

Australian Options – Public Forum
Elliott Johnston QC AO
The rule of law – what it means and how it affects the rights of people

I acknowledge that I speak tonight on Kurna land. I thank the Dunstan Foundation for making this meeting possible and the law faculties for their aid and I pay respect to Don Dunstan whose leadership gave us the first ever democratically elected Parliament in South Australia, the first Sex Discrimination Act in our country and the first conveyance of land to Aboriginal people in our country. I speak here as the representative of the broad left journal Australian Options, which was established by people who thought that following what had happened around the world, the left had lost its concept of the way forward and we had to find that way. We have lasted almost ten years, we still think that is the task.

The Rule of Law is a fundamental concept of our society and many others. It existed in the ancient Greek civilisation; in ancient Rome. In Australia we inherited our concepts of the rule from Britain from Magna Carta 1216 and from the Great Revolution of 1688 when Mary, daughter of the fleeing James the Second, returned to England with her husband, William of Orange, and together they accepted the Crown after acknowledging themselves bound by the Declaration of Right. By that Declaration the power of Parliament was secured against the power of the Crown. The Rule of Law was firmly established. The meaning of the rule is very simple, every member of the society is bound by the law. It is the function of the Parliament to make the laws and of the courts to interpret the law and apply it to the facts; but if the Parliament disagrees with the interpretation it may by statute amend the law. The Rule of Law is fundamentally important. It binds us all.

In Australia the position is slightly different from the UK as we chose a Federal organisation, we have a Commonwealth and State Parliament with different powers to make laws and the High Court having power to rule on their validity. I wish to make it absolutely clear that I support the Rule of Law. It is crucial to any decent society. Without the Rule of Law the citizens have no idea as to either rights or duties and no idea as to how to enforce their rights, or the limit of their duties. But I make it equally clear, that it is absolutely wrong to think the Rule of Law is synonymous with the question of fairness or justice to all. That depends upon the law. After Magna Carta, Britain was ruled by the Barons and the King in their own interests; after the Great revolution of 1688 by the Whigs the party of the developing trading and commercial class in the interests of their class. The feudal serfs were driven off the land into the cities and towns to work for the developing industries; the land became privately owned farms or was used for factories or mines; the children were employed in factories; the Tolpuddle martyrs were convicted and deported to Australia for forming a trade union; working men were deprived of a vote for the Parliament until early in the 19th century and the women until the 20th century.

The ruling class rules.

I refer to two great developments which have occurred since World War 11:

- 1) After the war, following so soon after World War 1, there was a profound wish for peace, for decency, for human rights. The United Nations organisation was established. I think we Australians can be quite proud of the part that our government and Dr Evatt played in its formation. On December 10 1948, the UN agreed, without dissent, and published to the world: The Universal Declaration of Human Rights I quote from the Preamble: "Member states have pledged themselves to achieve, in co-operation with the UN, the promotion of universal respect for and observance of human rights and fundamental freedoms." and it goes on to set out thirty articles or rights, three of which I refer to (briefly):
 - a) Article 2 : Every one is entitled to these rights irrespective of race;
 - b) Article 23 : Everyone has the right to work and to form and join a trade union;
 - c) Article 25 : Everyone has a right to a standard of living adequate for the health and well being of self and family, including food, housing, medical care and social services. I refer later to another Article.

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- 2) On the other hand the economic system which is called capitalism has grown and changed vastly as a result of changes in technology, transport, communication etc. It is now global capitalism, it wields extreme power. The World Bank, The International Monetary Fund, the theories of Friedman and Hayek are all of tremendous influence as is above all, the power of the international corporations.

