

# **How the Australian Constitution is little used but can be to defend our freedoms**

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Presentation to *Friedman17 Liberty Conference*: Sydney 1 May 2017

Presentation Notes

## **Introduction**

Australians, including most lawyers, tend to be ignorant of the Australian Constitution. If there is a legal issue to be argued Australian lawyers look first to legislation and case law with the Constitution rarely coming into view. The ‘people,’ if they think of the Constitution at all, view it as a technical oddity accessible only to highbrow, extravagantly paid top legal professionals.

In the United States of America it’s different. In the USA people know and venerate their Constitution and reference it quite routinely in public debate as well as legal cases. The USA Constitution is frequently used as the starting point for legal argument from which everything else flows.

In 2016 Independent Contractors Australia utilised the USA approach to further our efforts in the cause of economic freedom. Specifically to mount a defence of the right of Australians to be self-employed against the oppression of institutions of the State whose behaviour seeks to deny that basic freedom.

This presentation gives an overview of two constitutional cases we ran in 2016 with success. Even though judicial determinations did not result, the freedom defence outcomes we sought were achieved. Our experiences have given us renewed focus for future freedom defence activity.

## **Case One:**

### **The Road Safety Remuneration Tribunal: The ‘Truckies’ Dispute**

In 2012 the then Labor Federal Government created the Road Safety Remuneration Tribunal, a new ‘industrial’ tribunal charged with regulating pay rates to truckies in the long haul trucking sector.

For 3 years the RSRT held inquiries, hearings and the like into truckies pay rates. On the 18<sup>th</sup> December 2015 they made their first truckies rates order the *Contractor Driver Minimum Payments Road Safety Remuneration Order 2016* to come into operation on 4<sup>th</sup> April 2016. The excuse for the Order was that low rates caused owner-drivers to drive unsafely.

The effect of the order was to force businesses that used owner-drivers to haul product to pay a lot more than if they were to using trucking companies that used employee drivers. This made the some 50,000 self-employed owner-drivers across Australia highly uncompetitive against the large multi-national trucking companies that operated using employee drivers.

The impact was immediate. As of January 2016 businesses stopped using owner-drivers. A political storm erupted as self-employed truckies started to go broke in

large numbers. Feverish efforts were made to appeal the RSRT Order by peak industry bodies using the Australian 'traditional' legal approach of arguing within the confines of the legislation that gave the Tribunal its powers. All legal appeals failed.

Independent Contractors Australia was involved in the advocacy space along with many others.

On 2<sup>nd</sup> April 2016 we decided to launch a constitutional challenge to the validity of the Tribunal and its Order. We

- Had no money but one volunteer junior lawyer
- Raised \$25,000 in 2 weeks to fund the case.
- Had a senior barrister offer to help
- Were going to run the Constitutional argument that the Commonwealth has no power to price fix. (ie) Setting rates for owner-drivers involved imposing prices on commercial contracts.
- Ran instead with the argument that the RSRT Order breached freedom of interstate trade under section 92 of the Constitution

**S.92** reads

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/s92.html](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s92.html)

**Trade within the Commonwealth to be free**

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

On Friday 15<sup>th</sup> April 2016 Chief Justice French heard our arguments and determined that *"The constitutional case may be arguable.."* and referred our application to the Federal Court

On Tuesday 19<sup>th</sup> April 2016 the Road Safety Remuneration Act was repealed by Parliament meaning the Tribunal was abolished and the Order ceased.

With the abolition of the Act, the Tribunal and the Order there was no need for us to continue with our action. If the Act had not been repealed we would have continued our constitutional challenge. If a future government tries a similar or parallel action in the future, we will seek to mount a constitutional challenge.

## **Case Two**

### **Rod Douglass and a demand to pay \$440,000 by the Tax Office**

Rod Douglass is a 55-year-old engineer specializing in information technology systems in the mining sector in Western Australia. He had worked for himself as a self-employed consultant since he was around 30. He had also operated through a partnership with his spouse sometimes distributing income to his wife/partner sometimes not according to stated advice published by the Australian Taxation Office.

In 2006 the Tax Commissioner published a statement on the ATO website that splitting income with a spouse through a partnership was entirely legal and acceptable. Accordingly Rod proceeded to follow the ATO's instruction/advice. He paid all tax due and the ATO never queried his tax returns.

