Law Council
OF AUSTRALIA

Foreign Activity in the South Pacific and its Implications for the Rule of Law

Speech delivered by Morry Bailes, President, Law Council of Australia at the 31st LAWASIA Conference 2018, Cambodia.

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Introduction

I want to begin today by commenting on Pacific agency and the form of discussions about the Pacific.

This issue has been usefully summarised by the Lowy Institute, an Australian think-tank providing commentary and analysis on international events, which said:

"…much of the strategic debate in Australia, New Zealand and the US provides little space for Pacific voices. Instead, it implies that Pacific states are passive dupes to Chinese influence, unaware of regional geostrategic challenges.

This has been accompanied by a deeply patronising sentiment all too familiar in the Pacific that it is up to Australia and Pacific specialists to lecture the region about these supposed challenges."[1]

Quoting this commentary is not intended as a reflection on this panel or this session.

That there are relatively few Pacific voices on this panel is an indication of the difficulty and expense for Pacific lawyers to participate in Conferences such as this, and the need to continue to push for more opportunities for their voices to be heard.

My intention is to signal that I don't intend to labour the point on challenges that are widely acknowledged within the Pacific or to be prescriptive about how the Pacific ought to respond.

Instead, I want to make it clear that my intention is to try to limit my commentary today to discussion about foreign activity itself, especially Australian foreign activity, its connection to the rule of law in the Pacific, and to attempt to identify some lessons for foreign actors in the South Pacific.

The connection between foreign activity and the Rule of Law

Firstly, I think it is important to discuss the connection between foreign activity and the Rule of Law.

A critical problem for the legal profession in the South Pacific is that many law societies operate in very challenging and constrained financial circumstances.

The Pacific legal profession is small and tends to be concentrated in the major centres. There are generally far fewer private legal practitioners than public lawyers and the overall proportion of lawyers is much lower throughout the Pacific than in larger common law jurisdictions such as Australia or New Zealand.

The same observations could be made about Pacific governments, in relation to their capacity to provide services to citizens and residents or to deal with the full spectrum of legal, governance and policy issues that sovereign nations are presented with.

Where this is the case, foreign actors may deliberately seek jurisdictions where regulations are absent or inappropriate for contemporary needs, or where compliance with regulations can be avoided through lack of enforcement mechanisms, poor governance or corrupt or illegal practices.

[1] https://www.lowyinstitute.org/the-interpreter/chinese-whispers-and-pacific-agency

So we can see that at least some forms of foreign activity will be attracted by either a lack of rule of law or the opportunity to undermine the rule of law without consequence.

This presents a serious challenge for individual Pacific island countries and the region, including countries such as Australia whose national interests are intertwined with those of our Pacific neighbours.

A part of the solution, which has the Law Council's whole-hearted support, is to promote the development of a strong, independent and capable legal profession throughout the Pacific.

However, while the legal profession is essential to achieving rule of law outcomes, it is important to note that this role can also bring the lawyers into conflict with other actors, particularly those involved in governance and public institutions.

This is because the legal profession will be among the most forthright and strident of critics when governance is lacking and public institutions are weak.

I should moderate this comment by observing, without apologising for those who seek personal profit through weak governance and institutions, that criticism may be hard to take especially when there is a mismatch between demands and the means to satisfy them.

There is an important role here for countries such as Australia to provide a model for governments of Pacific island nations.

This model should demonstrate the importance of the independence of the legal profession.

That open criticism of government policy and legislation is positive and tends to improve the quality of policy and legislation under consideration.

That the ability of the voting public to understand and have a voice about matters that affect them, also benefits from unrestricted participation by lawyers and other civil society groups.

These are benefits we enjoy in Australia and throughout the Pacific, and which foreign actors should seek to buttress through their activities in the South Pacific.

Foreign activity should therefore be open and responsive to public assessment and criticism.

Rather than seek to exploit weak laws and accountability gaps, foreign actors should hold themselves to a standard of conduct that they hope will become the norm.