I remind you of what Don Dunstan said in his last speech at the Adelaide Entertainment Centre, April 21 1998, after referring to the domination of global capital: "Their thesis is that, faced with a globalised economy we must reduce government provision of services to the barest minimum; ensure that services are operating in the interest of private profit; ensure that competition and an unregulated market govern production and development of our resources ...and that we must totally deny ourselves of the fiscal flexibility to run a deficit budget." And he went on to speak of the effect of these doctrines; the selling off by those affected by these doctrines of our great social and public assets in South Australia the water, the electricity, the winding down of our public participation in the forests, the housing through the Housing Trust, health, education. Don spoke of South Australia, but of course it happened all over the country.

I pause for one moment to record that Don Dunstan gave the right to publish his speech to Australian Options, slightly edited by him, and to print an interview with him, headed "A Healthy Public Sector is the basis for decent Justice".

I add that Australia is a country which demonstrates the growth of global capitalism with extreme clarity; it is also one of a very few countries which has never legislated for a Declaration of some Human Rights (save for a very recent and very limited Bill in the ACT) . I suggest there is a connection. I turn now to the question of the relationship of our rights and the law.

This country was colonised by Great Britain and contrary to the facts of the matter the lands of the Aboriginal people were treated as terra nullius . The land was taken by the colonial power. Most of the people were driven into reserves and many had their children taken away; many were killed, either by arms or by introduced diseases; their culture was based on their land and overwhelmingly they lost their land. In the sixties there was the beginning of some change in attitude all over the country. The referendum to give Aboriginal people the right to vote in Federal Elections was carried with huge majorities, it was followed by a growing awareness that Aboriginal people must be given some rights of self determination. ATSIC was set up, it was chaired for some years by that wonderful South Australian lady Prof. Lowitja O'Donoghue. It was an effort at self determination in certain aspects of life very important to aboriginal people.. Reconciliation became a major issue.

Now the government introduces legislation to abolish ATSIC. It has passed the lower House, but it has not yet been considered by the Senate. The government proposes that ATSIC should be replaced by a group of three Aboriginal people to be appointed by the government. I say this, self determination is a fundamental for the Aboriginal people; the concept of the government appointing a committee of three in the name of self determination is a farce. But there is another matter. The ATSIC Act still stands.. The ATSIC Commissioners are still being paid because the Act so provides but they can do nothing because the government has taken away the funds and handed those funds back to the relevant departments. And they do that while the legislation still stands. I understand that the Commissioners are taking this point to the High Court. I would just add that I think that any government has the right to raise a question as to whether a body like ATSIC, or any other body, is the one best suited to the task and can, in this instance, talk with the Commissioners and can talk with other Aboriginal people, hold discussions, put up propositions, but I do not think it can abolish self determination.

I refer very briefly to refugees since in this hall last year we were addressed by the eminent human rights advocate Julian Burnside QC. But just let me say this.

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On 14th December 1967 the UN General Assembly voted unanimously (including Australia) for a resolution which repeated Article 14 of the Universal Declaration of Human Rights which reads: "everyone has the right to seek and enjoy in other countries asylum from persecution". A Labor government voted for the Declaration in 1948; a Liberal government voted for its re-assertion in 1967. Thirty years on we are locking up those who seek asylum in our country from persecution. We are doing that pursuant to our law. The High Court has recently held that it is our Law, the Law made by this government, which says that a person seeking asylum, who has been locked up, whose application for a visa has been denied, who in strict accordance with the Act has written to the Minister and asked to be deported but who cannot be deported, because he is stateless and being so no other country will accept him, is to be locked up and this may be for life. I think that is rather an example of the conflict between legal rights and the concept of human rights. As I said earlier the Declaration of Human Rights declares that all have a right to employment and to an adequate standard of living. What is our situation?

There is a view widely held that our economy is doing very well, some say better than any other. But certainly well. ACOSS, and other groups, say that our situation is that our rich are getting richer and our poor are getting poorer. Pretty obviously the rich are getting richer; few admit the poor are getting poorer, but I don't hear many denials. Given the state of our economy how is it that this can happen?

