, nor could the validity of anything done under the purported authority of such legislation be challenged. On its face, the Act was procedural, but because it prevented any challenge to the potentially unconstitutional Acts, it effectively validated them.[89]

Sometimes, there may simply never have been a statutory warrant for what was done. This may have been because of some oversight, as for example with the Chicken Meat Research Amendment Act 1984 (Cth); the Principal Act contained no provision stating what was to happen to penalties for the late payment of a levy, but they had been paid into the Chicken Meat Research Trust Account since 1969. The defect in the original legislation was essentially a failure by the legislature to provide the necessary directive to the executive branch of government; the retrospective issuing of that directive did not contradict any individual's expectations because there was no question about the validity of the penalties, just about what was done to them.[90]

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89 For further discussion of this Act, see R Lombardi and S Martin, "Acts without power?" (1991) 65 *Law Institute Journal* 75. A similar example is provided by the Bank Accounts Debits Tax Legislation Amendment Act 1983 (Cth), which provided a stronger constitutional footing for a potentially unconstitutional but unchallenged method of collecting a tax.

90 There was a similar defect in the Primary Industries and Energy Research Development Act 1989 (Cth), which allowed for the making of regulations pursuant to which the Grains Research and Development Corporation was established. The regulations also purported to provide that the research component of the Wheat Industry Fund Levy be paid to the Corporation. It transpired that the Act did not permit the latter part of the regulations, with the result that the research component of the levy had to remain in consolidated revenue. The Primary Industries and Energy Legislation Amendment Act 1990 (Cth) retrospectively amended the earlier Act to allow for the making of such regulations, with the result that the research component of the levy could be paid to the Corporation. A similar hole in the law was left by the repeal of the Wheat Marketing Act 1984 (Vic), as the repealing Act failed to direct what was to happen to moneys kept in a certain account. The necessary direction was subsequently provided by the Agricultural Acts (General Amendment) Act 1989 (Vic). Other examples are the Live-Stock Slaughter Levy Collection Amendment Act 1984 (Cth), which validated payments made by the Commonwealth to the Northern Territory out of the National Cattle Disease Eradication Trust Account, from which only payments to States were allowed; the Land (Miscellaneous Matters) Act 1989 (Vic), which retrospectively added a parcel of land to the schedule of lands from which Crown grants and reservations were revoked in order to allow for the widening of Punt Road; the Administrative Appeals Tribunal (Planning) Act 1990 (Vic), which gave retrospective authority to the President of the AAT to delegate his powers under Acts other than the Administrative Appeals Tribunal Act 1984 (Vic) (which powers he or she could already delegate), and validated any such delegations which had already been made. Invalid administrative practices were also validated by the Health Legislation

However, it is important not to be too easily soothed by the talk of validating defects. One of the most wicked pieces of legislation ever passed by a modern parliament was the German Reichstag's validation of the actions of the SS during the night of the long knives. While we would not share the fears of some opponents of retrospective laws who speak as if Australian laws approached, or were heading towards, such infamy, we must always be wary of the natural view of government officials that they have done the right thing and that the law should be changed to reflect that view rather than their views being forced to conform to the laws.

Curative legislation may be thought necessary to prevent persons from receiving benefits which it was never intended they should receive. For instance, certain amendments made by the Social Security Amendment Act 1988 (Cth)[91] prevented "double dipping" by a person who has received or is eligible to receive payments under the Social Security Act 1947 (Cth) but who has also received statutory compensation or damages at common law. While the amendments were undoubtedly necessary to ensure that the intention behind the legislation was effected, they may also have caused considerable injustice to persons who acted in accordance with advice that they were eligible for the relevant pension. The facts of *Re Krzywak and Secretary, DSS*[92] demonstrate how hardship could have been caused by the retrospective nature of the amendments. The Administrative Appeals Tribunal (AAT) noted that the applicant had received incorrect legal advice that the compensation would not affect her benefit payment and had then continued to receive those payments. Accordingly, much of her common law compensation payment had been used to pay off debts, and she was now without savings or income. It is difficult to characterise the nature of the applicant's expectation that she was entitled to receive benefits. It was illegitimate in the sense that it was contrary to the intention behind the legislation, but that intention was perhaps not easily discoverable, while the initial continuance of benefits would have provided some rational basis for her expectation.[93] Her reliance seemed no less legitimate than that of those who take advantage of sections whose effect is similarly contrary to the intention behind the legislation. Indeed, there is no evidence that she had looked for

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Amendment Act (No 2) 1983 (Cth), Social Security and Repatriation Legislation Amendment Act 1984 (Cth), and Veterans' Affairs Legislation Amendment Act 1989 (Cth).

91 This was the second attempt to close this loophole. The first attempt was made with the Social Security and Veterans' Entitlements Amendment Act (No 2) 1987 (Cth); the partial failure of this attempt was exposed by the AAT in *Re Tallon and Secretary, DSS* (1988) 8 AAR 348. The second attempt was also only partially successful, because the drafters of the 1988 Act apparently failed to realise that the 1987 Act had not been retrospective. In *Re Jovanovic and Secretary, DSS* (1988) 16 ALD 8 and *Re Krzywak and Secretary, DSS* (1988) 9 AAR 275, the AAT found various ways to plug the gap. For further details, see P Hanks, "Compensation payment: precluded from pensions" (1988) 43 *SSR* 544; "Social Security Amendment Act" (1988) 43 *SSR* 556; "Compensation payments: retrospective amendments and legal creativity" (1988) 45 *SSR* 573; and "Compensation payment: preclusion" (1988) 45 *SSR* 580.

92 (1988) 9 AAR 275.

93 A less controversial example related to amendments to the provisions of the Superannuation Act 1976 (Cth) dealing with lump sums payable on the commutation of a pension which came into effect on 1 May 1987; failure to make the necessary consequential amendments at that time meant that a person renouncing an invalidity pension could be paid the amount of accumulated contributions twice. The Superannuation Legislation Amendment Act 1990 (Cth) prevented such a person from receiving this windfall gain.

such a section. It is interesting to note the relative lack of political opposition to this particular example of retrospective legislation.

It is not always the acts of the executive which require validation, however. The *Australian Financial Review* of 2 May 1991[94] noted that retrospective amendments to the new Companies Code would soon be made. The Code, which came into effect on 1 January 1991, requires that a company must display its ACN (Australian Company Number) on its seal and on all of its public and financial documents. In doing so, it must also include the full-stops between the letters A, C and N. If this is not done, then the documents may be void. It seems that this requirement is to be retrospectively removed as from the date of commencement of the Code, so as to avoid the invalidation of large numbers of transactions the only defects of which are the lack of the required full-stops.[95]

Perhaps the most controversial recent example of Australian validating legislation is the Excise Tariff Amendment Act 1990 (Cth), which retrospectively validated an excise duty which had been collected for nearly a decade and which was in the process of being challenged in the AAT.[96] The amendments in question altered the definition of "new oil" contained in the Excise Tariff Act 1921 so as to ensure that certain oil was excisable at the rate for "old oil". The saga is long and involved. In January 1980, the producers (Esso and Hematite Petroleum, a BHP subsidiary) sought a declaration from the Government that oil produced from certain zones in the Tuna field should be classified as new oil. If so classified, the oil would have been eligible for a concessional rate of duty. The Minister advised that the zones were not so eligible. No challenge was made by the producers to this decision, although the Act provided mechanisms for such a challenge. On 1 July 1984 the Act was amended and a new definition of "new oil" introduced. The Minister announced on 20 September 1984 that previous determinations would not be affected by the new definition. Excise duty therefore continued to be levied at the "old oil" rate. Again no challenge was made by the producers. The Minister of Small Business and Customs, in a letter to the SBC, acknowledged that:

> It is now known that the legislation which purported to effect this status was defective. Accordingly the excise paid at the "old oil" rate, while in accordance with the legislative

94 "Law Critics Score a Win on Points".

95 Another example of the need for the validation of non-governmental actions is provided by the Bayside Project Act 1988 (Vic), which stated that no authority or permit to develop or build on the Bayside Project site could be granted until the Environment Protection Authority (EPA) had declared that contamination had been removed. This created something of a Catch-22 situation, because the effect of the provision was that decontamination work could not be carried out without EPA approval, which approval could not be given until the decontamination work had been completed. The Bayside Project (Amendment) Act 1989 (Vic) provided that no authority was needed to carry out decontamination work, and that a person who had done such work should be taken to have been authorised to do so. The subsequent Act here effectively conferred an immunity from prosecution on those who may have carried out decontamination work without realising that they needed EPA approval to do so.

96 See "Government's action sets dangerous precedent for Tax-payers" (1990) 25 *Taxation in Australia* 546, and SBC, *Seventh Report of 1990* (7 November 1990) at 98-102 and 115-125.

intention and the producers' understanding of their liability, in fact exceeded that payable under the law.[97]

On 1 March 1990 BHP decided to challenge the relevant determinations by seeking a refund of excise. When the Collector of Customs refused the refund, BHP commenced proceedings in the AAT. It seems that $30M was at stake (with a similar amount for Esso). The legislation was passed when the case was part heard, and hence closed off the argument being put by BHP. The Minister, however, claimed that the amendments might "properly be characterised as curative, and merely effecting a correction of a technical defect in the 1984 legislation".[98] He also noted that the Act would impose no extra payments, and argued that failure to have made the amendments would have resulted in a "windfall" gain to the two producers affected. In his support he might have cited the United States Supreme Court, which has drawn a distinction between "a bare attempt of the legislature retroactively to create liabilities for transactions ... and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government", holding that the power to pass the latter kind of statute "is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration".[99]

BHP's version of events was, however, slightly different. They claimed that they had always believed that the oil should have been classified as "new oil", but that they were "constrained by officials' determinations, over the years, to accept their version".[100] They noted that the original determination was incorrect because it applied the wrong test, and that the 1984 amendments did not purport to validate any earlier decisions which might have been incorrect. They denied that their seeming lack of protest should be construed as acceptance of the determination and argued that if anyone had had a windfall it was consolidated revenue.[101] The case is in many ways analogous to legislation retrospectively validating the collection of fees. However, there are major differences. Of course, the scale of the money involved was incomparably greater (although this does not necessarily found an argument from justice and it is not clear that the detriment was greater than for Krzywak). More importantly, it seems arguable that there was no technical mistake in the original Acts, but simply a misinterpretation of them by the Minister. Finally, the producers had challenged the determinations (albeit belatedly) and the legislation deliberately pre-empted the outcome of the proceedings.

It seems from these facts that BHP must at some stage have developed an expectation that the higher rate of duty was not payable and that expectation was, by the Minister's own admission, in accordance with the law. BHP's expectation could therefore be classed as legitimate. On the other hand, BHP must always have known that the Government regarded the higher duty as payable. The decision by the Government retrospectively to ensure that it was payable cannot, therefore, have surprised BHP. Indeed, it might have been rational to assume that the Government would do so if challenged. Whatever BHP's expectations, it was clear that the Government had different expectations. Furthermore, BHP would presumably have

97 Reproduced in SBC, *Seventh Report of 1990* (7 November 1990) at 116.
98 Ibid.
99 *Graham v Goodcell* 282 US 409 at 429-430; 75 Law Ed 415 at 440-441 (1930).
100 Letter to SBC, reproduced above n 97 at 118.
101 Ibid at 124-125.

taken the duty payments into account when working out the cost of producing oil from those zones, and the fact that they continued to produce the oil presumably indicates that it remained profitable to do so. It seems to the present writers, therefore, that no great injustice was done to BHP by the retrospective validation of the duty. It is at this point that we should be reminded that reliance works both ways. The Government relied on this interpretation and would at least have passed new prospective legislation earlier if it had known of the possibility that it may have been misinterpreting the Act. It is interesting that this was classed as curative or validating rather than a matter of closing a loophole in a taxation law.

Overturning judicial decisions

As noted already, this category is in many ways a subset of the category above, in that the usual reason for enacting legislation to overturn a judicial decision is to make the law conform to that which the executive always believed it to be.[102] The distinguishing feature of the statutes included in this category is that the realisation that an erroneous view of the law has been relied upon is due to a court's interpretation of the statutory provision concerned. That a court has been involved points to another distinguishing feature: at least one person was aware of what turned out to be the correct view of the law. What is more, that person demonstrated reliance in a particularly expensive way, by taking the matter to court and making the executive rely on a judicial decision rather than on its own erroneous view. If the plaintiff had been wrong, he or she would have lost a lot of money and the Government could well have demanded its own costs. It seems unsporting to deprive a person of a hard-won victory in the courts. Further, there is concern that winning the case makes the litigant(s) known to the Government, so that a newly drafted law could be seen as a direct attack upon that individual or those individuals. In recognition of this, this kind of statute usually includes some sort of savings provisions. The incorporation of a savings provision is a way of respecting a person's reliance on the law as well as keeping a safe distance between the legislatures and the courts.[103] However, it should be pointed out that the identifiability of those

102 Some other statutes falling into this category have been or will be discussed elsewhere in this article, including the Repatriation Legislation Amendment Act 1985 (Cth), Veterans Entitlements (Transitional Provisions and Consequential Amendments) Act 1985 (Cth), Taxation Administration Amendment (Recovery of Tax Debts) Act 1985 (Cth) and Social Security Amendment Act 1988 (Cth).