In 2014 the ATO had an apparent change of mind saying he could not split the income. Under Australian tax law the ATO can only review an individual's tax return going back 2 years. However, if the ATO 'forms the opinion' that an individual has committed fraud or evasion they can review as many years as they wish.

In Rod's case the ATO 'formed an opinion' that, no matter what the statement on the ATO website said, that Rod had committed evasion because he had failed to seek 'professional advice.' (Rod had always submitted his own tax returns)

- The ATO issued Rod a \$440,000 tax bill with penalties and interest backdated to 2006.

We started providing assistance to Rod in mid-2015 helping with internal ATO appeals all of which were rejected.

We have considerable experience with the ATO on small business tax matters going back to ICA's formation in 2000. We have seen many Rod Douglass-type cases. We decided to assist Rod.

We mounted a Constitutional challenge in the Federal Court about the ability of the ATO to act on an 'opinion' of fraud or evasion without first seeking judicial review of their 'opinion.'

Section 75(v) of the Constitution says

**S75(v)**

**Original jurisdiction of High Court**

In all matters:

- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
- the High Court shall have original jurisdiction.

We contended that

- "Section 170(1) Item 5 of the 1936 Act (Income Assessment Act) requires the existence of a valid fraud or evasion as a necessary jurisdictional fact prior to the issuance of any amended assessments issued under that head of power."

By way of explanation, in 1901 when Australia was formed, s. 75(v) was included in the Constitution which allowed a citizen to apply directly to the High Court to seek review of an administrative officer (which includes the Commissioner of Taxation) exceeding his power. The Federal Court has been entrusted with this same constitutional action by s. 39B of the *Judiciary Act 1903*.

Then Chief Justice French of the High Court noted in a speech in 2010,

<http://netk.net.au/Lectures/French.pdf>

"In Australia, which has a written Constitution with a distribution of powers between Commonwealth and State parliaments, no decision-maker has carte blanche. Unlimited power would be unconstitutional power. Moreover, there is a constitutionally entrenched jurisdiction in the High Court to entertain applications for judicial review of the decisions of officers of the Commonwealth where mandamus, prohibition or an injunction is sought."

The ATO had, for more than 2 years, maintained their 'opinion' that Rod was committing 'fraud or evasion.' Yet it was not until the Constitutional challenge was

argued in the Federal Court that the Commissioner of Taxation took a different view. They recanted.

In the Federal Court on the 28 November 2016 the barrister for the Commissioner of Taxation stated to the Court that

- "...the opinion as to fraud or evasion was incorrectly formed and on that basis, was withdrawn..."

In our experience the ATO routinely and almost systemically makes accusations of fraud or evasion against small business people and extracts massive amounts of money because the small business people do not know how to, nor can afford to, defend themselves.

In our view, the ATO retreated on the Rod Douglass case because they did not want to run the risk of a judicial decision clarifying that the ATO cannot act on an 'opinion' of fraud or evasion unless first seeking a Federal Court review.

### **Lessons**

The Australian Constitution is little understood or utilised by Australians as a 'freedom protection' document. In our view and experience the Constitution is just that—a 'freedom protection' document.

In our two efforts in 2016 we called on the Constitution to protect the economic freedoms of individuals, self-employed truckies and self-employed taxpayers against the unrestrained behaviour of institutions of the State. In both cases, in our view, the Constitution proved to have freedom at its heart.

### **Other potential applications**

Here are two examples of potential further application.

#### 18C Racial Hatred Laws and Freedom of Speech

In 2017 in the ongoing campaign to reform the racial hatred laws (18C), elements from the Labor Party suggested that 18C should be extended to religious discussion. Such a move would be clearly unconstitutional.

##### **SECT 116**

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430/s116.html](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/s116.html)

##### **Commonwealth not to legislate in respect of religion**

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

#### The Federation: Independence of the States

In November 2006 in a dissenting High Court opinion Justice Callinan wrote:

"there is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshape[s] the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.

*State of New South Wales v Commonwealth of Australia (Work Choices Case) High Court of Australia, 14 November 2006 [2006] HCA 52 (2006) 229 CLR 1.*