QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
GPO Box 2281 Brisbane 4001
visit and contact us at www.qccl.org.au

Motor Dealers & Chattel Auctioneers Bill 2013
Submission 007

The Research Director
Legal Affairs and Community Safety Committee
Parliament House

By Email: lacsc@parliament.qld.gov.au

Dear Sir

Fair Trading Inspectors Bill 2013

I refer to my appearance before the Committee on 6 February, 2014 and your email dated 7 February 2014.

I seek the opportunity to make a supplementary submission in relation to two issues raised by the Committee.

Motor Dealers and Chattel Auctioneers Bill 2013

The Member for Rockhampton asked me some questions about this Bill. As I indicated at the time I had not in any way considered the Bill. However given the statements made by Mr Byrne about the provisions in the Bill I consider it important that the position of the QCCL be recorded.

These comments relate to the provisions contained in divisions 4 and 5 of Part 2 of the Bill. It would appear that these provisions are replicated in other parts of the Bill and to the extent they are the same comments apply.

Under these provisions the Chief Executive of the Department when considering an application for a licence or to renew a licence or to restore a licence must inquire of the Commissioner of Police as to whether or not the applicant or a director of the applicant in the case of a corporation is a participant in a criminal organisation.

The Chief Executive may to cancel the licence if they become aware that the licensee or an executive officer of the licensee if it is a corporation has been identified as a participant in a criminal organisation. In this particular case the source of the information is not specified. Presumably then the information could come from somebody other than the Commissioner of Police.

Should the Chief Executive decide to refuse an application for, or cancel a licence on the participant ground (to use a shorthand) the Chief Executive is not required to specify in his or her statement of reasons the fact a person is *alleged* to be a participant in a criminal organisation as the reason for their decision.

A more flagrant denial of the principles of natural justice is hard to imagine.

A member of the public who maybe entirely innocent of any offence may be deprived of their livelihood on the untested say so of a member of the executive namely the Commissioner of Police.

This is particularly so when you consider the definition of participant as contained in section 60A of the Criminal Code which includes "a person who attends more than one meeting or gathering of persons who participate in the affairs of the organisation in any way." That provision of course requires no proof that the person knew that the organisation engaged in criminal activity nor that they did anything to either actively support or encourage the organisation to engage in criminal activity.

We note that of course there is a right of review to QCAT for a person who has had their application refused or their licence cancelled. Of course, the right of review is entirely otiose if the person in question does not know the real reason for the decision.

But even if at the review stage in the QCAT the reason is identified to them the Tribunal is then given the power, in the absence of the parties, to review the information provided by the Commissioner and determine whether or not it is criminal intelligence. It seems clear that if the Tribunal decides that the information is criminal intelligence the QCAT will consider it without reference to the person accused of the conduct. If the Tribunal is of the view that it is not criminal intelligence then the Commissioner has the option of withdrawing the information so that the applicant to the Tribunal is left having had their reputation besmirched but unable to address the allegations.

The QCCL objects strongly to this cult of secret evidence. It is a violation of the most fundamental right to a fair trial.

The problems with Secret Evidence were considered in a report by Justice, which is the British section of the International Commission of Jurists.

In a major report in June 2009 Justice observed in its Executive Summary:

- It is a basic principle of a fair hearing that a person must know the evidence against him.

- This core principle of British justice has been undermined as the use of secret evidence in UK courts has grown dramatically in the past ten years.

- This report calls for an end to the use of secret evidence. Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts.[1]

In considering the case against secret evidence, the Justice report quoted the noted British Jurist Jeremy Bentham. Bentham was a vicious critic of secrecy in the courts and he wrote that:

> "In the darkness of secrecy ... sinister interest and evil in every shape, have full swing. Only in proportion as publicity has placed can any of the checks, applicable to judicial injustice, operate. Where there is no publicity, there is no justice".[2]

---

[1] See "Secret Evidence", a Justice report June 2009 p.5
[2] See "Secret Evidence" p.214

The Justice report makes the following observations as to secret evidence:

- Secret evidence is unreliable.[3]
- Secret evidence is unfair.[4]
- Secret evidence is undemocratic.[5]
- Secret evidence damages the integrity of the courts.[6]
- Secret evidence weakens security.[7]
- Secret evidence is unnecessary.[8]

Justice notes that in the absence of the defendant's side of the story, a court may well arrive at what seems to be a credible conclusion but, as long as it is based upon secret evidence, it will never arrive at the correct one.[9]

The maxim that justice must not only be done but seen to be done goes deeper than is first apparent. For, despite the importance of open justice, it remains possible to have a fair hearing behind closed doors, so long as all the parties have had an equal opportunity to make their case. Whatever the outcome, the participants themselves will understand that the procedure adopted was fair. But in a hearing in which secret evidence is used, it is not merely that justice is not being seen to be done, it is actually that justice itself is not being done. It is not simply the *perception* of fairness that matters, but the practice of fairness too.[10] This point applies to the Chief Executive in arriving at a decision with equal force to that of a Court.

The Justice report notes that the resort to secret evidence is not necessary. This claim covers two different points. First, the government sometimes claims secrecy in respect of things which, it later emerges, are already in the public domain. Or the government wrongly claims that the disclosure of some item of information would damage some vital public interest when it would not. Secondly, the resort to secret evidence is unnecessary in the larger sense that there are inevitably better means of protecting the relevant public interest in a way that is compatible with the defendant's right to a fair hearing or an applicant for a licence whose income depends on a successful outcome.[11]

The criticisms of secret evidence could be more fulsome however time does not permit.