The Australian Bureau of Statistics (August 2004) says that we have a labour force of 9.7 million people of which 6.9 million are employed full time, 576,000 are unemployed and 2,271,000 are employed part time. Of course I do not suggest that all those 2,271,000 wanted full time jobs. But I suggest at least 500,000 did. Many say more than that. But what it means is that more than ten percent of our labour force are unemployed or underemployed. How is this in such a successful economy? There are a number of explanations. 1. We all know that the banks have reduced jobs by closing branches and that some companies particularly in the clothing industry have moved a good deal of manufacturing overseas to countries where labour is very cheap. But I suggest that the main reason lies in the efforts particularly of big corporations to reduce both the number of workers and the number of permanent workers.

It is worth looking at a bit of history. Back in 1890 Samuel Griffiths, who became the first Chief Justice of the High Court of Australia, tried to persuade the Queensland government to declare it their duty to legislate for wages: sufficient to maintain the laborer and his family in a state of health and reasonable comfort. (Almost the UN Declaration) With Federation we got an Industrial Tribunal, and employers and employees were encouraged to join organisations and in the latter case trade unions. Justice Higgins declared the first basic wage in the Harvester case and for nearly 90 years we had a Conciliation and Arbitration system which by legislation has ceased to exist, except in a very reduced form, since the early nineties. The consequence of our system was that the person who was in ordinary employment became entitled to a salary, to annual leave, long service leave, public holiday pay, sick leave, protection against unfair dismissal, workers compensation and in some cases maternity leave.

Global capital has set out to change the situation by abolishing conciliation and arbitration, by reducing the number of people employed and the number of people in that full employment which carries these various benefits. It seeks to do this in two ways in particular:

- 1) Reducing the number of employees by the working of over time. Recently I went to the office of ABS. Among their new books is one: "Australian Social Trends 2003". It states that over recent years they have seen a big rise in overtime and that now 28.8% of all full time workers " work fifty hours per week or more" and they give figures for particular groups ranging from 15.8% to 52.3% of workers. They do not refer to the maximum number of hours worked but it is said that many work up to sixty hours per week. I acknowledge that there are perfectly legitimate reasons for some overtime: eg breaking down of equipment, but this extent is quite extraordinary. The overtime workers get higher overtime pay of course, at least where covered by awards, but it has many savings. Not only less

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workers with all the entitlements, but space, equipment, plant, tools, administration. It is widely recognised that the reduction of employment is fundamentally concerned with overtime. Faced with a considerable unemployment problem, France has recently legislated for a thirty five hour week and an abolition of over time except in special circumstances. Should we consider such legislation? Not necessarily exactly the same, but certainly some limitation of overtime.

- 2) Perhaps even more important is the effort of the employers to engage what are sometimes called casuals or part timers or non permanents or another group namely those provided by labour hire firms. As I earlier said there are 2,271,0000 of these or actually 23.4% of the total of the employed work force. There are a lot of disputes over the questions of what entitlement casuals have to other benefits such as annual leave, sick leave, public holiday pay, long service. Particularly intriguing are the labour hire workers. There is great argument as to whether these people are entitled to workers compensation if they are injured at work.

There was a case some two years ago in South Australia where a young lady approached a labour hire firm and obtained what I will refer to for want of a better word, as "employment" with a company growing tomatoes. She had no agreement whatever with that company and supplied nothing except her labour and a pair of gloves. She had a written agreement with the labour hire firm which provided that she would obey the instructions of "the employer"; which acknowledged that there was no employer/employee relationship between herself and the hire company, and acknowledged that she was not entitled to any annual leave,sick leave etc from the hire company. The hire company agreed to pay her a fixed amount for each hour that she worked. The amount that she received was quite significantly less than the award rate for an employee. The hire company had a written agreement with the tomato company whereby the latter made payments to the hire company ,out of which payment of the hourly rate was made to the worker. You will notice that the whole purpose of these agreements is to deny to the worker the status of "employee" and thereby to deny to him/her the rights of an employee. She suffered injury at work. I do not know whether she ever made a claim for compensation against the "employer" but she did against the hire company. It was fiercely contested, both at first instance where they lost and on appeal where they also lost. The SA court declined to follow a Victorian decision. I am sure hire companies will be amending their agreements.