I shall deal with two case studies of Australia's activity in the South Pacific, one positive and one less so.

Case Study: The South Pacific Lawyers' Association

The Law Council is a committed partner for the rule of law in the Pacific.

As a nation, Australia has a long and close relationship with the Pacific.

Our legal systems are very closely related, sharing the same pedigree of English common law.

And the Australian legal profession has the expertise and resources to make a positive difference for the Pacific legal profession.

Scale is an important factor and there are many things that we can do that are currently beyond the reach of some Pacific jurisdictions.

Realising this, the Law Council, with the New Zealand Law Society and the International Bar Association, worked with the Pacific bars to establish a regional association to support developing law societies and bar associations and to promote the interests of the legal professions in the South Pacific region.

An initial funding grant was made by the IBA to enable the Law Council to host a Secretariat and in 2007 the South Pacific Lawyers' Association was established.

The Law Council continues to host the Secretariat and is committed to seeing the work of this important regional organisation continue.

The South Pacific Lawyers' Association – also known by its somewhat unfortunate acronym, SPLA -

One thing that is consistent between Pacific legal professions and colleagues in other regions is the essential role played by the legal profession in engaging the judiciary as an independent check and balance to implement and sometimes moderate the actions of the legislature and the executive in accordance with the rule of law.

The Honourable Chief Justice Lunabek of the Supreme Court of Vanuatu observed:

> *"The Courts only become active when legal disputes require adjudication. This may be in a criminal context when the guilt of a person has to be determined. It may be in a civil context when civil rights, commonly about money or property, have to be resolved. It may be in a public context which engages not only the rights of the parties actually before the courts, but more importantly, the public interest as a whole."*[2]

Especially in the case of civil and public interest matters, a strong, independent and capable private legal profession is an essential precondition for engaging the oversight of the Courts.

Access to quality professional legal services – including services that can make effective use of local laws, procedures and enforcement mechanisms, including the court system – is an essential enabling factor for the rule of law in the South Pacific.

However, when we begin to look at whether the necessary enabling factors are in place to support the provision of quality professional legal services, the picture that emerges is that much of the regulatory foundation for good legal practice is missing in many Pacific jurisdictions.

Research carried out by SPLA and published in 2017 on *Legal Profession Regulation in the South Pacific* found that:

In addition to impacts on clients, the undermining of trust in the legal system and erosion of the rule of law, ineffective legal profession regulation has several deleterious effects:

[2] Chief Justice Lunabeck, 'Official Opening of the Courts of Vanuatu, 2016' (speech delivered at Port Vila, Vanuatu, 2016) <http://www.paclii.org/vu/other/speeches/official-court-opening-speech-2016.pdf>, 9.

- Failure to effectively regulate lawyers (or any profession) contributes to an environment in which systemic corruption can thrive, particularly as lawyers necessarily draft laws, facilitate the transfer of property and are involved in the resolution of most commercial disputes.
- Lawyers are intrinsically involved in all domestic and international trade. Ineffective regulation creates uncertainty in the effectiveness of dispute resolution which negatively impacts domestic and international trade – particularly foreign direct investment. Corruption and rent seeking behaviour by officials adds to the cost of doing business in the particular country.[3]

Although it is tempting to view these issues as being solely related to poor professional discipline, the report on *Legal Profession Regulation in the South Pacific* found a wide range of issues occurring across many individual jurisdictions:

- Absence of good character requirements to gain admission to the profession
- No disciplinary mechanism to enforce requirements to disclose matters affecting 'good character' and suitability to practise
- No mandatory requirement for professional indemnity insurance
- Where there is a fused profession, a lack of separate professional conduct rules for lawyers practising solely as barristers
- Inadequate regulation of trust accounts
- Inadequate regulation of disclosure obligations to prospective clients
- Inadequate regulation to ensure fees are reasonable, to manage contingency fees, setting aside or varying cost agreements and recovery of costs for clients
- Non-existent or inadequate professional conduct rules, and
- Lack of clear procedures for making complaints about the conduct of lawyers.[4]

SPLA, through its research and other activities, supports the legal professions across different Pacific island states to resolve these issues.