103 A typical example is provided by the Superannuation Legislation Amendment Act 1986 (Cth), which gave retrospective validity to the Commissioner for Superannuation's interpretation of a section in the Superannuation Act 1976 allowing the Commissioner to issue a certificate stating that, due to a condition specified in the certificate, a person "is not likely" to continue as an eligible employee until retirement. The purpose of this section is to allow the payment of reduced benefits to an employee who retired on the grounds of invalidity where the Commissioner was of the opinion that the invalidity was caused or substantially contributed to by a condition specified in the certificate. The Commissioner had always interpreted the "is not likely" test as meaning "there is a real risk". In *Re Bewley and Commissioner for Superannuation* (1985) 8 ALD 293, however, the AAT held that the test actually meant "more probable than not". Any AAT decision, made before the date of Assent, to set aside the Commissioner's decision to issue a certificate was saved. Similarly, the Repatriation Act 1920 (Cth) provided that the Repatriation Commission (the Commission) should grant a claim for a pension unless it was satisfied beyond reasonable doubt that there were insufficient grounds for granting the claim. The Commission had

who may be affected by legislation is a common feature of much prospective legislation as well. Furthermore, this concession to the litigants means that not all cases are treated alike.

The Customs and Excise Legislation Amendment Act 1990 (Cth), which overturned the Federal Court's decision in *Turner and Anor v Jones*,[104] was unusual in that it contained no savings provision. Indeed, a savings provision would have defeated the very purpose of the Act, which was not just to overturn the general rule announced in the case, but also to overturn the specific ruling. The Federal Court had held invalid the seizure by Australian Customs of certain dangerous goods such as machine guns and flick knives. Unless the seizure had been retrospectively validated, the Department would have had no choice but to release these goods. This seems to be a case, therefore, where protecting the public was more important than respecting the particular individual's expectation of being able to import the goods in question.

Evaluation

It will usually be difficult for persons adversely affected by curative legislation to claim that they had acted in reliance on the defective legislation and been subsequently surprised by the curing of the defects. The probability is that persons affected by the curative legislation will, like the draftsperson of the defective legislation or the legislature which enacted it, have been unaware of the defects; indeed they may have organised their affairs in reliance on what the legislature intended the law to be, rather than on what the law was later interpreted to be. In such cases the reliance argument would actually work in favour of the retrospective statute: without it, people's reasonable, albeit erroneous, expectations might be defeated. Where a person was aware, or believed, that the view of the law being applied by the executive was erroneous, however, and challenged that view in the courts, then the curative legislation usually contains a savings provision to avoid depriving that person of victory. Reliance on the correct view of the law is thus respected. If the Customs and Excise Legislation Amendment Act 1990 seems unfair, it is precisely because it pre-empted the outcome of such a challenge. However, as we have seen, the savings clause is not essential to justice.

Criminal legislation

Effectiveness

Criminal laws are generally intended to identify forms of social behaviour which are damaging to society and to attach penalties to those who pursue them. When they work they do so first because the fact of disapproval is sufficient for most citizens to comply and because most of the remainder will comply for fear of the punishment or

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held it to be so satisfied whenever it failed to accept any evidence that a claimant's incapacity arose out of or was attributable to his or her war service. In *Repatriation Commission v O'Brien* (1985) 58 ALR 119, the High Court rejected this approach, but the effect of the decision was undone by the Repatriation Legislation Amendment Act 1985 (Cth). The Veteran's Entitlements (Transitional Provisions and Consequential Amendments) Act 1985 (Cth) applied the same amendments to another statute which contained an identical standard of proof provision.

104 (1990) 96 ALR 119.

social disapproval that goes with conviction. This is classically a case of the law affecting behaviour because citizens mould their behaviour to it. This is clearly all but impossible with retrospective legislation. A retrospective law is ineffective in deterring behaviour prior to its enactment. However, this does not mean that it is totally ineffective. Criminal laws are frequently seen as having several functions, including reinforcing social solidarity and making a strong moral statement of community or government views.

Human rights

It is now generally recognised that the maxim *nullum crimen nulla poene sine lege*[105] embodies a human right. This right has been given expression in various authoritative human rights documents, including the Universal Declaration of Human Rights 1948,[106] the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950[107] and the International Covenant on Civil and Political Rights 1966 (the Covenant), Article 15 of which is in the following terms:

> (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
>
> (2) Nothing in this article shall prejudice the trial and punishment of any person for any act or omission, which at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.

The rationale of the right is to avoid what Lon Fuller has called "the brutal absurdity of commanding a man today to do something yesterday",[108] or more accurately, the injustice of punishing someone "for acts which, at the time of their commission, did not entail any moral responsibility or guilt",[109] it being presumed that a lawful act is a morally innocent act.[110] Another way of expressing the rationale for the right was advanced by Toohey J in the recent case of *Polyukhovich v Commonwealth*, where he stated that:

> All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanctions; a choice made impossible if the conduct is assessed by rules made in the future.[111]

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105 There is no crime or punishment except in accordance with law.

106 Article 11(2).

107 Article 7.

108 L L Fuller, above n 7 at 59.

109 G Triggs, "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield" (1987) 16 *MULR* 382 at 392.

110 For a general examination of the right, see J Popple, "The Right to Protection from Retroactive Criminal Law" (1989) 13 *Crim L J* 251. Unfortunately one of Popple's main examples of an allegedly retrospective criminal law — the bottom-of-the-harbour legislation — conflates a non-retrospective statute (the Crimes (Taxation Offences) Act 1980 (Cth)) and a non-criminal one (the Taxation (Unpaid Company Tax) Assessment Act 1982 (Cth)): see at 259-260.

111 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 688.

Some of these statements do not distinguish between criminal and other laws. The key difference is that it is part of the way that criminal laws work that they publicly condemn certain kinds of action. It seems particularly unfair to impose this moral obloquy on those who knew nothing of the law at the time.

As can be seen from the expression of the right contained in the Covenant, the prohibition against retrospective criminal laws is not absolute. Specifically, it does not apply where the application of the retrospective law would lead to the imposition of a lighter penalty and would therefore be beneficial to the person affected, or where the person's actions were "criminal according to the general principles of law recognised by the community of nations". This latter exception recognises the fact that one cannot always answer a charge of moral wrongdoing by showing that one's actions were lawful at the time. In such circumstances, punishment may be justified, as was noted by Toohey J in *Polyukhovich's* case:

> In so far as the principle of non-retroactivity protects an individual accused, it is arguably a mutable principle, the right to protection dependent, to some extent on circumstances. Where, for example, the alleged moral transgression is extremely grave, where evidence of that transgression is particularly cogent or where the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression, there is a strong argument that the public interest in seeing the transgressors called to justice outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct.[112]

Where the conduct does not, for technical reasons, amount to a legal transgression, punishment can arguably be justified whether or not the persons were aware of the technical reasons which prevented their conduct from being criminal. If they were aware, it could be argued that the moral transgression is as great as it would have been were it also a legal transgression because of the element of premeditation: that is, they may have thought, "We can get away with this on a technicality". If they were not aware of the reasons, then it is arguable that they did not actually choose to avoid conduct which would attract criminal sanctions: the fact that criminal sanctions were not attracted was due to some misapprehension about the details of the law.[113]

Human rights and heinous crimes

Where the moral trangression is extremely grave, the argument is more simple: the act deserved punishment, notwithstanding that it was lawful at the time of commission. As Dawson J noted in *Polyukhovich's* case, "War crimes of the kind created by the Act could not, in any civilized community, have been described as blameless conduct

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112 Ibid at 689.

113 This argument could have been used to justify the Commonwealth Places (Application of Laws) Act 1970 (Cth). In *R v Phillips* (1970) 125 CLR 93 the accused was charged with an act of gross indecency under Western Australian law, the relevant act being committed on a RAAF base. The High Court held that upon acquisition of a place by the Commonwealth, State laws ceased to apply. This left a legal gap: no general criminal laws covered these places. Section 4(1) of the Act deemed the laws of the State in which a Commonwealth place was located to have applied at all times to such places. The Attorney-General admitted that "the Bill, if enacted, will apply State laws retrospectively in both civil and criminal matters": H Reps Deb 1970, Vol 70 at 2801. It is extremely unlikely, however, that persons caught by the Act would have been aware of the existence of a legal vacuum which rendered their actions non-criminal.

merely because of the absence of proscription by law".[114] The "general principles of law recognized by the community of nations" provide a standard against which conduct can be measured: if the conduct contravenes these principles, it can be assumed that it is so morally reprehensible that the question of lawfulness becomes irrelevant. The test is, however, undoubtedly a vague one: compare it for instance with the following Nazi addition to the German Criminal Code:

> Whoever commits an act which ... deserves punishment according to the principles of criminal law and to the sound feelings of the people, will be punished.[115]

The War Crimes Amendment Act 1989 (Cth) defines punishable war crimes by reference to the domestic law in force in Australia at the time the acts were committed, rather than by reference to international law.[116] This does not mean, however, that the war crimes created by the Act would not be "criminal according to the general principles of law recognised by the community of nations"; as Toohey J noted:

> Conduct constituting such an offence [murder] under the Act was conduct which attracted the sanctions of criminal laws generally, not just the censure of moral codes. In those circumstances, it cannot be said that an individual is caused detriment to which he or she would not have been subject at the time of the conduct, or that he or she had "no cause to abstain" from that conduct.[117]

As a final point, it can be argued that the use of retrospective laws can, in certain circumstances, actually be supportive of human rights in two ways. The threat of retrospective criminalisation of activities such as torture or genocide may act as a deterrent to those engaged in them, and thus reduce the prospect of such infringements of human rights occurring. The precedent created by the Nuremberg trials, or the prospect of a return to democratic rule, might well discourage an individual from joining in such crimes, even if authorised to do so by the laws in force at the time. This is another case in which the reliance argument runs the other way. As in all deterrence, the probability of arrest and conviction are relevant. The "other side" will have first to win, whether by victory in war or by a return to democracy, decide to prosecute and then successfully arrest and convict the individual. This may seem a remote probability and therefore be of little account. However, there are many people who will choose paths which avoid even a low chance of a catastrophic occurrence and will choose "safer" callings than mass murder and torture. Furthermore, the probability can radically change during the term of a government. Although the possibility of future punishment by a successor regime may carry little weight when the evil regime is at its height, it certainly concentrates the minds of members of an outgoing regime and leads to a quick, less violent, collapse as they attempt to ingratiate themselves with

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114 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 643.

115 *Reichsgesetzblatt* (1935) I Art 1, quoted in S Glueck, *The Nuremberg Trial and Aggressive War* (1946) at 73.

116 This fact was crucial to Brennan J's determination that the Act could not be supported on the external affairs power conferred by s 51(29) of the Commonwealth Constitution: *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 572. All of the other Justices, on the other hand, held that the external affairs power did support the Act simply because the conduct with which the Act was concerned occurred outside Australia.

117 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 691.

the new order.[118] In all this, the determination of the international community to deal with the worst crimes against human rights will increase both the actual probability and the all-important perceived probability of punishment.

Some might see this kind of probability as too little to gain in return for what may be seen as a restriction on the rule of law. However, while limiting the rule of the domestic law under which the human rights abuses were carried out, the threat of punishment is actually furthering the rule of international law which is attempting to protect human rights. It makes the law more effective by indicating the likelihood of punishment for those who commit certain acts and encourages individuals to make their behaviour conform to that law, so rendering the law effective. From the point of view of the torturer, his autonomous ability to choose life plans with certainty is limited. However, the international law is providing clear guidance: "Do not make life plans that include serious abuses of human rights; if you do then you have been forewarned of the consequences". But in any case, the autonomy and rights of the torturer are not the only ones to be considered: the victim's rights, autonomy, plans, and life itself are under threat. Few have difficulty giving greater weight to the victim at the expense of the careers of torturers and mass murderers.

We can understand the concerns of some that an important principle is compromised. For this reason it is highly desirable to establish specifically which human rights abuses can lead to retrospective punishment, preferably by international declaration rather than by case law. It would also be desirable to take into account the legitimacy of the regime. The degree of protection that reliance on existing laws should give should be related to the basis for those laws. We see real weakness in claims to reliance on laws permitting human rights abuses passed by a government which maintains its power by the abuse of human rights. There may even be a case for denying such reliance altogether. This is not to say that human rights abuses by democratic regimes should be excused, but that those who would rely on the laws of non-democratic regimes should be particularly wary.