There have been some cases recently where the employer has been held liable for workers compensation. The whole question of the entitlement of these various classes of casual or non permanent or part time or hire workers is a vexed question and urgently in need of settlement. In the meantime I think there is no doubt that the business world is saving itself plenty of dollars by way of working overtime and employing casuals. At the same time they are making problems not only economic but also family and social problems for the working people. It is the trade unions, including in SA. that are trying to do something about these questions. applying for award variations, seeking agreements etc.

The AMWU has recently done an in depth analysis of the position as to these types of employees in the manufacturing industries which they cover. In 1990 there were 1,130 million employed in those manufacturing industries. By 2003 it had fallen by 10.3%. The permanent jobs had fallen by 159, 900; the casual jobs had risen by 71,000. In the manufacturing industries there are alot of labour hire firm workers. There is some other data in Research Note 53 issued 16th September 2004 by the Parliamentary Library of the Federal Parliament. It reports that since 1988 54% of all new jobs created have gone to casual workers.

The position of the Federal government is that it gives no attention whatever to the question of overtime or the casual groups. It is intent on doing away with what remains of arbitration; it supports the Australian Workplace Agreement system which it has legalised by legislation. The AWA is simply the agreement prepared by the employer without any input from other interest. The worker applies for a job; the employer produces the Australian Workplace Agreement; it is take it or leave it between what is often a very wealthy corporate employer and an unemployed worker. On the 28th September 2004 *The Advertiser* reported:

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"The Federal government will inject millions of dollars into luring workers away from unions and onto contracts under a Workplace policy". Workplace Relations Minister Kevin Andrews will announce today a 12 million package to increase the number of workers on Australian Workplace agreements. The government will also unveil plans to protect small businesses from unfair dismissal and redundancy laws" This is simply our Government acting on behalf of global capital. It is fundamentally opposed to the Declaration of Human Rights, to declarations which have in the past been supported both by Labor and Liberal governments and incidentally opposed to the ideas of our first Chief Justice of the High Court expressed more than 100 years ago.

The other aspect associated with the poor getting poorer is the treatment of those who are unemployed or those unable to seek employment because of ill health or disability. It is not an area which I have greatly studied. I will say just this. The payments are low; the conditions are extremely strict; the penalties for breach are draconian and the efforts to find work for the unemployed are nil. There is another matter which I think is universally admitted and that is that the number of homeless people is increasing alarmingly. That surely indicates that the poor are getting poorer.

The evidence is overwhelming that the rich are getting richer. I was quite astounded recently looking at *The Weekend Australian* of 18th-19th September 2004, page 38. The page consisted of four different articles and the conclusion of two other articles. Five of them were either mainly or wholly directed to increased pay for corporate leaders. Chief Executives of the 4 main banks were said to have annual salaries of \$7.4 million, \$7 million, \$4.426 million and \$2.482 million and the Chief Executive of Macquarie Bank \$9.089 million. In quite different and unconnected articles it was said that the Managing Director of Origin Energy received \$2.44 million for his years work; the Chief Executive of Bluescope Steel \$4.4 million; the Chief Executive of Billabong \$1.4 million, and it was said that Mr Ahmed Fahour, " the 37 year old wunderkind " (whatever that is)" poached from the local operations of the world's biggest bank, CitiGroup, was paid \$13.3 million in a golden hello just to sign on the National Australia Bank". I have also read that Mr Packer is about to invest \$55 million in some not highly useful British enterprise. Recent reporting from the 4 main banks has some interesting information; together their after tax profit is more than \$11 thousand million; the percentage of shares held by their top five shareholders range between 30% and 51 %, and each of their top shareholders is a USA banking group.

