ON THE DRY SIDE RETROSPECTIVITY 3 John Hyde

A Mr Bewley successfully appealed to the Administrative Appeals Tribunal against limiting his ability to retire on a disability pension for a condition he had before joining government service. If the case establishes a precedent it will cost the pension fund about $35 million per year. The government is trying to change the position to what it was believed to be before the Bewley case.

If carried, the bill will change the pension rights of civil servants who successfully claim to have physical or mental conditions which stop them working and who had symptoms of the condition before joining government employment. It will not affect Mr. Bewley.

The words 'successfully claim to have', not merely 'have', are important because civil servants retire early with diagnosed ailments, particularly neurosis, at about seven times private sector rates. Are our civil servants extraordinarily neurotic or is the Commonwealth Medical Officer guilty of gross over-servicing? To the extent the pension scheme is unfunded the burden falls on the taxpayer.

Parliament should stand between taxpayers and public extravagance and its forms are appropriate for this. One might expect Opposition support of bills curtailing expensive scandals.

The Federal Opposition is not supporting this bill because it is retrospective. Since the 'bottom of the harbour' episode, the Liberal Party seems to have informally resolved it will never again have any truck with retrospective law.

General positions of principle are right. I look forward to the adoption of principles requiring governments except during grave national crisis to balance their books, and to treat citizens, including whole industries, equally. But principles need to be first understood and adequately defined.

The principle of government by *ex-ante* rules that are known, rather than by whims, is crucial to liberty and prosperity.

It requires that laws are simple enough for citizens to have a reasonable chance of understanding them. Otherwise laws become allies of the rich, powerful and clever and enemies of the weak. This is a reason socialist states, which need complex regulation, always harm the poor.

Constantly changing laws cannot be known even by the most expensive lawyers. But we cannot avoid some changes, both to correct bad laws and because of new circumstances.

This is less a problem in liberal societies where laws are more general and more durable than in regulated societies. A fine

example of liberal law is the American constitution which has stood the tests of time well.

As governments meddled more the chaos of unworkable laws was countered by eroding certainty. Government had to assume the capacity to correct its many errors. Errors were anticipated by giving Ministers (actually civil servants) discretion.

The underlying principle of the rule of law is that people should not be prejudiced for things they do by changes to the rules afterwards. Unfortunately where government is up to its neck in everything the principle is clearer than the practice.

Many cases are perfectly clear. No degree of retroactivity is admissable in criminal law. It was still clear, but less so, that when Afro West over-pegged part of the Ashton Diamond deposit the West Australian Government was wrong to change the law rather than let the dispute go to court. But the principle tails off into doubtful cases.

In practice it is impossible to change many laws without affecting results of earlier actions. Income or turnover taxes expropriate the rewards of earlier decisions to invest in machines or education; a capital tax expropriates the rewards of decisions to save. If people could anticipate future taxes they would act differently.

New regulations favouring one group usurp the rights of others. Deregulation too affects the consequences of past acts. Deregulation of taxis, although good for passengers, could destroy investments of up to $80,000 in taxi plates.

To the extent that it treats past acts justly, an old law is a good law. But we should not accept legal situations which are too discriminatory, too economically damaging or too abused.

Courts claim to 'discover' the law, but as far as the citizen is concerned they change it. I imagine when Lord Mansfield ruled 'The air of England is too pure for a slave, and every man is free who breathes it', slave owners cried 'retrospectivity!'.

Parliament should not retroactively confer guilt but with laws which make people liable to pay the prescription against retroactivity is less clear. This is such a big problem because government has got us into situations, like unsustainable superannuation schemes, which in the interests of liberty, efficiency and ultimately national survival need changes penalising those who guessed wrongly.

When law is interpreted in a way clearly not anticipated, a new law confirming things as they were thought to be may enhance certainty and equity---as with the Commonwealth superannuants.

Clear principles on retrospectivity are needed. But the Liberals must stop kidding themselves they have the luxury of not

carrying any laws which have retroactive consequences. That would not allow them even to carry much-needed repeal bills.