Australian legislation

Although the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 have both been ratified by Australia, this does not prevent the passage of legislation contravening them. Nor does the Commonwealth Constitution, unlike the Constitution of the United States of America,[119] contain any prohibition against retrospective criminal laws, and the High Court has recently again upheld the constitutional validity of such laws in the four-to-three split decision in *Polyukovich*.[120] The appellant argued that the Act was invalid

118 This is suggested as a deliberate tactic by those who would restore democracy in countries which have suffered coups (see C Sampford, "Coups d'etats and Law" (1990) 13 *Bulletin of the Australian Society of Legal Philosophy* 253).

119 "No Bill of Attainder or ex post facto law shall be passed" by Congress (Art I, s 9, cl 3), or by the States (Art I, s 10, cl 1). These prohibitions have been construed by the United States Supreme Court as being limited to retrospective criminal laws: *Calder v Bull* 3 US (3 Dall) 386 (1798).

120 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; Brennan J did not, however, deny the validity of retrospective criminal laws *per se*, but held that the War Crimes Amendment Act 1988 (Cth) could not be supported on any Commonwealth head of power. Retrospective criminal laws were also upheld in *R v Kidman* (1915) 20 CLR 425 and *Millner*

because it enacted that past conduct would constitute a criminal offence. This would be an invalid attempt to usurp the judicial power of the Commonwealth, a power vested by the Constitution in Chapter III courts. The majority judges, Mason CJ, Dawson, Toohey and McHugh JJ, all agreed that a bill of attainder, or some other retrospective law which "adjudged persons guilty of a crime or imposed punishment on them"[121] would constitute trial by legislature, and therefore usurp judicial power. Deane and Gaudron JJ went further, arguing that the Act was invalid because:

> [I]t trespasses upon the exclusively judicial field of determining whether past conduct was a crime, that is to say, whether it was in fact an act or omission which the law "prohibited with penal consequences". Within that field, it negates the ordinary curial process by enacting, and requiring a finding of, criminal guilt regardless of whether there was in fact any contravention of any relevant law.[122]

The majority rejected this argument because the Act did not designate specific individuals either by name or characteristic;[123] rather, the focus of the Act was on conduct, and it did not foreclose a determination of guilt or innocence.[124]

It is not unconstitutional, therefore, for the Commonwealth Parliament to ignore or override the human right to be free from retrospective criminal laws. It might be thought that the right extends to retrospective statutes which, although not criminal, have the same purpose of deterrence or punishment as criminal statutes do. For example, the Public Service Legislation (Streamlining) Act 1986 (Cth), amended the provisions of the Public Service Act 1922 (Cth) dealing with disciplinary charges, among other things increasing the maximum possible salary deduction from $40 to $500. The amendment applied to disciplinary charges made before the commencement of the section which had not yet been finally disposed of.[125] This would seem to

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v Raith (1942) 66 CLR 1. Both cases dealt with wartime statutes. *R v Kidman* upheld the validity of the Crimes Act 1915 (Cth), s 2 of which added conspiracies to defraud the Commonwealth to the conspiracies declared by s 86 of Crimes Act 1914 to be indictable offences; s 3 deemed the Act to have been in force since the commencement of the 1914 Act. For an indictment of this Act, see D Gifford, *Statutory Interpretation* (1990) at 172. *Millner v Raith* upheld the validity of the Defence Act 1941 (Cth). Section 73C(1) of the Defence Act 1903 made it an offence fraudulently to supply to the Commonwealth for use by the Defence forces any article of food inferior in quality or less in quantity than that specified by contract. Section 3 of the Defence Act 1941 shifted the onus of proving absence of fraud from the Commonwealth to the defendant. Related changes were made by s 4, adding to the Principal Act s 73E which provided that where the person to whom s 73C applied was a body corporate, the directors and managers of the body corporate covered were also guilty of an offence. Section 2 of the Act deemed the amendments made by ss 3 and 4 to have come into operation as from the start of the war.

121 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536-537 per Mason CJ; see also 646 per Dawson J, 689 per Toohey J and 721 per McHugh J.

122 Ibid at 612 per Deane J; see also at 707-708 per Gaudron J.

123 Such as membership of an organisation. A statute was struck down as an unconstitutional Bill of Attainder by the United States Supreme Court in *United States v Brown* 381 US 437 (1965), where the characteristic was membership of the Communist Party.

124 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 536 per Mason CJ, 649 per Dawson J, and 721 per McHugh J.

125 The Minister argued that this might actually benefit persons charged by increasing the likelihood that the disciplinary tribunal would choose to impose the deduction penalty, rather than one of the harsher penalties such as deferral of an increment, demotion or

constitute an infringement, albeit a minor one, of the right not to have a heavier penalty imposed than that which existed at the time.

As already noted, the right not to be prosecuted or punished under retrospective criminal laws is subject to an exception where the application of the retrospective criminal law would be beneficial to the accused. Although the expression of the right contained in the Covenant refers only to the retrospective application of a lighter penalty than that which existed at the time of the commission of the offence, the beneficial principle would also, presumably, apply if a person would benefit from the application of a retrospectively created offence. At first sight it seems an absurd notion to suggest that persons could possibly benefit from the application to them of a law which criminalised conduct which was not criminal at the time it was committed. This, no doubt, is the reason the Covenant refers only to lighter penalties. Nevertheless, just such a claim was made in respect of the Extradition Act 1988 (Cth). The relevant part of the Act allows for the prosecution, rather than extradition, of certain Australian citizens. Section 45(1) creates a new offence where the following conditions are met:

a a person who is an Australian citizen engages in conduct outside Australia;

b the person subsequently enters, or is brought into, a State or Territory; and

c if, at the time the person engaged in the conduct, the person had engaged in the conduct in the State or Territory, the person would have committed an offence against a law of the State or Territory.

Effectively, then, the Act extends Australian criminal law to conduct which occurs outside Australia, which means that the Act is similar in operation to the War Crimes Amendment Act 1988 (Cth). By virtue of s 45(2), s 45(1) applies whether the conduct was engaged in, or the person entered the State or Territory, before or after the commencement of the Act. Section 45(3) provides that the Attorney-General's consent is necessary for a prosecution. Section 45(4) provides that this consent should only be given if a country has sought the extradition of the person in respect of an extraditable offence and the Attorney-General has (for various specified reasons) determined not to extradite the person. The Attorney-General stated that:

> The reason for giving the section a retrospective operation was to enable Australia to refuse extradition on the basis of citizenship from the time the legislation commences. Without sub-clause (2) Australia would, unless it was to create a haven for Australian criminals, in practical terms be unable to refuse to extradite on the basis of citizenship alone any citizen accused of an offence committed abroad before the commencement date. Thus the benefit of the section would not fall on Australian citizens for some years.[126]

It probably is preferable from the point of view of accused persons to be tried and punished in their own country rather than to be extradited to another country, both because the conditions in Australian prisons may be better than prison conditions in many of the countries to which the Attorney-General is likely to refuse to extradite a person, and because custody in an Australian prison will make it far more likely that a prisoner will be able to maintain contact with his or her family and friends. But it would be even better from the point of view of an Australian citizen in respect of

dismissal: see Letter to SBC, reproduced in SBC, *Twelfth to Twentieth Reports of 1986* (Parliamentary Paper No 445 of 1986) at 155-156.

126 Letter to SBC, reproduced in SBC, *Eleventh to Eighteenth Reports of 1987* (Parliamentary Paper No 442 of 1987) at 112.

whom an extradition order is requested and refused not to be punished at all. If the reality is that the extradition request would have been refused anyway — because, for instance, the alleged offence is a capital one in the country which is seeking extradition — then the retrospective criminalisation in Australia of the accused's conduct would clearly not be beneficial.

From a reliance point of view, it is possible that a person charged under the Act might have returned to Australia in reliance on the fact that extradition was, for whatever reason, unlikely. In other words, the person has chosen to take advantage of the haven referred to by the Attorney-General. This is a very different thing from saying that the person had chosen to avoid conduct which would attract criminal sanctions; rather the person would have chosen a course of conduct — returning to Australia — which made it unlikely that the criminal sanctions he or she had already attracted would be applied, which clearly makes the expectation of non-punishment less worthy of protection.

Tax legislation

The area of law which has undoubtedly aroused most of the controversy about retrospective legislation in Australia in the last 15 years is taxation. In order to understand why retrospective legislation was resorted to by the Fraser Government and attempted by the Hawke Government, it is necessary to recall the fact that by the end of the 1970s tax avoidance in Australia had become rife, and constituted a serious threat to revenue. The reasons for this were probably a combination of political indifference, lax administration by the tax authorities, an anti-revenue High Court, the promotion of schemes by elements of the accounting and legal professions and the erosion of the acceptance of an obligation to pay tax by many in business and the professions.

This is not the place to consider all the reasons for this phenomenon. The professional apologia has tended to criticise the Government on two grounds: the introduction of high rates of taxation and reliance on complicated tax legislation.[127] But the problem with the first criticism is that it was middle and lower income earners whose effective rates had risen due to bracket creep. The higher income earners who indulged in tax avoidance activities had received a three-fold bonus in the decade before the era of the schemes began. The top marginal rate had dropped from 65 per cent to 60 per cent, the extra 10 per cent tax surcharge on unearned income was dropped and the widespread introduction of family trusts and their acceptance by the federal Government (where most of the members of Cabinet had taken advantage of them) meant that the maximum rate of tax was generally 50 per cent. The problem with the second criticism is that the increasing complication of the tax laws was the direct result of attempts to plug tax loopholes (not least because the self-evident plug, s 260, was stripped of the meaning and effect it had previously had and subsequently regained). The truth, we suspect, is that feelings of obligation to pay tax are always vulnerable to temptation. When the opportunity to avoid tax was presented to some, they responded with glee. Others held out for much longer, but many succumbed either to the temptation or to the economic arguments that corporations which paid more tax than others would be less able to accumulate capital and compete with others.

127 This has received recognition by some academics such as G de Q Walker, above n 4, ch 13.

Curran schemes

By 1977 the Fraser Government had acknowledged the problem,[128] and soon admitted that tax avoidance was casting the burden of taxation disproportionately on to the shoulders of ordinary wage and salary earners, and thus undermining the fairness and equity of the tax system, as well as having a massively detrimental effect on the revenue.[129] Yet the Government had been slow to respond, and only did so when the budget deficit threatened to blowout in 1978.[130] Even then the Government was reluctant retrospectively to recoup tax which had been avoided and did so only in relation to Curran schemes. The response to the legislation was complete outrage, with an editorial in the *Australian Tax Review*, for instance, claiming that:

> It is almost universally acknowledged that retrospective legislation is highly undesirable ... The injustice to persons who are affected by retrospective laws is so obvious as not to require elaboration.[131]

Before accepting that there was any injustice in the retrospective nature of the anti-Curran legislation, however, one should first recall just how artificial, blatant and contrived the schemes were. Their precise details are now of purely historical interest,[132] but the effect of them was that through the issuing of bonus shares, an actual profit on an investment in shares could be converted into a loss, for tax purposes, of whatever magnitude the taxpayer desired. Liability to pay tax could in this way be eliminated for years in advance. It is difficult to see what substantive injustice lay in denying a taxpayer the right to claim a cost which he or she had never actually incurred (although some might have lost something because of the fees they had paid to the promoters of the schemes).

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128 See, for instance, Treasurer Lynch's Budget Speech, H Reps Deb 1977, Vol 106 at 54.

129 See Treasurer Howard's Second Reading Speech on the Income Tax Assessment Amendment Bill 1978, H Reps Deb 1978, Vol 108 at 1244-1245: at the time this speech was described as the dropping of a "bombshell".

130 Whether the budget blow-out was the cause of the Government eventually taking action is impossible to know, although the ALP certainly claimed that the Government was solely "motivated by concern at the enormity of the prospective loss of revenue": see Shadow Treasurer Willis, H Reps Deb 1978, Vol 109 at 1901. See also "Recent amendments to the Income Tax Assessment Act 1936; the issue of retrospectivity" (1978) 52 *ALJ* 299 at 300.

131 "Retrospective Legislation" (1978) 7 *Australian Tax Review* 165.

132 In *Curran's* case itself, the taxpayer purchased 200 shares in a private company for $186,000 (the figures have been rounded for convenience). As the principal shareholder he then caused a dividend of $191,000 to be paid in the form of 191,000 bonus shares. These dividends were not assessable as income because of s 44(2) of the Income Tax Assessment Act 1936 (Cth), which gives recognition to the fact that a bonus issue of shares does not constitute a realisation of income but rather a further sub-division of the shareholder's interest, ie before the bonus issue the shareholder had 200 shares worth a total of $186,000 and after the issue he had 191,200 shares worth a total of $186,000. The taxpayer then sold the 191,200 shares for $188,000, meaning that he had made a profit on the entire transaction of $2000. He claimed, however, that in determining his profit or loss figure, he should be allowed to deduct not only the cost of purchasing the original shares, but the par value of the bonus shares, namely $191,000. He claimed, in other words, that the bonus shares which had cost him nothing should for tax purposes be deemed to have cost him $191,000. The High Court (Barwick CJ, Menzies and Gibbs JJ, Stephen J dissenting) agreed. The transaction therefore gave rise to a tax loss of $189,000.