Why is it that our laws relate to the question of wages of ordinary workers and are silent on the question of returns for Senior Executives, Company Directors and such like? Why cannot the Industrial Court deal with these matters. Why is it not possible to amend the tax act so that companies are quite free to pay such amounts as they like to their Directors and Executives but with a proviso that x amount of dollars is to be treated as expense and the balance to be paid out of profit?

In 1998 our Federal government appointed a committee to report on business taxation. Its report was published in July 1999 entitled: A Tax System redesigned, more certain, equitable and durable. The three members were all Company Directors. The Chair was John Ralph AO, who at the time was Chair of Foster's Brewery and Pacific Dunlop, Deputy Chair of CBA and Telstra and Director of BHP. I make no comment whatever about the members who were no doubt highly intelligent, but none of them were representative of other than corporate interests. I should be very surprised if any government appointing a committee to report on the tax on wages appointed three workers without other interests having a say. The Committee, which incidentally placed great emphasis on the globalisation of the economy, recommended a reduction in company tax to 30% (which in fairness I should add the government had told them it desired), it went along with the dividend imputations credit which Keating had introduced (but I should add also in fairness that at the time he said that the company tax rate should be raised to the highest individual tax rate which at the time I think was 48%). The 30% tax rate is the lowest company tax rate which has existed since at least World War 2. When the Government actually introduced it they were able to say (and said) that it was recommended by this highly expert committee. The Report (which I produce)

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is too long to discuss. But I would like to be able to draw attention to some matters which I respectfully think say a lot about the pro-corporate attitude of the reporters.

However, the matter that I want to draw attention to is the enormous effect of dividend imputation credits (which they endorsed). When the company system was being developed the biggest concern was that if people were involved in what today we would call a partnership, they would not only share the profit but they would be responsible for the losses and so the limited liability company was formed and has of course become the dominant form of company. A shareholder must pay 100 % of the price of his share, but he or she is a totally different person than the company. If the company goes bankrupt the shareholder is not liable at all. They are two entirely different persons. So for years the company paid tax on its profits and the shareholder paid tax on the dividend. Dividend imputation credits means something entirely different. The company declares a dividend and providing that dividend is paid out of that current years profit, it can fully frank the dividend with a credit which (when the tax rate is 30%) is 3/7ths of the amount of the dividend. Not all dividends are fully franked but 90% is a very reasonable percentage. In preparing the tax return the franking credits are added to the income; the tax is calculated on the resulting total and the total of the credits is then deducted from the total. So A and B each have a yearly taxable income of say \$50,000. A's is wages, B's is dividends, 90% fully franked. At the current tax rate A's tax is just over \$11,000, B's tax is nil. When I did this calculation it occurred to me that it would be fascinating to find out what B would have to receive in dividends, 90% franked, before he paid the same proportion of his taxable income in tax as A. The answer is \$300,000. He would then pay the same 22% as A pays. I am sure that there can be other matters argued concerning the tax system, but I believe that this is a rather important one.

There is absolutely no doubt that the reason for the development of the limited liability company was to completely separate the personality of the company from that of the shareholder. The shareholder may buy his shares one day before the company declares its dividend and sell them a few days after. The shareholder gets the dividend and he gets the credits. Think of what this does for people who hold 50,000 shares in BHP or ANZ or Fosters etc. The rich are getting richer for all sorts of reasons and some of those reasons are associated with changes to the law and some are associated with failure to make changes. The poor are getting poorer for similar reasons. Let me turn to two quite different matters.