Its primary aim is to support the development of its member law societies and bar associations and to promote the interests of the legal profession in the South Pacific region.

The Law Council is firmly committed to continuing to take an active role in SPLA, recognising that it has the capacity to make a positive difference to the Rule of Law in the South Pacific.

The Law Council has the resources, in terms of finances, personnel and its ability to draw on the expertise of the Australian legal profession, to work as a committed partner to the Pacific over the long term.

The most important part of that commitment is partnership.

The Law Council does not suggest for a moment that its relative strength should crowd out other voices, especially the voices of other SPLA members.

[3] South Pacific Lawyers Association, *Legal Profession Regulation in the South Pacific* (July 2017) p 15, <https://www.southpacificlawyers.org/research>.
[4] *Legal Profession Regulation in the South Pacific,* pp 8-9.

Case study: Australia's offshore detention policy

However, as a representative of the Australian legal profession, it is incumbent upon me to be the first critic of my own country and the times where its position of relative strength in the region has had negative implications for the rule of law in the Pacific.

None of us should claim that our countries are perfect and without blame in this regard.

We should be open to criticism about where our interventions as foreign actors in the Pacific have not had a positive effect on the rule of law, and we should seek to engage with that criticism so that we can improve into the future.

Australia's policy of offshore detention is a policy deserving of such scrutiny.

Offshore detention aims to discourage over-water refugee migration to Australia by ensuring that anyone who arrives by boat is never allowed to come to Australia.

Unfortunately, there has been only sporadic progress towards resolving the question of where these people will ultimately be allowed to settle.

As a consequence, hundreds of people have been held for years in 'indefinite detention' on Manus Island in Papua New Guinea and on Nauru.

The vast majority of those in indefinite detention have been found to be genuine refugees.

On 25 October 2018, the Asylum Seeker Resource Centre reported that there are 52 children on Nauru.

Some of these children have spent their entire lives in detention.

Of these 52 asylum seeker children on Nauru:

- one in four are acutely suicidal
- seven cases have been reviewed and found to be critical by Australian doctors, and lawyers are to seek urgent injunctions for medical transfer to Australia
- A further 22 cases have been flagged for urgent written independent medical opinions by Australian doctors.[5]

Statistics like these have led the Australian Medical Association, The Royal Australasian College of Physicians and The Royal Australian College of General Practitioners to raise the alarm over the welfare of refugee and asylum seeker children held on Nauru.

The Law Council has called for asylum seeker children and their families to be moved off Nauru as a matter of urgency.

It is clear that removing asylum seeker children from the Nauru is not just medically necessary, it is also consistent with Australia's obligations under domestic and international law.

Australia's offshore detention policy was, until Australian doctors began speaking out in their thousands about the plight of these children, a politically popular model.

[5] https://www.asrc.org.au/2018/10/25/furious-doctors/

However, it has always been problematic from the perspective of rule of law and respect for fundamental rights.