It is in fact highly doubtful that the expectations of citizens that they would be allowed to retain this benefit were either rational or legitimate. As regards the rationality of the expectation, the then Treasurer announced on 1 December 1974, less than one month after the High Court's decision in *Curran v The Commissioner of Taxation*,[133] that the decision would be reversed by statute.[134] A more general warning about blatant avoidance schemes had been given in the 1977 Budget speech;[135] it was to the date of this speech that the anti-Curran legislation was made retrospective. Given that some promoters of Curran schemes were offering money-back guarantees in the event of them being retrospectively struck down, many of those entering a Curran scheme would have been aware of the threat of retrospective legislation.[136] As the Australian Tax-payers' Association acerbically and pithily put it, "People 'doing Currans' knew the risks".[137] As regard the legitimacy of the expectation, it is hard not to see *Curran's* case as contrary to the underlying justifications for the system of deductions created by the Income Tax Assessment Act 1936. However, the closer one got to the arguments, the easier it became to forget the principle and to be swept up into the interpretative issues. Secondly, the tax avoidance industry was a pretty rough and ready one. The schemes were often "sold" to clients by suburban accountants who, from positions of long-standing trust, were marketing the schemes. The possibility of retrospective legislation was not always discussed, the public warnings either being not mentioned or downplayed. The opinions of QCs were frequently used in marketing schemes, even when they were out of date because of major legislative changes.

Whether or not the expectation was rational and legitimate and hence deserving of protection, it cannot really be argued that people who had "done a Curran" had acted to their *detriment* in relying on *Curran's* case. As *Curran's* case itself shows, the schemes were basically paper transactions which could easily yield a profit to the person engaging in them, even without taking into account the effect of the tax loss created. Some might argue that the anti-Curran legislation did not go nearly far enough, because it applied only to schemes where the bonus shares had been issued after 16 August 1977. This meant that those who had managed to "do a Curran" before that date could continue to benefit from their purely fictitious losses for many years to come. The Treasurer's announcement of 1 December 1974 could have been used to justify legislation retrospective to that date. This would have been another example of legislation by press release, albeit one where the delay between press release and legislation was longer than usual. In many ways this would actually have been more legitimate than relying on the general warning given in the Budget, as the 1974 statement was more precise and focused.[138] However, it would have been politically difficult. Although the previous Government could have been rightly blamed for not acting, the ALP response would have focused on the political turbulence engendered

133 (1973) 131 CLR 409.

134 Interestingly, it could therefore be argued that while there was no justification for making the anti-Curran part of the legislation which was eventually introduced retrospective to 1977, there was a justification for making it retrospective to 1974.

135 H Reps Deb 1977, Vol 106 at 54.

136 See Treasurer Howard's Second Reading Speech, H Reps Deb 1978, Vol 108 at 1245.

137 Editorial, (1978) 8 *Taxpayer* 99.

138 See discussion below.

by the then Opposition and their difficulty in securing passage of legislation through the Senate.

There was a good deal of anxiety in the Liberal party about the tactic and the uniqueness of the exercise was constantly emphasised. The clear impression was given, and several statements were made, that retrospective legislation of this kind would not again be enacted. Secure in that expectation, the tax avoidance industry flourished. If the Curran legislation was to be the only retrospective taxation statute, the strategy was obvious. Plan your scheme, market it, complete it and then move on to the next scheme when the discovery was announced.

Bottom-of-the-harbour schemes

Although Curran schemes might appear blatant in their avoidance of tax, they did not, at least, involve any outright criminality: a person involved in a Curran scheme had no reason to hide his or her transactions from the scrutiny of the Commissioner once they were completed. The evasion represented by the bottom-of-the-harbour schemes was, in one sense, of an entirely different character. The expectations of vendors that they would be able to avoid tax on the untaxed profits of their companies may have been rational — after all the Australian Taxation Office (the ATO) had become aware of this form of evasion as early as 1973,[139] but had done nothing about it — but they were certainly not legitimate. It required more than just a clever lawyer or accountant to strip untaxed profits from companies in such a way as to leave the vendor free of any liability to pay tax and the ultimate purchaser unable to pay it; it often also required links with organised crime and the deliberate flouting of company and tax laws. Of course the vendors involved in the schemes claimed that they knew nothing of what had happened to their companies after sale, and could not therefore be held responsible for their failure to pay tax; as Freiberg notes, this involved "the largest single case of mass wilful blindness known".[140]

There was no legislative response to the bottom-of-the-harbour evasion until late 1980 when the Crimes (Taxation Offences) Act was passed by the federal Parliament. This made it a criminal offence for a person to be a party to arrangements designed to render a company or trustee incapable of meeting its tax obligations. Although the introduction of criminal penalties into the taxation area was roundly condemned by the legal profession, it is credited with bringing the use of bottom-of-the-harbour schemes to a sudden halt.[141] The schemes did not, however, disappear from the headlines: the revelations of the *McCabe/Lafranchi Report*[142] and the Costigan Royal Commission into the Federated Ships Painters and Dockers' Union made tax-evasion a continuing source of political embarrassment for the Government. Accordingly, on 25 July 1982 Treasurer Howard announced that legislation would be introduced to recover tax evaded through bottom-of-the-harbour schemes.[143] The legislation

139 See A Freiberg, "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud" (1988) 12 *Crim LJ* 136 at 139.

140 Ibid at 143.

141 Ibid at 160.

142 *Report of Inspectors P W McCabe and D J Lafranchi Appointed to Investigate the Particular Affairs of Navillus Pty Ltd and 922 Other Companies* (1982).

143 The announcement is reprinted in I C F Spry QC, "Retrospective Legislation for Company Tax" (1982) 11 *Australian Tax Review* 152. The original Bill introduced on 23 September 1983 was withdrawn a month later, to be replaced with a more extensive Bill enabling recovery

imposed a tax liability on vendor shareholders equal to the amount of tax owed by the company which had been stripped. It applied to schemes entered into between 1 January 1972 and 4 December 1980.[144]

Smashing the tax-avoidance industry

Tax avoidance remained an issue in the 1983 Federal election campaign and the incoming Government promised in very clear terms to stamp out tax avoidance and to smash the tax avoidance industry, once and for all:

> [T]he Government is not prepared to leave open even the slightest possibility that blatant tax avoidance arrangements could have their intended effect. We accept that, as a general rule, individuals should not be disadvantaged by legislation operating retrospectively. Such legislation should be contemplated only in exceptional circumstances. For this Government, the threat to the equity of the taxation system posed by the unscrupulous use of these arrangements constitutes such circumstances.
>
> Accordingly, I now affirm that the Government will, as necessary, employ retrospective legislation to ensure that tax sought to be avoided under any blatant tax avoidance scheme that comes to light during our term of office will be collected, irrespective of when the scheme was entered into. Any legislation that it becomes necessary to introduce in pursuance of that policy will be made to operate from the date of first known use of the particular scheme.[145]

True to its word, the new government first sought to enact further bottom-of-the-harbour legislation in order to recover, among other things, personal tax on the sold company's undistributed profits.[146] The Government's Bills were, however, repeatedly defeated in the Senate.[147] Undaunted, on 9 October 1984 the Government introduced the Trust Recoupment Tax Assessment Bill[148] to deal with the practice known as trust income stripping. The Bill originally applied from 1 July 1980, but was amended in the Senate so as to apply to all trusts entered into for tax avoidance purposes on or after 12 May 1982. The significance of the latter date is that former Treasurer Howard had given a clear and unambiguous warning about the practice on 11 May 1982.[149] The effect of the Opposition's amendment, then, was to convert genuine retroactivity to

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of unpaid company tax from promoters as well as vendors. The following legislation was eventually enacted: Taxation (Unpaid Company Tax) Assessment Act 1982, Taxation (Unpaid Company Tax — Promoters) Act 1982, Taxation (Unpaid Company Tax — Vendors) Act 1982, Taxation (Unpaid Company Tax) (Consequential Amendments) Act 1982.

144 The second date being the date of commencement of the Crimes (Taxation Offences) Act 1980 (Cth).

145 Finance Minister Dawkins, "Retrospective legislation against tax avoidance", Press Release of 28 April 1983, reprinted in (1983) 17 *Taxation in Australia* 1006 at 1006-1007.

146 The logic being that if the profits had been distributed to the shareholders they would have been taxable as income; instead they were distributed in the then non-taxable capital form of consideration for the shares.

147 For a list of the defeated Bills, see A Freiberg, above n 139 at 166. The *Australian Financial Review* commented that the defeat of the first such Bill introduced by the Government was "a victory for selfishness and a defeat for fair play and social equity": Editorial, 3 June 1983.

148 The Bill lapsed on the dissolution of Parliament and was re-introduced on 22 February 1985.

149 Further warning was given in Finance Minister Dawkins's statement of 28 April 1983.

"legislation by press release". The then Finance Minister, Senator Walsh, described the difference between the Government and the Opposition in the following way:

> [T]he Government has said that if it is discovered that people have been plundering the public purse they will be required to pay the money back no matter when they did it. [The Opposition] has said that if it is discovered that people are plundering the public purse they will be told: "Those who plundered the purse yesterday and earlier can keep the money and those who plunder today and thereafter will have to pay it back."[150]

The Government resisted the amendment on two further grounds. Firstly, most of the income tax sought to be assessed related to the period between 1 July 1980 and 11 May 1982.[151] The second ground of objection was advanced by Treasurer Keating:

> Let me make it clear that the Government adheres to the view that a credible threat of retrospective legislation is the only certain way to smash the tax avoidance industry and ensure that it is not revived.[152]

Where the tax avoidance industry was concerned, the Hawke Government's policy was to speak loudly and carry a big stick. While the Opposition may have prevented the stick from ever being used, it seems likely that the precedent created by the Opposition's own legislation, together with the new Government's determination to see that tax avoidance schemes would never succeed, played an important part in the end of the mass tax avoidance industry.[153] That end was also in part caused by changing community perceptions, aggressive tactics by the ATO which made tax avoidance a potentially expensive and risky business, the new anti-avoidance provisions in Part IVA of the Income Tax Assessment Act 1936 (Cth) and a change in the judicial approach to interpreting tax legislation. It is quite possible that the last was actually the most important in the long term. However, in all these attitudinal changes it is also

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150 Sen Deb 1985, Vol 107 at 608.

151 The estimated figures being $9.5M out of $10M: see Treasurer Keating, H Reps Deb 1985, Vol 140 at 961.

152 H Reps Deb 1985, Vol 140 at 961. The Government suffered a similar rebuff with the Income Tax Assessment Amendment Act (No 5) 1984 (Cth), which introduced an anti-avoidance measure with respect to certain employee superannuation funds. The Bill for the Act had an effective date of 1 July 1977, but this was amended in the Senate. Two arguably retrospective taxation statutes were, however, passed in the period examined; neither statute was concerned with avoidance. The Petroleum Resource Rent Tax Assessment Act 1987 (Cth) had, according to the SBC, retrospective effect in that "assessable receipts derived by a person (and eligible expenditure incurred by a person) after [1 July 1984] may be taken into account in determining a person's liability to tax ... even though liability will only be imposed on profits of a year of tax, being a financial year commencing on or after 1 July 1986": SBC, *First to Tenth Reports of 1987* (Parliamentary Paper No 171 of 1987) at 57. A similarly backward-looking statute is the Customs Tariff (Stand-By Duty) Act 1985 (Cth), which imposes duty on oil imported by refiners who fail to take up their quota of Australian crude oil under the Crude Oil Marketing Partial Allocation Scheme for a period of three or six consecutive months (depending on the source of the oil). Although no duty would be imposed until the date of assent, the period of three or six consecutive months could start to run three or six months before that date: the potential for the Act to have a retrospective effect therefore only lasted for six months from the date of Assent.

153 While the "mass" tax avoidance industry of the 1970s is clearly dead, reports of the health of the industry are still mixed — and naturally clouded by definitional problems about industry and avoidance.

easy to see the pivotal role played by the retrospective legislation and the public debates about it.

A policy cannot be judged solely by reference to its success. The revolt was quelled, and the industry was either smashed or limited. But did the end justify the means used to achieve it?[154] The arguments advanced to justify retrospective tax measures are usually that it is necessary either to avoid enormous loss to the revenue, or to uphold the institution of taxation, or to ensure that the taxation system is fair and equitable. This last argument, which is essentially based on notions of justice, has been dealt with above. The arguments used to condemn retrospective legislation are usually that it breaches human rights, that it is unfair to the persons affected by it, who reasonably relied on the existing state of law in organising their affairs, and that it is bad for society as a whole in that it creates a "deplorable precedent"[155] which undermines confidence in the certainty of the law.