Even if the Parliament were to reject those criticisms we note that the legislation does not even provide for the COPIM to have a role before the QCAT. It should be noted that in the view of the QCCL the COPIM is no substitute for proper disclosure of the case to the applicant. COPIM is a more recent development of the concept of the Public Interest Monitor which was introduced in Queensland in the mid 1990s. The Public Interest Monitor is a Special Advocate by another name. The use of Special Advocates has come in for significant criticism in the UK. In a report of the Joint Committee on Human Rights in February 2010 a number of very pertinent criticisms of the limitations of Special Advocates were made.[1] Those criticisms are equally

---

[3] See "Secret Evidence" pp.215-220
[4] Ibid pp.220-221
[5] Ibid pp.222-223
[6] Ibid pp.224-225
[7] Ibid pp.226-227
[8] Ibid pp.227-228
[9] Ibid p.219
[10] Ibid p.224
[11] Ibid p.227

applicable to the Queensland concept of Special Advocates, especially COPIM. The point made here is simply that not even this inadequate response to the serious issues raised is provided in the Bill.

Finally, the complete abrogation of due process is continued by clause 203 which excludes the operation of the *Judicial Review Act*. Whilst of course, fortunately, following the decision of the High Court in *Kirk* it is not possible for this parliament to entirely exclude the jurisdiction of the Supreme Court on judicial review it is no doubt the case that the *Judicial Review Act* gives broader grounds of review and is a flexible device.

This is quite simply a return to the old English practice of the "Bill of Pains and Penalties". [12] The parliament is seeking by this Bill to create "adjudicative facts about a set of identifiable persons and then to inflict punishment".[13] To deprive a person of their source of income is clearly punitive. This violates the fundamental right of due process (to use the American nomenclature) and the separation of powers. This latter point was recognised by the High Court in *Polyunkhovic v The Commonwealth of Australia* 101 ALR 545 where six judges of the High Court ruled that Bills of Attainder are unconstitutional by reason to the separation of powers in the constitution. In his judgment the then Chief Justice Mason referred with approval to the decision of the United States Supreme Court of *United States v Brown (1965) 381 US 437* in which the Court struck down a law which prohibited persons who had been members of the Communist Party from having executive positions in trade unions as a Bill of Pains and Penalties. The US Supreme Court has recognised that the prohibition on Bills of Attainder cannot be got around by giving the power to the executive – *Joint Anti Fascist Refugee Committee V McGrath* 71 S. Ct 624 at 634 per Black J.

Since then of course the decision in *Kable* has seen the High Court extend the principle of the separation of powers (even if in a somewhat modified sense) to the State Courts.

These provisions are quite perplexing coming from a government that apparently believes in the free market and free enterprise.

It is even more perplexing when it is said that the purpose of the so called Anti Bikie laws is to stop people from making money out of the sale of drugs. How depriving a person of their right to make an income in a legitimate fashion is going to encourage them to give up making an income from the sale of illicit drugs is unfathomable.

Voter Identification Law

I indicated to the Committee at the time that I appeared I did not think I was going to be asked about the electoral laws. That may be my fault. I am not sure. However, I did wish to respond further to the comment made by the Member for Broadwater to the effect that even if, as in our submission the evidence clearly demonstrates, there is currently no problem with voter identification *fraud* (as opposed to voter error) steps need to be taken to prevent it becoming a problem.

---

[12] The difference between a Bill of Pains and Penalties and a Bill of Attainder is simply that the latter resulted in execution

[13] See Tribe, *American Constitutional Law* (The Foundation Press, 2nd ed, 1988) Chapter 10 especially pages 643-5

I repeat that not only is the evidence referred to in our submission that there is no problem with identity fraud both the Shepherdson Inquiry only some ten or so years ago and prior to that by the Electoral and Administrative Review Commission found there was no problem[14].

The answer to the Member's question about the future is contained in the quote from Justice Ginsburg in the QCCL's original submission "fraud by individuals acting alone, however difficult to detect is unlikely. While there may be greater incentive for organised groups to engage in broad gauged in person voter impersonation fraud…it is also far more difficult to conceal large enterprises of this sort."

In other words cases of individual fraud whilst they may not be easy to detect are most unlikely to affect the outcome of the election. As the quotation from Justice Ginsburg indicates the evidence before the Supreme Court of the United States was that no State or Federal election in that country had ever been decided by a single vote. On the other hand if identification fraud is practised on a large scale it will become very easy to detect. The people who work on polling booths are members of the local community. Many of them are teachers. They have a fairly good knowledge of who is who in the community and are likely to very quick to spot identity fraud.

So that in summary there is no problem that needs attention. If it does occur in any *significant* way it will be detected and those involved will be subject to the substantial penalties in the current law. On the other hand taking action is certain to disenfranchise a significant number of people. It is we would submit quite immoral to take action to deal with a non existent problem or one which is already adequately catered for when the action will *without doubt* result in significant harm in this case the disenfranchisement of up to some 40,000 people.

Once again I thank you on behalf of the Council for the opportunity to make a submission to this Committee.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
10 February 2014

[14] I thank the former Attorney General Mr Foley for pointing this out to me.