THE LIZARDS STRIKE BACK[1]

Albert Langer

On 28 February 1995, at 10am, Justice Bollen of the Supreme Court of South Australia will hear charges of contempt against Patrick Muldowney for publicly advocating an informal vote in the Taylor by-election on November 5th, after being served with an order not to do so from Justice Perry. The order was rubber stamped by the Judge in chambers on the day before the election, at the request of the Electoral Commissioner for South Australia, one Andrew Becker, without any opportunity for Patrick to be heard. It was based on s.126(1) of the Electoral Act 1985 (SA) which purports to prohibit public advocacy of an informal vote.

Just to find out what was said about him, Patrick had to pay $4.50 per page for the transcript, as the Electoral Commissioner refused to supply one without charge (his solicitor, Judith Bradsen, emphasized how expensive it would be for Patrick to defend his legal rights - a tactic the Australian Electoral Commission has used repeatedly to intimidate vote informal advocates in other instances).

According to the transcript, the Electoral Commissioner and his legal representatives misled the Judge by not informing the Court of the following relevant facts:

1) Patrick applied more than a year ago to the High Court of Australia (No. C22 of 1993), for a declaration that there is no such law as s.126(1). Instead they told the Judge that Patrick was 'quite a well-known opponent to compulsory voting' and implied that his High Court case was about that.

2) The Electoral Commissioner had admitted, in paragraph 7 of a draft 'case stated' for the Full Court of the High Court of Australia sent to Patrick on 27 June 1994, that Patrick 'has published and intends to publish material in which voters are encouraged to [vote informal]'. This means that the Electoral Commissioner could have sought an injunction at any time with a proper hearing, so there was no conceivable justification for arranging to do so without notice to Patrick on the day before the election. Instead they just told the Judge that Patrick had sent them a copy of his leaflet 'out of the blue' on the previous day.

1 Originally published in *Empire Times*, Vol. 27 No. 1 1995, student newspaper at Flinders University, South Australia. In Australia,voting in elections is compulsory.

3) Patrick has been publicly advocating an informal vote for years and his doing so during the last State general election, December 11, 1993, was reported to the Electoral Commission by officers in charge of a polling booth. Again this means the Electoral Commissioner could have sought an injunction at any time with a proper hearing and again he misled the Judge by implying that Patrick had been expressing opposition to compulsory voting at the last State election rather than advocating an informal vote.

4) Patrick was not present because the Electoral Commissioner had told him of the 11:00 am hearing by a fax sent to *Empire Times* at 9:30 am and a phone call to his home at 10:20 am. Patrick said he would go to collect the fax and find out what it was all about. Instead of telling the Judge that, they told the Judge that Patrick had gone to collect 'a' fax. By the time Patrick got the fax and rang the Court, the hearing was already over.

This suggests the possibility of a deliberate ploy to obtain an injunction the day before the election, knowing that Patrick would not comply with it, so that Patrick could be 'got' for contempt of court even though the injunction as well as the section of the Electoral Act would ultimately be quashed as unconstitutional by the High Court. (There is a real risk that Patrick could be in gaol for months before the High Court deals with the matter).

The general principle is that Court orders must be obeyed even when made in error - the error must be corrected by a Court, not by simply ignoring its orders. On that principle the Electoral Commissioner presumably hopes to 'legalize' its unconstitutional intimidation of Patrick.

There are however other relevant principles such as:

1) The powers of every Court in Australia are just as limited as the powers of every Parliament in Australia by the system of representative Government established in the Constitution. No Parliament and no Court has power to interfere with free elections. Judges simply can't order people not to publicly advocate a lawful vote any more than they can order people not to breathe. The lack of precedent for lawfully ignoring such orders is due to the lack of precedent for such orders being made. (In my own High Court case, No C2 of 1993, relating to similar Commonwealth Legislation, the defendants avoided the possibility of an interim injunction against them by saying that they had no intention of prosecuting me or seeking an injunction against me for similar conduct to Patrick's).

2) People who procure Court orders by fraud are liable for malicious prosecution, professional misconduct and contempt.