We have already seen that the expectations of Curran avoiders were neither rational nor legitimate, and that the expectations of bottom-of-the-harbour avoiders were, at the very least, illegitimate. As far as the "deplorable precedent" supposedly created by the anti-Curran and bottom-of-the-harbour legislation is concerned, that precedent has yet to be followed by the Commonwealth Parliament. Perhaps the fact that the legislature was on two occasions prepared to pass retrospective legislation coupled with the Hawke Government's announced willingness to retrospectively eliminate avoidance schemes, may have sufficiently deterred potential tax avoiders so as to render the actual use of further retrospective legislation unnecessary. We will examine the other arguments in turn.

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154 The use of metaphors in answering this question usually casts more light on the beliefs of the writer than it does on the merits of the debate. The use of a military metaphor makes retrospectivity seem eminently reasonable. For example: "For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their shoulders on to those of their fellow subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents ... It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers ... The fact that the section has to some extent a retroactive effect appears to us of no importance when it is realised that the legislation is a move in a long and fiercely contested battle with individuals who well understand the rigour of the contest": *Lord Howard de Walden v Inland Revenue Commissioners* [1942] 1 KB 389 at 397-398 per Lord Greene MR. Use of a games metaphor, on the other hand, makes a legislature which resorts to retrospectivity sound rather like a cad and a cheat. For example, "[I]t is suggested that there is an important distinction between either or both sides taking advantage of the existing rules, on the one hand, and one side not letting the other know what the rules are, on the other": H Reicher, "Legislation by Press Release" (1978) 7 *Australian Tax Review* 31 at 32. Just not cricket indeed! The adoption of one or other metaphor, then, prejudges the issue: the importance of winning a war justifies considerable sacrifice, including the sacrifice of certain liberties; the importance of a game lies in the manner in which it is played as much as in the eventual outcome.

155 D H Bloom, "'Bottom of the harbour' legislative action" (1982) 56 *ALJ* 668 at 672; see also I C F Spry QC, above n 143 at 158.

A necessary evil

One reason the Fraser Government claimed for treating Curran schemes differently from the other schemes targeted by the Income Tax Assessment Amendment Act 1978 was the "magnitude" of the evasion.[156] The same justifications were advanced for the bottom-of-the-harbour legislation. The then Treasurer referred to the "revenue implications"[157] of the schemes, and the fact that they had caused revenue losses of "hundreds of millions of dollars".[158] The ALP questioned "whether the extent of tax avoidance involved in a particular scheme provides a sound basis for differential treatments as to operative dates for prohibitive legislation".[159] In our view it does not. There are two major problems with this kind of argument. First, retrospective legislation is a very blunt instrument. If it is to be used only when there are billions of dollars at stake, it means that when schemes designed for a very small number of clients are discovered, the revenue loss is insufficient to justify retrospectivity. Tax avoidance would then move back up the income scale whence it had come.

Secondly, seeing retrospectivity as a necessary evil concedes and reinforces the validity of the arguments against retrospective rule-making. If the argument is that "we will act because, and only because, revenue loss is reaching crisis proportions",[160] then the argument appears to be one of sheer expedience and an argument from expedience will always have difficulty in standing up against an argument purportedly based on principle. It makes it appear that those against the legislation are the people of principle and those for it are sacrificing principle merely to balance the budget. This is deeply ironic, given the motivations of the people whose avoidance schemes are the subject of the most controversial retrospective legislation. It would be most unfortunate to allow them to avoid for their clients the responsibilities that others take for granted.

Protecting institutions

Another way of looking at these sorts of justifications is to see them as a claim that the evil of retrospectivity was necessary to protect the workings of vital institutions like taxation, or even the economy as a whole. It could be argued that the tax avoidance of the 1970s threatened the institution of taxation, in the sense that if the Curran and bottom-of-the-harbour avoiders were permitted to keep their gains, this could encourage others to engage in similarly dishonest acts. Only if there is a plausible threat of retrospective recoupment of avoided tax, it can be argued, will people pay the amount of tax intended by the legislature. Similarly it might be argued that the economy is severely distorted if the tax avoider is allowed to be in a better position than real risk takers. In general it is a dangerous and inefficient distortion to allow short-term profit-making schemes a benefit that it is not possible to give long-term ones. It is even more of a distortion when these schemes have no legitimate commercial

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156 H Reps Deb 1978, Vol 108 at 1245.

157 Treasurer Howard, Press Release of 25 July 1982, reprinted in (1982) 11 *Australian Tax Review* 152 at 154.

158 Ibid at 156.

159 Shadow Treasurer Willis, H Reps Deb 1978, Vol 109 at 1902. He argued that all of the schemes covered by the legislation should be targeted retrospectively.

160 This was how the ALP Opposition characterised the Government's actions, claiming that they were solely "motivated by concern at the enormity of the prospective loss of revenue": see Shadow Treasurer Willis, H Reps Deb 1978, Vol 109 at 1901.

function or genuine connection with the business of the taxpayer, and are entered into only because of the tax advantages involved.

Taxation, Criminal Law and Human rights

Finally, if there is a general right to be protected against retrospective laws, it is one about which international declarations are universally silent, and one which the United States Supreme Court has refused to recognise,[161] despite the fact that the United States Constitution could be interpreted as embodying such a presumption.[162] Indeed the Supreme Court has construed what appears to be a general prohibition against retrospective laws as if it were exclusively directed at retrospective criminal laws. It must therefore be concluded that there is no general human right to be free from the effect of non-criminal retrospective laws.

It is often assumed that acceptance of a general human right not to be subjected to retrospective criminal laws necessarily implies the existence of a further right to be free of all retrospective laws, especially taxation laws. For instance, one commentator has stated that he can see "no difference in principle between [retrospective taxation] legislation and retrospective criminal legislation".[163] The difference is simple:

> A revenue law stating what income is and is not assessable does not, after all, make certain activity unlawful or illegal. All it does is attach certain financial consequences to the pursuit of that activity.[164]

Tax is not a penalty for earning income, nor is there any social disapproval attaching to the fact that a demand for unpaid taxes has been made. When an assessment is issued, the ATO is not accusing the taxpayer of doing something wrong in earning more income than was declared. Earning a high income is generally regarded as virtuous and at times during the 1980s appeared to be the only virtue. Indeed it might be said that the ATO is simply accusing the taxpayer of excessive modesty in a society in which the ability to earn money is held in such high regard.

This does not, of course, mean that retrospective taxes and other non-criminal laws may not infringe human rights; but it does mean that they cannot be assumed to do so merely because retrospective criminal laws might. It also means that if there is a right to be free of retrospective laws generally, then it must rest on a different basis from that which supports the right to be free of retrospective criminal laws. The objection to non-criminal retrospective laws is that they make it difficult for persons to plan their affairs with certainty. Retrospective legislation could, therefore, be said to infringe human rights if it could be shown that there is a human right to be able to plan one's affairs.

If such a right exists, however, then it is only the wealthy or powerful who are able to enjoy it; one is suspicious of a right which is capable of enjoyment by only a small minority of the human race. The right, if it exists, is also constantly infringed. A factory closure, reduction in unemployment benefits, redundancy, or even a natural disaster would make it as difficult for individuals to plan their affairs with certainty as would a

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161 Starting with *Calder v Bull* 3 US (3 Dall) 386 (1798).

162 Article I, s 9, cl 3: "No Bill of Attainder or ex post facto law shall be passed" by Congress; art I, s 10, cl 1 places the same restriction on State legislatures.

163 D Russell, "Recent Amendments to Taxation Legislation" (1981) 15 *Taxation in Australia* 664 at 670.

164 Senator Evans, Sen Deb 1979, Vol 82 at 618.

retrospective tax. It could be countered that the right to plan is only infringed by governmental action, but given that acts of God or of the private sector can disrupt people's plans in precisely the same way as governmental action, there seems little basis for such a distinction.

Human plans can, furthermore, be disrupted equally by prospective as by retrospective laws: the effect of a law which prospectively removes the preferential taxation treatment of an investment will be basically the same as the effect of a law which removes the preferential treatment from a date preceding enactment. The reply to this argument is to assert that retrospective laws are different from prospective ones. But unless one starts with the preconception that retrospectivity is bad, it is difficult to see why they are so different. There must be a further premise before it can be argued that there is a right to plan one's affairs free from the effect of retrospective laws, when the effect on people's plans of such laws is no greater than the effect of prospective laws, natural disasters, or private actions.

It is highly unfortunate that governments on both sides have been far more sensitive to the upset plans of those who have tried to avoid paying taxes than to the plans of those who have tried to manufacture goods and services. The political rhetoric always favoured the latter, but the actions of government protect the former. The only kind of plans that can be fully protected against the effects of future legislative change are those that are completed over a short time-span. It is *possible* to give this kind of protection to a scheme that is completed in a day; but it is not possible to give such protection to a ten-year manufacturing or marketing strategy. The protection of the former and the exposure of the latter obviously tend to promote short-term planning, and this certainly appears to have happened over the last 20 years with a shift in national effort from long-term investment to gaining short-term benefits from short-term schemes.

It would seem highly desirable to redress this imbalance by increasing the degree of certainty enjoyed by long-term investors and possibly reducing the degree of certainty enjoyed by those who seek profits out of short-term schemes. Of course, it is impossible to provide guarantees for the future in market-related activities. However, it is noticeable that some of the more economically successful countries have concentrated their attention on this aspect of economic policy and attempted to minimise changes produced by tariff and exchange rates.

Acts retrospective to date of announcement — "Legislation by Press Release"

Increased use

The Hawke Government may have been deprived of its weapon of choice by an Opposition-controlled Senate, but it was quite prepared to make use of the practice derisively known as "legislation by press release". This practice essentially involves the Government announcing that changes will be made to the law, and that those changes will apply as from the date of announcement.[165] Use of this practice appears to have

165 We will not be considering here statutes which are effective from a date on or after the date of the Bill's introduction, but before the date upon which it receives the Royal Assent. Examples of such statutes include the Tobacco Charge (Nos 1 to 3) Amendment Acts 1982 (Cth), Sales Tax Laws Amendment Act (No 3) 1990 (Cth), Conservation, Forests and Lands Acts (Amendment) Act 1989 (Vic), and the Fisheries (Abalone Licence Charges) Act 1990

escalated over the last decade,[166] and criticism of this development has come from many quarters.[167] This form of legislation is clearly retrospective. At the time the legislation is passed (and critics can justly add the adverb "eventually") it is clearly retrospective: it removes some consequences and adds other consequences to actions that occurred prior to the eventual legislation. However, the practice is specifically designed to address the major argument against retrospectivity. It does not undermine reliance as no rational person would rely on a law remaining the same when the Minister has specifically said that it will be changed.

The practice has been used by a variety of Departments, using a variety of methods of making the announcement and for a variety of purposes, including to prevent the unauthorised use of the Advance Australia logo,[168] the making of changes to bounty schemes,[169] the declaration of the Republic of South Africa to be a "proscribed country" so as to deny benefits under the Export Market Development Grants Act 1974 to persons trading with South Africa,[170] the prevention of the Northern Territory Government from alienating any Crown land which was subject to a traditional land claim,[171] and the making of changes to the law regarding foreign takeovers.[172] The most frequent user of this practice, however, has undoubtedly been the Treasury and the ATO. The SBC has charged that the ATO has resorted to the practice "as a matter of course" and "as a matter of administrative routine", and the evidence seems to support such a charge.[173] The Committee argued that the practice should be used only in order

(Vic). The reason for not considering them is that the degree of retrospectivity involved is usually very small, and the unfairness which is arguably involved in forcing people to rely on the inherently less specific terms of a press release is not present when one is forcing them to rely on the terms of a Bill.

166 The reports of the SBC are neither intended for nor particularly suited to the collection of data, but the number of Acts identified by the Committee which fall into this category grew from one in 1982 to six in 1987, and has remained fairly constant since.

167 See, for instance, H Reicher, above n 154; SBC, *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 11-17; Sir Anthony Mason, "The state of the Australian judicature" (1989) *Law Institute Journal* 974 at 977; Law Council of Australia, "Legislation by Media Release", Media Release of 18 July 1988; Law Council of Australia, "Submission on Legislation by Media Release", attachment to Media Release of 18 July 1988; Law Council of Australia, "Views of Taxation Commissioner Condemned", Media Release of 5 October 1988; G de Q Walker, above n 4 at 320.

168 Advance Australia Logo Protection Act 1984 (Cth).

169 Bounty (Two-Stroke) Engines Act 1984 (Cth) and Bounty and Subsidy Legislation Amendment Act 1988 (Cth). In the latter case all known manufacturers of agricultural tractors in Australia were notified by telex of the removal of the bounty.