In 1945 our Federal Parliament passed an Act " To Approve the Charter of the United Nations" . It was an exceedingly simple act. Four sections only. The last approved the Charter and the Charter was then set out in full in the schedule. The Charter has been amended on a few occasions since and each time the Australian Parliament has passed an Act which records and approves the alteration. Article 39 of the Charter provides that the Security Council: " shall determine the existence of any threat to the peace, breach of peace, or act of aggression" and shall decide the measures to be taken to maintain or restore peace and security. Article 25 of the Charter reads: " the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". And Article 51 provides that: "nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by the members in exercise of this right of self defence shall be immediately reported to the Security Council and shall not in anyway ay effect the authority and responsibility of the Security Council to take at any time such action as it deems necessary....".

Koffi Anan has said what is obviously true, that the invasion of Iraq was illegal. It was obviously so. Iraq, had not made an attack on the United States, on Great Britain or Australia nor threatened to do so. It is acknowledged that Iraq played no part in the attack on September 11 in the United States. The United States, recognising the role of the Security Council in relation to such matters, tried to convince the Security Council to resolve that there should be force used against Iraq. It clearly failed to convince and, in fact, when it became clear that it would not do so the US decided to withdraw it's resolution (to avoid an obvious

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defeat) and, instead, to launch an invasion. The right to live in peace is a very fundamental right. A right of all people. Our right and the right of the Iraqi people is being trampled on by the aggressors. It is somewhat unclear to me why it is that our government can act in direct opposition to the terms of a Charter which has been approved by our Parliament on several occasions but apparently it is so. That means that our law is fundamentally at odds with the Charter of the United Nations developed and adopted by people the world over who were determined to seek peace after two world wars. Finally I refer to a matter which arose perhaps thirty years ago.

Scientists began to express concern about threats to our environment. They were concerned about climatic changes associated with what was called "greenhouse gases". There was debate and discussion. Finally relevant countries met together in Kyoto and discussed the problem and made a decision usually referred to as The Kyoto Accord, which called upon the major countries to make laws to limit the production of greenhouse gases in their country by certain proportions per year over a certain period of time. Most countries have accepted the Accord; Russia as late as last week. The United States and Australia refuse to adopt the Kyoto Accord. This question is crucial for us for two main reasons:

- 1) we produce the greatest quantity of greenhouse gases per capita of any country in the world.
- 2) Scientists consider because of our geographic situation in the world we face greater threats to our environment from the climatic changes than most other countries.

Why does the Howard government refuse to adopt The Accord? To adopt it would require cuts in the burning of oil, coal and gas. I quote *The Weekend Australia* 2-3 October 2004 page 45 under the heading Russia's Kyoto Deal puts heat on Howard and Co: "Russia's decision on Thursday to sign the Kyoto Protocol has put fresh pressure on the Australian government and business to accept measures such as carbon trading and taxes that would penalise them for emissions..... ratification of Kyoto by Australia would accelerate the growth of natural gas at the expense of coal ...the losers would include BHP Biliton, Rio Tinto and WestFarmers". They are three of the biggest companies in Australia and two of the biggest miners (possibly the two biggest). The influence of such companies on the government and the government's blind following of US policies explains its attitude to Kyoto.

I repeat what I said earlier, I believe in the Rule of Law. I also believe in justice and the rights of people. I realise that not everybody agrees on exactly what those rights ought to be or on exactly how they should be enforced. I think we agree that we do not want our environment greatly harmed by climatic change (or indeed other changes). I think we believe that it is unfair for the rich to get richer and the poor to get poorer at the same time. I think we have an interest in peace. I believe that we do not want to see people locked up, deprived of all liberty because they are attempting to avoid persecution. I think it is crucial in all of our interests that the Aboriginal people and non Aboriginal people become totally reconciled and that the Aboriginal people attain justice and fairness.

We have many problems. We have to find the way forward. I think that we have to end the rule of global capital, its domination of our society. I think we have to talk with others about how this can be achieved . May I respectfully remind you of the last words that Mr Dunstan used in his great speech to which I have referred. After speaking about the power, the operation, the ideology of global capital he concluded with the words: "We intervene -or we sink." I respectfully agree.