Those matters are likely to be raised when Patrick finally gets a hearing on the original injunction, some time in the week of January 30th, as well as at any contempt proceedings on February 28th.

The Electoral Commission at both State and Federal levels has a history of using injunctions to intimidate advocates of an informal vote and to disrupt vote informal campaigns by dragging people into court so they cannot effectively campaign during the election period. (After the order was rubber stamped, Patrick was offered a hearing to have it discharged on election day - which would have been just as effective in preventing him from distributing his leaflet as if he had stayed at home).

Injunctions were used to disrupt and intimidate in Victoria during the 1987 Federal elections and threatened against anarchist candidates in the 1992 Federal elections, forcing them to abandon their campaign. The high cost of defending legal rights and the summary nature of proceedings initated by Electoral Commissioners for injunctions has been deliberately exploited to achieve a chilling effect. This time they may have gone far enough to demonstrate the unconstitutionality of the laws under which injunctions have been claimed, just as abuse of the defamation laws by politicians ultimately resulted in those laws being declared unconstitutional.

Empire Times number 9 [1994] published both the Judge's order and Patrick's leaflet advocating 'Vote Informal'. Here again is the guts of the leaflet, an extract from 'So Long and Thanks for All the Fish', fourth volume in the 'Hitch-hiker's Guide to the Galaxy' trilogy:

> 'On its world, the people are people. The leaders are lizards. The people hate the lizards and the lizards rule the people.' 'Odd', said Arthur, 'I thought you said it was a democracy.''I did' said Ford, 'It is.' 'So,' said Arthur, hoping he wasn't sounding ridiculously obtuse, 'why don't people get rid of the lizards?' 'It honestly doesn't occur to them,' said Ford. 'They've all got the vote, so they all pretty much assume that the government they've voted in more or less approximates to the government they want.' 'You mean they actually vote for the lizards?' 'Oh yes', said Ford with a shrug, 'of course.' 'But', said Arthur, going for the big one again, 'why?' 'Because if they didn't vote for a lizard', said Ford, 'the wrong lizard might get in. Got any gin?'

And here again is an explicit public advocacy of voting informal in both South Australian and national elections. Vote Informal!

Civil Disobedience

Obviously, if there was a law that made it illegal to publicly advocate a lawful vote against all the parties and their candidates, it would be necessary to resist. Some would do so without sticking their necks out. Others would engage in militant defiance. Resistance would range from underground publications through sarcasm making a mockery of the lizards without openly breaking their laws. For example badges saying 'So Long and Thanks for All the Fish' could be used to express solidarity with people distributing 'forbidden' literature such as the above excerpt from the 'Hitchiker's Guide to the Galaxy'. Both lizards and humans would come to understand the reference.

Side by side with militant resistance there would inevitably be 'Civil Disobedience'. Pompous Christians and the like declaring their infinitely humble respect for the lizards and their laws, parading their Consciences and wringing their hands about their inability to obey an unjust law.

Perhaps the Electoral Commissioner for South Australia imagines that Patrick and myself are engaged in such 'Civil Disobedience' to an unjust law - inviting punishment to appeal to the consciences of the more enlightened lizards and persuade them it would be better to change their laws rather than resort to the degree of repression that would be required to actually enforce them.

If so he is mistaken. Neither Patrick nor myself are breaking an "unjust law". The Electoral Commissioner is not administering an unjust law. He is breaking the law he is supposed to enforce.

In this country, the right to choose freely which lizards shall rule over the humans is not just an aspiration for justice, but a law. It is a fundamental ("constitutional") law valued greatly by lizards and humans alike.

For humans, free elections are a great advance from the days when lizards ruled by "divine right" and could do what they liked. It remains a mystery why humans do not form their own parties and throw the lizards out, but the right to support or oppose any or all of the lizard parties makes a real difference to how we live. The more obnoxious lizards are restrained by the knowledge that humans will choose their opponents if sufficiently provoked. While all the lizard parties converge towards the same basic policies, they are forced to keep a certain distance and maintain a certain degree of choice, by the knowledge that supporters of each party will not bother to vote for it if the differences become too small.