170 Export Market Development Grants Amendment Act 1985 (Cth).

171 Aboriginal Land Rights (Northern Territory) Amendment Act 1987 (Cth); in this case it was merely necessary to inform the Northern Territory Government that any such alienation would be of no effect.

172 Foreign Takeovers Amendment Act 1989 (Cth). Here the announcement took the form of "detailed corrigenda to the foreign investment guide-lines" which the Foreign Investment Review Board treated as if they were already law: see SBC, *First to Twenty-First Reports of 1989* (Parliamentary Paper No 466 of 1989) at 63.

173 See *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 13-14; see also the Committee's comments on the Taxation Laws Amendment (Company Distribution) Act 1987 (Cth), contained in SBC, *First to Tenth Reports of 1987* (Parliamentary Paper No 171 of 1987) at 180-181. It is hard to deny this contention, given the large number of Acts, in

to announce the closure of an "avenue for tax minimisation which has been abused".[174] Where avoidance is concerned, the rationale for allowing a statute to be retrospective to the date of its announcement is obvious: legislation takes time to draft, and if the executive is unable to announce the immediate closure of the "avenue" being exploited, the avenue will turn into a freeway.

However, the Committee also recognised the existence of a long-standing convention that where changes to taxation laws are announced in the Budget or in similar statements they should be retrospective to the date of announcement, so as to prevent tax-payers from taking advantage of any foreknowledge provided by the statement.[175] This convention extends to situations where the Parliament has enacted legislation permitting the responsible Minister to announce changes which can then be subsequently validated by legislation. For instance, the Excise Act 1901 (Cth) permits the Minister to alter excise tariffs by tabling an excise tariff proposal in Parliament; the proposal must then be validated by legislation within 12 months.[176] Despite the condemnation of the SBC, the Commonwealth Parliament has generally been prepared to pass tax legislation with effect from the date of the announcement which foreshadowed it. This may indicate the beginnings of an extension of the Budget convention to statements made at any time of the year; such an extension could be justified on the grounds that the taxation system is so complex that it requires fine-tuning throughout the year and not just at Budget time. Alternatively, Parliament's failure to reject such legislation may show how far the practice has gone in undermining the independence and authority of Parliament. We turn to a discussion of this latter possibility now.

Undermining Parliament

The most fundamental objection to "legislation by press release" is that "it involves a usurpation of the Parliament's legislative power by the Executive".[177] It should be

addition to the Acts discussed in greater detail in this part, which were enacted in order to give effect to a press release, including the Sales Tax (Exemptions and Classifications) Amendment Act 1984, Taxation Laws Amendment Act (No 2) 1985, Australian Capital Territory Tax (Transfers of Marketable Securities) Act 1986, Income Tax Assessment Amendment (Research and Development) Act 1986, Taxation Laws Amendment Act 1986, Taxation Laws Amendment Act (No 2) 1986, Taxation Laws Amendment Act (No 4) 1986, Taxation Laws Amendment Act (No 3) 1987, Taxation Laws Amendment Act (No 2) 1988, Sales Tax (Exemptions and Classifications) Amendment Act 1989, Taxation Laws Amendment Act (No 4) 1989, and Taxation Laws Amendment (Foreign Income) Act 1990.

174 *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 13. The Law Council of Australia recommended that not only must the legislation be of an anti-avoidance nature, but that the potential revenue loss must be so great and the scheme so blatant, artificial and contrived, that it is imperative that the scheme be terminated at once: "Submission on Legislation by Media Release", attachment to Media Release of 18 July 1988.

175 *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 13.

176 Excise Act 1901, s 114. The Customs Act 1901 contains a similar provision. Acts falling within this convention include the Bass Strait Freight Adjustment Levy Amendment Act 1985, Customs Tariff Amendment Act 1985, Excise Tariff Amendment Act 1985, Customs Tariff Amendment Act 1986, and the Excise Tariff Amendment Act 1986.

177 Law Council of Australia, "Legislation by Media Release", Media Release of 18 July 1988. See also SBC, *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 12-13 and Sir Anthony Mason, above n 167 at 977.

noted that this objection is completely different from the usual rule-of-law objection to retrospective laws. Generally the rule of law is concerned with ensuring that law is capable of guiding the behaviour of citizens, not with the identity or nature of the law-maker.[178] This does not make the criticism any less significant: in a political system which reserves the law-making function for the legislature, executive usurpation of that role is clearly a cause for concern. As the SBC has repeatedly said of the practice of making statutes retrospective to the date of their announcement:

> [It] treats the passage of the necessary retrospective legislation "ratifying" the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning arrangements which many people may have made in reliance on the Ministerial announcement.[179]

Parliament's freedom to amend Government legislation is thus drastically curtailed. The same might be said, of course, of the Budget speech, but Budget matters have always been considered the preserve of the Government rather than the Parliament. By making pre-emptive announcements outside the Budget the Government is effectively claiming that the area of law to be changed is also its exclusive preserve.

The most glaring recent example of such a governmental annexation of an area of law were the changes to the media ownership rules. On 27 November 1986 the Minister announced the Government's intention to move from the existing "two-station rule" for ownership of commercial television licences to a "75 per cent reach rule".[180] It was obvious that such a change in the rules would lead to a major media shake-up and result in drastic changes in the ownership and control of the media in Australia. The nature and pattern of media ownership were clearly an important issue, one which, it might be thought, Parliament should be free to debate. The Minister's announcement, however, effectively precluded such debate from occurring, because he went on to declare that the "two-station" rule would be repealed as from the date of announcement. With the rule effectively suspended, there was no reason for a person wishing to buy into the media not to act at once, and every reason to do so: ownership changes were occurring at dizzying speed and anyone who failed to buy or sell at this time might have lost the opportunity forever.[181] By the time the Bill was introduced into Parliament, the situation had changed: media ownership patterns now largely conformed to the rule which had been announced, rather than to the law as it stood. For Parliament, the choice was either to accept the substance of the changes or to reject the new rule and thus force some of the new owners to divest themselves of their acquisitions.

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178 See J Raz, "The Rule of Law and its Virtue" (1977) 93 *LQR* 195.

179 SBC, *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 12.

180 In fact the Broadcasting (Ownership and Control) Act 1987 (Cth), eventually substituted a "60% reach rule" for the old rule. This reduction was the result of a deal between the ALP and the National Party to get the Bill through the Senate. This Act was the focus of a major condemnation of the practice in the SBC's *Annual Report 1986-87* at 14-17. The Broadcasting (Ownership and Control) Act 1988 (Cth) was condemned by the SBC on the same grounds: see *First to Eighteenth Reports of 1988* (Parliamentary Paper No 402 of 1988) at 57.

181 For a description of these events see P Chadwick, *Media Mates: Carving up Australia's Media* (1989) at xix-xlvii.

In this case there was no good reason why the Government had to make the changes effective from the date of announcement.[182] Delaying the introduction of the new rule until it was enacted would simply have delayed the firing of the starting-gun for the mad media scramble from the date of the announcement to the date of enactment. Such a delay might even have produced a better outcome than that which actually resulted. More importantly, it would have given Parliament the ability to debate the new rule free from concern for those who had acted in reliance on the announcement.

An executive announcement that a particular law will be changed with effect from the date of announcement is obviously intended to make citizens rely on and be guided by the terms of the announcement rather than the law as it exists. If Parliament refuses to make the changes foreshadowed by the announcement, then it will be Parliament, rather than the executive, which upsets people's expectations. This means that such an announcement effectively precludes Parliament from giving independent consideration to the proposed changes. If we are to have a strong and independent Parliament, then such announcements should be restricted to those situations where there is a genuine need for immediate action,[183] or where the making of an announcement that the law is to be changed would, unless coupled with a promise to make the change effective from the date of the announcement, allow citizens to gain some unwarranted advantage from their foreknowledge of the change.[184]

Undermining respect for the law

It can also be argued that the practice of making statutes retrospective to the date of their announcement undermines the respect of citizens for the law in general. Sir Anthony Mason has argued that:

> The rise in the power of the Executive has contributed to a decline in respect for the law ... people are expected to comply, not with the law as it stands, but with what the Executive says that the law will be declared to be at some future time ... [T]hese procedures encourage people to act on the footing that the existing law is irrelevant.[185]

This criticism is exemplified by the Sales Tax Laws Amendment Act 1990. The Treasurer had announced that from 1 April 1990 increased sales tax would apply to luxury cars. On 27 March 1990 it was announced that the starting date would be postponed to 1 May 1990, because of the delay in finalising the Federal election result, and on 9 May 1990 the legislation was introduced. The SBC noted, however, that it was an offence for persons liable to pay sales tax (here the car dealers) to include in the price of a product an amount representing sales tax which exceeded the amount payable by them. This meant that dealers who acted on the announcement by including in the price of a luxury car an amount representing the proposed tax would commit an offence, because until the legislation was passed they were under no liability to pay the luxury car tax.

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182 Except, of course, to avoid Parliamentary debate on its policy.

183 The Advance Australia Logo Protection Act 1984, Export Market Development Grants Amendment Act 1985, and the Aboriginal Land Rights (Northern Territory) Amendment Act 1985 could probably all be justified on this basis, as could most anti-avoidance taxation measures.

184 The latter kind of situation most frequently occurs in the tax area.

185 Sir Anthony Mason, above n 167 at 977. See also SBC, *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 12-13.

The Treasurer announced that the ATO would not prosecute any dealer who acted in reliance on the announcement. The various announcements therefore constituted, in effect, incitement to break the law and commit a criminal offence. Although luxury car dealers might have felt secure from prosecution, they might also have experienced some unease about the fact that they were being forced to commit a crime. For these reasons the Senate amended the starting date of the new tax to 9 May 1990, the date on which the legislation was introduced, apparently failing to realise that this would still require car dealers to break the law between the date of introduction and Assent.

Undermining the rule of law

Another criticism of "legislation by press release" is that it "flouts the rule of law".[186] The major rule of law objection to retrospective laws, as we have seen, derives from the notion that the law should be capable of guiding the behaviour of citizens. Provided that an announcement foreshadowing changes to the law is specific and clear, the delay between announcement and enactment is not too great, and the legislation which is eventually enacted conforms to the announcement, there is no reason why the announcement should not be capable of guiding the behaviour of citizens until the legislation is introduced. Of course the announcement is not itself law, and neither does it make law, but as long as citizens receive accurate guidance about what laws will govern their affairs, then the rule of law has not been breached.

The rule of law argument does, however, have some relevance where the announcement is unspecific, ambiguous or vague, or where the legislation which is eventually introduced differs from that foreshadowed in the announcement, or where the delay between the announcement and the legislation is so great that this itself causes uncertainty. The rule of law criticism applies, in other words, not to the practice as a whole but to isolated instances of it. There were several such instances in the period examined, although in most cases the objectionable features of the relevant Bill did not actually become law. The most common criticisms of "legislation by press release" are dealt with below.

(1) Insufficiently clear announcements. It has been argued that forcing people to rely on the terms of a press release rather than legislation is always unfair because a press release will never be as specific as the eventual statute.[187] It is, of course, possible to imagine announcements which are so vague and unclear that they are simply incapable of providing accurate guidance to citizens as to the future state of the law, but it is rather more difficult to find examples. Generally, there are only problems for persons wishing to rely on a press release if their legal advisers attempt to interpret the press release as they would a statute. A press release in the taxation area, for instance, will usually identify a particular practice which is to be targeted by legislation. If persons relying on the press release adopt a purposive approach to its interpretation, they will probably refrain not only from the practice identified but also from any

186 See Law Council of Australia, "Views of Taxation Commissioner Condemned", Media Release of 5 October 1988.

187 See, for instance, Sir Anthony Mason, above n 167 at 977; SBC, *Annual Report 1986-87* (Parliamentary Paper No 443 of 1987) at 12. Reicher suggests that Governments might deliberately make vague announcements on the assumption that "the threat will be more effective than the deed itself": see H Reicher, above n 154 at 32. There is no evidence, however, that this has ever been done.

variants of it which create the same mischief as the practice identified, but which might happen to fall outside the precise terms of the announcement, or the tax adviser's interpretation of it. It is only through such an approach that the person will have taken account of the expectations of officials. Expectations formed on the basis of a literalist approach to interpreting a press release are probably not, therefore, rational.

If persons do have some genuine doubt as to whether the transaction they wish to enter will be covered by legislation foreshadowed in a press release, it is a relatively simple matter for them to contact the ATO and ask for a ruling. If they do not do so, this may be because they wish to exploit a loophole which they believe the ATO has failed to notice. This was certainly the Government's justification of the Taxation Laws Amendment Act 1987. It was argued that "those who sought to rely on a narrow interpretation of the announcement deliberately took a risk that the foreshadowed Bill might not be as complete in its outlawing of a tax avoidance practice as would obviously be necessary".[188] The ATO noted that it had received very few inquiries about the Bill, and suggested that this was because "people had seen a loophole in the announcement and did not really want to have that drawn to attention".[189] According to the Government, the chief effect of the Senate's eventual removal of those provisions which went beyond the announcement was to "confer an unwarranted benefit on a small group of eagle-eyed tax accountants and their clients who deliberately tried to frustrate the intention of the Treasurer's announcement".[190]

(2) Excessive delay. The problem with excessive delay is that it creates a degree of uncertainty about whether the legislation will ever in fact be introduced, and therefore about the law which will eventually govern the transactions concerned. There is also the problem, alluded to above, that a press release can never be as specific as a piece of legislation. This may not matter too much where the press release is only a stop-gap until the introduction of a Bill; it does matter where a citizen must rely on the terms of a press release for an extended period. Reicher argues that pre-announced legislation should be introduced no later than the following session of Parliament, "failing which the retrospective element should not be proceeded with".[191] The Law Council of Australia has suggested that the maximum permissible delay between the announcement and the public availability of the Bill should be one month. This figure is probably a little unrealistic, given the pressure under which parliamentary drafters work, a fact recognised by the Australian Democrats who, although largely adopting the Law Council guide-lines, proposed a maximum delay of six months.

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188 *Reports on the Sales Tax (Exemptions and Classifications) Amendment Bill (No 2) 1986 and Taxation Laws Amendment Bill (No 5) 1986* (Parliamentary Paper No 137 of 1987) at para 3.13.

189 Ibid at para 3.14.

190 Mr Cohen, H Reps Deb 1987, Vol 155 at 3950. A similar charge was made by the Opposition (but not the SBC) in relation to the announcements foreshadowing the Taxation Laws Amendment (Superannuation) Act 1989 (Cth). It was objected that following the superannuation changes announced in the May 1988 Economic Statement there had been "almost on a monthly basis ... constant changes, through press release, to the ball game": Mr Connolly, H Reps Deb 1989, Vol 166 at 2375. The strength of this charge is difficult to judge, but one can at least say that it did not convince the Australian Democrats who ensured the Bill's passage through the Senate.

191 H Reicher, above n 154 at 38.

One Bill amended in the Senate because of the allegedly excessive delay in introducing it was the Taxation Laws Amendment Act (No 4) 1988. There was a delay of three and a half years between the announcement on 4 February 1985 that non-cash business benefits would be taxed and the introduction of the legislation to do so on 31 August 1988. The Bill was amended to be effective from the date of introduction. The Government, of course, objected to the amendment. They argued that, while the revenue implications of the amendment were negligible — because the announcement had "stopped that practice stone dead" — the carrying of the amendment would undermine the credibility of future announcements that loopholes would be closed.[192] In fairness to the Opposition, it can better be argued that it was the delay and not the amendment which undermined the announcement.[193]

(3) Non-conformity to announcement. The greatest problem occurs where the legislation does not conform to the announcement which foreshadowed it. In such cases the guidance provided to citizens by the announcement is inaccurate. The most infamous recent example of this related to the Capital Gains Tax (CGT).[194] The introduction of a CGT was announced in the Treasurer's major tax reform statement of 19 September 1985. It was announced that the tax would apply to assets acquired on or after 20 September. In the statement the Treasurer said that, "The Government proposes to provide additional information concerning some design details that remain to be settled. These include ... the treatment of leases". This was the only reference to leases. When the legislation was introduced on 22 May 1986, however, leases were covered: a grant of a lease was treated as the sale of an asset in return for the lease premium.

The Grays, a married couple who owned and operated a service station were caught by the legislation. In March 1986 they had leased their service station to an oil company in order to reduce their debt. The company paid them a premium of $200,000. They were assessed for CGT of $85,000. The Grays appealed to the AAT and then to the Federal Court, losing both times.[195] However the Grays and those in a similar situation won in the end because the Taxation Laws Amendment Act 1990 changed the commencement date for created assets (such as leases) to 23 May 1986, the day after the CGT legislation was introduced into Parliament. However, it is not clear that the Grays suffered any real injustice. The declared aim of the CGT was to ensure that all gains, whether income or capital, were taxable and to stop the attempt to convert income into capital to avoid tax. It appears that this is exactly what the lawyers for the Grays attempted to do. They must have either assumed that the Treasurer did not mean what he said and that the law would not reflect its stated purposes or they did not take heed and continued their past practices oblivious to the principles

192 Senator Walsh, Sen Deb 1988, Vol 129 at 2216.

193 In three other cases, however, the Parliament enacted, without amendment, legislation where the delay between announcement and introduction was as great as, or even greater than, with the Taxation Laws Amendment Act (No 4) 1988. These were the Income Tax Assessment Amendment Act 1984, the Sales Tax Laws Amendment Act 1985 and the Taxation Laws Amendment Act 1985. Each of these Acts implemented announcements made by the former Fraser Government, which may explain their passage through the Senate.

194 See T Dodd, "The perils of the press release" *Australian Financial Review* 29 March 1989.

195 See *Gray v Federal Commissioner of Taxation* (1989) 20 ATR 649.

involved. Neither of these assumptions was wise, but a good publicity campaign helped them get what they wanted. It must be borne in mind that the result of that campaign was itself a retrospective change in taxation legislation.

The provisions of a Bill which fail to conform to the announcement foreshadowing them will not, however, always be passed by the Parliament. An example of this is provided by the Taxation Laws Amendment Act 1987 (Cth). The relevant press release was headed "Redeemable preference shares: income tax treatment". It explained how such shares were being used as a substitute for debt, because in certain circumstances the use of equity rather than debt meant that less tax was payable. The Opposition claimed that the Bill went further than the press release, however, in that it dealt with other share-based short-term financing arrangements, and with shares issued before the date of announcement, but acquired or renewed after. The ATO acknowledged that the announcement's lack of precision meant that the Bill involved "a degree of retrospectivity",[196] but the Government defended the Bill on the grounds that it was "necessary and justifiable to address fully and fairly the mischief indicated in the press release".[197] It is again arguable that the legislation should have been passed unamended because it must have been clear what that mischief was and any expectations which failed to take it into account were probably irrational. The fact that the legislation was amended, however, indicates the difficulties which a Government will have in enacting legislation going beyond the terms of the press release which purportedly announced it.

Evaluating the practice

Legislation by press release seldom involves the overriding of rational and legitimate expectations. It may do so where the announcement foreshadowing the legislation is vague or unspecific, or where the legislation which is introduced does not actually conform to the terms of the announcement. There can be no doubt that it is highly desirable for such press releases to be as clear, timely and explicit as possible. But, law-making is not a precise art either for legislatures or the judiciary. It is common for new case law to take years to develop. New legislation can wait years for authoritative interpretation. In this context the delay in achieving precision is less objectionable. In legislation by press release, it is only those expectations which are formed in reliance on the strict terms of the announcement and without regard to the probable expectations of officials as revealed by the announcement which are likely to be defeated; such expectations may not be rational. As a practical reality, however, legislation that significantly varies from the press release is seldom enacted by Parliament. The changes involve clarification or the closing of loopholes that enterprising tax lawyers thought the legislation might imply. The more troubling objection to the practice is that it undermines the institutions of Parliament and the law. This objection is less easily assessed, but the importance of these institutions means that the practice should be used only when it is genuinely warranted and a delay would undermine the intentions of the Bill.

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196 See comments of Mr Brian Nolan, Second Commissioner of Taxation, quoted by Senator Short, Sen Deb 1987, Vol 121 at 3304.

197 *Reports on the Sales Tax (Exemptions and Classifications) Amendment Bill (No 2) 1986 and Taxation Laws Amendment Bill (No 5) 1986* (Parliamentary Paper No 137 of 1987) at para 3.13.

Subordinate legislation

The scope for Commonwealth retrospective subordinate legislation is limited by the combined effect of s 48(2) of the Acts Interpretation Act 1901 (Cth) (the AIA) and the scrutiny of the Senate Standing Committee on Regulations and Ordinances.[198] A measure of the power of the Committee is the fact "that in the 58 years of its existence the Senate has never refused to support a recommendation of the Committee that a flawed instrument should be disallowed because a Minister was not willing to amend it".[199] Section 48(2) of the AIA provides as follows:

> Regulations shall not be expressed to take effect from a date before the date of notification in any case where, if the regulations so took effect:
>
> (a) the rights of a person (other than the Commonwealth or an authority of the Commonwealth) existing at the date of notification, would be affected in a manner prejudicial to that person; or
>
> (b) liabilities would be imposed on any person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of notification;
>
> and where, in any regulations, any provision is made in contravention of this subsection, that provision has no effect.

It is basic constitutional law that one Parliament cannot bind its successors, so there is nothing to prevent the Parliament from conferring a power to make delegated legislation in contravention of s 48(2), provided that it does so in sufficiently explicit terms. There is, in any case, no problem with regulations which operate beneficially on those they affect, but to be certain that the regulations will be valid the legislation conferring the regulatory power may, nevertheless, specifically override s 48(2) of the AIA. Section 168 of the Superannuation Legislation Amendment Act (No 2) 1986 (Cth), for instance, allowed for the making of regulations with effect from 15 March 1981 and 31 March 1977; the regulations were necessary to remedy certain oversights and omissions so as to protect persons re-appointed to the Commonwealth Public Service from disadvantage in respect of their superannuation rights.[200]

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198 The only State with an equivalent provision and committee is New South Wales, with s 39(1) of the Interpretation Act 1987 (NSW) and the Regulation Review Committee of the Parliament of New South Wales, which was established under the Regulation Review Act 1987 (NSW). The Legal and Constitutional Affairs Committee of the Parliament of Victoria also, among other things, scrutinises subordinate legislation. For further information about parliamentary scrutiny of delegated legislation, see M Allars, *Introduction to Australian Administrative Law* (1990) at 340-345. On the interpretation of potentially retrospective regulations, see D C Pearce, *Delegated Legislation in Australia and New Zealand* (1977) at paras 641-650.

199 Senate Standing Committee on Regulations and Ordinances, *Eighty-Sixth Report* (Parliamentary Paper No 93 of 1990) at 1.

200 Other examples of specifically retrospective regulatory powers are provided by the Taxation Laws Amendment (Foreign Income) Act 1990 (Cth), which allowed regulations to be made with effect from or after the date upon which anti-avoidance accruals tax measures were announced; Parliamentary Contributory Superannuation Amendment Act 1983 (Cth); Occupational Superannuation Standards Act 1987 (Cth); and the Foreign States Immunity Act 1985 (Cth), which confers certain immunities from action on foreign states and their representatives, but allows the Governor-General to make regulations restricting these immunities and such regulations may be expressed to apply to proceedings which have already been commenced. This gave effect to a recommendation of the Australian

The Senate Standing Committee on Regulations and Ordinances is not concerned so much with regulatory powers as with the regulations themselves. Its reports are not principally directed to whether the rights or interests of anyone are adversely affected. Its major concern seems to be that, "Ministers and departmental managers with delegated law-making powers must demand a high level of competence in the monitoring of possible changes to entitlements if the use of retrospectivity is not to be seen merely as a painless alternative to the demands of efficiency".[201] Its comments on retrospective regulations generally amount to complaints about the time taken by the relevant department to make the changes, the rationale behind this complaint being "to ensure that instruments coming before the Parliament represent, as far as possible, authorisations for *contemporaneous*, and not historical, expenditure".[202]

In the three reports examined, all but one of the retrospective regulations commented on conferred benefits on those they affected, usually by validating payments or allowances made or concessions given.[203] The regulations commented on are essentially curative, therefore, and the same justifications that were cited in relation to curative legislative also apply to them. The sole exception was the retrospective removal of a requirement that the ACT Director of Public Prosecutions consent to an incest prosecution where the victim was less than 16 years old. The Attorney-General assured the Committee, however, that no charges which had been improperly laid without such consent being given would thereby be validated.[204]

Procedural legislation

There is a general presumption of statutory interpretation that, in the absence of a clear intention to the contrary, statutes do not have retrospective operation.[205] Procedural statutes, however, are applied retrospectively to all actions or proceedings which are not completed at the time of enactment, no matter when the right to the action accrued. The reason courts prefer to apply procedural statutes retrospectively is no doubt to avoid the complications which would result if a court had to apply different procedural rules according to when the action accrued or was instituted. Any argument that this produces unfairness is rejected on the grounds that:

> No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done.[206]

Where procedural changes are concerned, in other words, courts assume that rights are not affected, so that there will be no injustice in applying the changes retrospectively. As the above statement shows, however, the presumption is rebuttable: if injustice would be occasioned by the application of a procedural change to an existing action,

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Law Reform Commission, which argued that a purely prospective power would hamper the ability of the Government to negotiate claim settlement agreements with other countries: Law Reform Commission, *Foreign State Immunity*, (Report No 24, 1984) at 162.