For lizards, free elections are an important safety valve. They know that humans would not submit to rule by lizards without the appearance of consent. The right to choose freely is not a mere constitutional fiction, like the Royal status of the protestant descendants of Princess Sophia, Electress of Hanover, but a fundamental principle of lizard rule. No doubt if humans did wake up and organize their own parties to take power from the lizards, other more fundamental principles such as property rights would require the use of unconstitutional force to preserve lizard rule. But no sane lizard would prefer to rely on the force of a small minority rather than the consent of the majority. There are after all very few lizards who actually own the planet. They are overwhelmingly outnumbered by humans who 'only work here'.

Criminal Reptiles

The Electoral Commissioner for South Australia is not just a lizard administering an unjust and oppressive law. His job is to help preserve and prolong lizard rule by ensuring that elections really are free and fair. Instead of doing that job he is openly breaking the law which prohibits the use of intimidation to interfere with free elections. He is a criminal reptile.

In ordering Patrick not to publicly advocate a lawful vote, the Judge who rubber stamped the Electoral Commissioner's order, and so threatened Patrick with imprisonment for contempt, was not making an 'error of law' in his capacity as a Justice of the Supreme Court of South Australia, any more than bank robbers make an 'error of law' when robbing banks. His job is to help preserve and prolong lizard rule by ensuring that it is seen as the rule of law rather than the arbitrary rule of lizards. Respect for the law requires that Judges obey it. Complying with arbitrary and unconstitutional orders undermines the rule of law.

The Electoral Commissioner and the Judge knowingly and deliberately set out to intimidate Patrick from exercising his lawful right to participate in the election campaign, by threatening him with imprisonment. Any school child should know that is illegal in Australia. A school child might be taken in by an Act of the Parliament of South Australia purporting to make such intimidation legal, especially if he or she was completely ignorant of our history as well as our laws. Such ignorance would not be an excuse, but could mitigate the very serious penalties for political intimidation (three years imrisonment under s.28 of the Crimes Act, two years under s.110 of the Electoral Act, SA). But how could an Electoral Commissioner or a Supreme Court Judge plead ignorance of Australia's

Constitution? Here are some extracts from the High Court's judgment of 12 October 1994 in Theophanous v Herald & Weekly Times Ltd. and Another, that would have been drawn to the Court's attention if Patrick had been given a hearing instead of an arbitrary order.

> (i) There is an implied freedom of communications with respect to discussion of government and political matters....
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> (iv) If the Constitution, expressly or by implication is at variance with a doctrine of the common law, the latter must yield to the former.
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> (v) When the purpose of the implication is to protect the efficacious working of the system of representative government mandated by the Constitution, the freedom which is implied should be understood as being capable of extending to freedom from restraints imposed by law, whether statute law or common law....
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> (vii) An implication of freedom of communication, the purpose of which is to ensure the efficacy of representative democracy, must extend to protect political discussion from exposure to onerous criminal and civil liability if the implication is to be effective in achieving its purpose...
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> (xi) Once it is acknowledged that the existing law seriously inhibits freedom of communication on political matters, especially in relation to the views, conduct and suitability for office of a member of the Australian Parliament, then that law is inconsistent with the requirements of the implied freedom of free communication...

As for the theory that one must obey a purported law until it has been declared invalid by a Court:

> 'It is of course convenient to speak of an unconstitutional law but that phrase means merely that that purported law is not a law at all.' per Menzies J. in Cormack v Cope, (1974) 131 CLR 432.

'I was only obeying orders' has been rejected as a defence for crimes against humanity. Perhaps it can still help Andrew Becker if he ever faces criminal charges, since crimes against the constitution are rather less serious. Nevertheless, nobody is required to obey an 'unconstitutional law', because it is 'not a law at all'.However clear the law may be, that isn't much help when public officials are deliberately breaking it and the mass media is ignoring the issue. If you are sick of having to choose between different lizards, join the Vote Informal Campaign. If you still prefer one lot of lizards over the others, but support civil liberties then please help publicize this case and ensure lots of people are watching when Patrick goes to court. Either way, please contact Patrick c/- Empire Times. Help Needed.