201 Senate Standing Committee on Regulations and Ordinances, *Eighty-Third Report* (1988) at 41.

202 *Eighty-Fifth Report* (1989) at 30. Emphasis in original.

203 See *Eighty-Third Report* at 39-41, *Eighty-Fifth Report* at 29-31 and *Eighty-Sixth Report* at 26.

204 *Eighty-Third Report* at 39-40.

205 See D C Pearce and R S Geddes, above n 12, ch 10.

206 Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at 69; quoted approvingly by Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

the change will not be applied. How do courts articulate the distinction between procedural statutes and those affecting substantive rights? In the leading Australian case of *Maxwell v Murphy*,[207] Fullager J described the distinction as one between "statutes which create or modify or abolish substantive rights or liabilities on the one hand and statutes which deal with the pursuit of remedies on the other hand".[208] He went on to note, however, that the distinction "has not unnaturally been criticised on the grounds that it does not represent a logical dichotomy ... if one traces any substantive right back far enough, it will be found 'secreted in the interstices of procedure'".[209] This, together with the overriding question of whether injustice will occur, means that the distinction is often easier to state than it is to draw.

Statutes of limitation

As far as the courts are concerned, statutes of limitation are presumed to be procedural, but the presumption is rebuttable.[210] In particular, it has been said that:

> Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural.[211]

The Taxation Administration Amendment (Recovery of Tax Debts) Act 1986 (Cth) was passed in order to overcome the effect of the decision of the Queensland Supreme Court in *Deputy Commissioner of Taxation v Moorebank Pty Ltd*.[212] Prior to that decision the ATO had always assumed that taxation debts could, by virtue of Crown prerogative, be recovered at any time. In *Moorebank*, however, it was held that the relevant State or Territory limitation periods apply to actions for the recovery of such debts. The Deputy Commissioner appealed to the High Court, but in the meantime this Act was passed to provide that the relevant limitation period would apply not from the date upon which the action accrued, but from the date upon which all proceedings arising out of an objection to the assessment of the debt were finalised.

These provisions applied to all actions for taxation debt, whether they accrued before or after the commencement of the section, other than those which had been determined before the introduction of the Bill on the basis that a limitation period applied. Whether this extension of the limitation period could be described as procedural would depend upon whether the statute revived any actions which would otherwise have been statute-barred, or whether it simply allowed extra time for the issuing of proceedings in respect of actions which had not yet been barred. Even if it did revive certain actions, it is doubtful that any unfairness would be involved: the ATO would still be able to recover only the amount of tax which had been payable before the expiration of the limitation period, and the taxpayer could not be surprised

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207 (1957) 96 CLR 261.
208 Ibid at 285.
209 Ibid.
210 Ibid, particularly at 286-291 per Fullager J.
211 *Maxwell v Murphy* (1957) 96 CLR 261 at 278 per Williams J, quoted approvingly by Gibbs J in *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228 at 241.
212 (1986) 70 ALR 357.

by the fact that he or she was liable to tax.[213] Ultimately, however, the High Court upheld the Deputy Commissioner's appeal, thus rendering the Act unnecessary.[214]

Right of subrogation

The Legal Profession Practice (Amendment) Act 1989 (Vic) applied where the innocent employer of a defalcating solicitor had paid compensation to the victim of the defalcation. Section 12 gave the employer a right of subrogation to the victim's normal claim against the Solicitor's Guarantee Fund. The right already existed where the defalcating solicitor was a partner of the compensating solicitor. The right was conferred with effect from 6 November 1986. This was not the date of an earlier amendment, nor was the provision mentioned in the Parliamentary debates on the Bill, so its significance can only be guessed at, but it is at least possible that it was chosen in order to give a right of action to a specific compensating solicitor. If the right was exercised it would in turn give rise to a right of subrogation on the part of the fund against the defalcating solicitor. The defalcating employee solicitor might, perhaps, argue that it was unfair that he or she could be sued as a result of a person exercising a right of subrogation which had not existed at the time at which the defalcation occurred. The solicitor could not, however, argue that he or she was being sued for something which was not actionable at the time of the defalcation. Indeed, the cause of justice was probably advanced by ensuring that the person who was ultimately liable for the cost of compensation was the person who had caused the loss.

New remedies or penalties

On several occasions the courts have held that a statute conferring on a court a new power to grant a remedy or make an order is procedural.[215] This is perhaps surprising as the granting of such a remedy or the making of such an order could drastically alter the outcome of an action. This is even more obvious where the penalty for a criminal offence is increased: the cases are divided as to whether the penalty to be imposed on a convicted person is that which existed at the date of the offence or that which exists at the date of conviction.[216]

An example of this is provided by the Crimes Legislation Amendment Act 1989 (Cth). The relevant sections dealt with penalties for persons convicted of narcotics offences under the Customs Act 1901 (Cth). The pecuniary penalty which can be imposed under the Principal Act is calculated by reference to the benefit the person derived from engaging in the narcotics trade. One of the amendments was intended to allow a court to "lift the corporate veil" in making this calculation, by allowing the court to treat as the defendant's property any property which it considers to be under the defendant's effective control. The amendment applied to proceedings instituted

213 It was essentially on this ground that the United States Supreme Court in *Graham v Goodcell* 282 US 409 at 430; 75 Law Ed 415 at 440 (1930) held that a statute which allowed the collection of tax debts which had become statute-barred was not in breach of the due process clause of the United States Constitution.

214 *Deputy Federal Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55; 78 ALR 641.

215 See *Minister for Home and Territories v Smith* (1924) 35 CLR 120, *Realty Development & Mortgage Co Ltd v Londish* (1967) 87 WN (Pt 1) (NSW) 92, and *Re Hassell; ex parte Pride* (1984) 52 ALR 181, all of which are summarised in D C Pearce and R S Geddes, above n 12 at 190.

216 See D C Pearce and R S Geddes, above n 12 at 171-172.

before the commencement of the amending Act where the hearings had not yet begun. The amendment did not, therefore, allow for the imposition of a heavier penalty than that which existed at the time of the offence, but rather increased the likelihood that the penalty imposed would accurately reflect the benefit a person had derived from involvement in the narcotics trade. A related amendment allowed the court to order that a pecuniary penalty could be satisfied from property which it considered to be under the defendant's effective control. Such an order could be sought and made at any time after the hearing at which the pecuniary penalty was imposed, including where the person against whom the order was sought had been tried, convicted and sentenced before the commencement of the amending Act. Again, this would not mean that a heavier penalty could be imposed, but only that it would be more likely that the penalty already imposed would actually be recovered. The only expectations which might have been defeated by this legislation would be an expectation by a person accused or convicted of trafficking in narcotics that he or she would be able to retain some of the profits of this activity by hiding them behind a corporate veil. Such an expectation is clearly not based on the underlying purposes of the law.[217]

Beneficial legislation

Obviously there are few objections from those on whom a law confers a benefit, retrospectively or otherwise.[218] The fact that such a statute rarely creates controversy probably means that people are generally unaware that retrospective statutes are ever beneficial, yet such statutes are actually quite frequent. The statutes discussed under this category are distinguished from those beneficial statutes discussed above, such as some of those included in the "restorative" category, because they are purely beneficial. They are, in effect, the statutory equivalents of *ex gratia* payments, in the sense that the persons receiving the benefits would have had no expectation that the benefit would be conferred.

The benefit may take the form of the legislature forgoing revenue to which it is legally entitled. An example of this is the Australian Capital Territory (Vehicle Registration) Amendment Act 1982 (Cth), which exempted from registration tax vehicle transfers occurring in specified circumstances, including in the course of winding up a deceased estate or on the repossession of a vehicle by a hire-purchase

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217 Another procedural statute is the Bankruptcy Amendment Act 1987 (Cth) which inserted a new Division 4A into the Bankruptcy Act 1966 (Cth), allowing for the making of certain orders in relation to the property of a legal entity controlled by a bankrupt. The new division applies "in relation to a bankrupt in respect of a bankruptcy whenever the date of the bankruptcy occurred": s 51(2). This would mean that the consequences of a declaration of bankruptcy may have differed from the consequences which were foreseeable at the time of the declaration. It is arguable that this is not a case of retrospectivity at all, however, on the grounds that the future consequences depended not on a prior event — a declaration of bankruptcy — but on a person's status as a bankrupt: see E A Driedger, above n 11 at 272-275.

218 Nor does anyone object when the Commonwealth imposes an adverse effect upon itself or its statutory authorities. One statute which did this was the Commonwealth Borrowing Levy Amendment Act 1989, which retrospectively added Aerospace Technologies of Australia Pty Ltd and the Civil Aviation Authority to the list of bodies liable to pay the borrowing levy under the Commonwealth Borrowing Levy Act 1987.

company.[219] Another means of conferring a benefit is for the legislature retrospectively to confer the right to payments or allowances. An example of this is the Veterans' Affairs Legislation Amendment Act 1989 (Cth), which backdated certain pension increases.[220] The benefit conferred need not be directly financial: an example of a non-financial (or only indirectly financial) benefit was the extension of the period of validity for drivers' licences issued under the Motor Car Act 1958 (Vic) from 12 months to 3 years.[221]

Most of these Acts are likely to be passed with good reason and can be justified as readily as other prospective or retrospective legislation on the grounds of justice, equity, protecting institutions and so on. However, we would caution those who would ignore them in discussions of retrospectivity. To say that they do not matter because they are beneficial makes the same assumption about public revenue that tax avoiders and pork barrellers make; that it does not matter if it is the government's money. Any government payment reduces the options for other initiatives. Every dollar foregone in a "beneficial" retrospective statute is a dollar that is unavailable for either welfare payments, infrastructure or tax cuts. Public Choice theorists should be particularly careful as this is an area where lobbyists may plead for favours for their constituencies without any possibility of wider public benefit. Being retrospective, the law cannot provide an incentive to the future behaviour of citizens which is so often an object of prospective beneficial statutes. This is not to say that beneficial retrospective statutes should be banned any more than we would say that retrospective taxation statutes should always be banned. It is to say that such legislation should be carefully judged by the normal standards of justice and equity as to its content, and reliance arguments, both positive and negative, should be considered in relation to its timing.

CONCLUSION

Our conclusions can be summarised as follows. Firstly, retrospective legislation is by no means rare. Secondly, it is generally not controversial. Thirdly, many of the broadest criticisms, that it is necessarily undemocratic, unjust or contrary to human rights, are either not made out or reducible to issues of reliance. However, the reliance argument is a very important one. Citizens form expectations that the law which will be applied to them, if their actions and transactions come to court, will be the law as it stood at the time they acted and transacted. Encouraging that reliance tends to make

219 Other examples are the Income Tax Assessment Amendment (No 5) 1982 (Cth), retrospective conferral of a "retention allowance" to private companies in respect of their distributable income; Income Tax Assessment Amendment Act (No 3) 1984 (Cth), widening of an exemption; Customs and Excise Legislation Amendment Act (No 3) Act 1989 (Cth), extension of rebate on diesel fuel to certain activities; Sales Tax Laws Amendment Act (No 3) 1990 (Cth), removal of sales tax from certain computer equipment where purchased by registered manufacturers; Taxation Laws Amendment Act (No 5) 1990 (Cth), widening of the exemption from Capital Gains Tax for personal homes, retrospective to the introduction of the CGT.

220 Other examples include the Judicial and Statutory Officers Remuneration Legislation Amendment Act 1989 (Cth), which made minor and beneficial amendments to salary provisions; Social Security and Veterans' Affairs Legislation Amendment Act 1989 (Cth); Social Security Legislation Amendment Act 1990 (Cth); and the Veterans' Affairs Legislation Amendment Act 1990 (Cth) which backdated an increase in allowances.

221 Road Safety (Miscellaneous Amendments) Act 1989 (Vic).

the law more effective and gives citizens the opportunity to plan (with beneficial, if sometimes limited, improvements in liberty and autonomy). Fourthly, reliance is not a one-way argument. It can sometimes actually be used to justify retrospective legislation, either because it is undesirable that citizens rely on the law continuing unchanged, or because citizens have acted in reliance on an erroneous view of the law which the retrospective statute is intended to validate. Indeed, there are some cases where we argue that the last thing we should do is to protect reliance and that forewarning of this would assist in important human rights goals. Fifthly, the arguments for protecting reliance are much stronger in criminal law than other areas of law and support a defeasible human right against retrospective criminal legislation. However, such a right might be outweighed by arguments from reliance and other human rights arguments, thereby justifying retrospective legislation.

Retrospective law-making is neither particularly rare nor necessarily evil. It plays a more significant part in Australian legislation than most would imagine. Much of it can be justified. Some of it is very contentious and the justification should be subject to intensive and, hopefully, rigorous debate. Where retrospective laws are mooted there will be important arguments that have to be addressed; most of them against, but some of them for, such legislation. However, the fact that the proposed statute is "retrospective" should merely be the starting-point of that debate, not its conclusion.