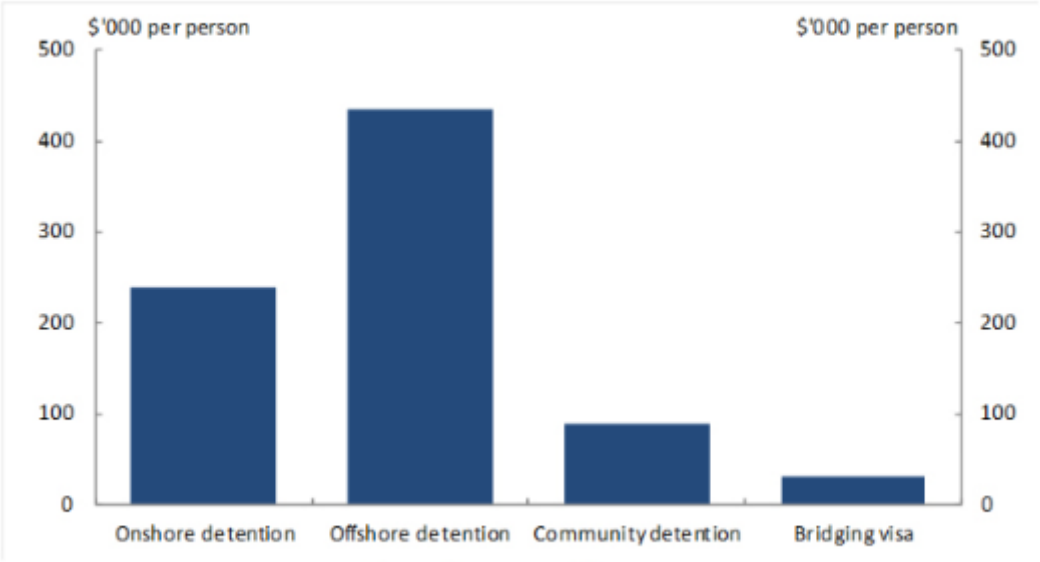
The law should not be convenient to political populism.

In addition to the human costs, and the unavoidable conclusion that the law has not provided sufficient protection to these very vulnerable people, the cost of Australia's offshore detention policy should also be considered in terms of opportunity cost.

Had even a small portion of the funds required for offshore detention been differently invested for the benefit for rule of law and local communities in PNG and Nauru we would have different outcomes.

A National Commission of Audit found that the cost of offshore detention was above AU$400,000 per person, per annum in 2013-14.[6]

Chart 10.14.1: Relative cost per person for 12 months in detention, 2013



Source: Department of Finance.

According to a 2016 report produced by Amnesty International, the estimated cost of operations on Nauru and Manus cost the Australian government AU$573,000 per person, per year.[7]

In 2017, Nauru's GDP per capita was US$8,344 (~AU$11,500).

According to Australia's Department of Home Affairs, as of 31 July 2018, there were 189 asylum seekers held in the detention centre on Nauru.[8]

The cost of keeping these people in Nauru for a year, using the smaller National Commission of Audit figure, would be AU$75.6 million.

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[6] http://www.kaldorcentre.unsw.edu.au/news/commission-audit-reveals-offshore-processing-budget-blowout

[7] See: Andrew & Renata Kaldor Centre for International Refugee Law, Factsheet: The cost of Australia's asylum policy: a guide to sources (Last updated: 15 May 2017), http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_The_Cost%20_of_Australia%27s_Asylum_Seeker_Policy%2016.05.17%20.pdf

[8] https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-june-18.pdf

According to Australia's Department of Foreign Affairs and Trade, "the Australian Government will provide an estimated $25.9 million in total Official Development Assistance (ODA) to Nauru in 2018-19", which is estimated to be equivalent to one quarter of Nauru's GDP in 2017-18.[9]

There is clearly a great deal of Australian foreign activity taking place in Nauru, however, the amount of money being spent on immigration detention on one hand, and Official Development Assistance on the other, gives a clue about the priorities of the Australian government as a foreign actor in Nauru.

There are potential implications for the rule of law.

As a foreign actor in the South Pacific, the Australian government has used the remoteness and sovereignty of Nauru and Papua New Guinea, to a degree, to shield against scrutiny and accountability.

We have accepted departures from international law, including treaties and conventions to which Australia is a party, and erosions of the rule of law, especially the principles that:

- Access to the court should be available to all;
- All are equal before the law;
- No person held in conditions of detention which amount to cruel, inhuman or degrading treatment; and
- States should comply with their international legal obligations including the promotion and protection of human rights.

This is to say nothing of opportunity costs, including possible missed opportunities to support the development of peace, justice and strong institutions[10] for the people of Nauru and Papua New Guinea.

The damage to the reputation of Nauru and PNG as jurisdictions that respect and uphold the rule of law has also been tarnished by their association with these activities.

The elephant in the room

I have so far avoided mention of the often-charged topic of Chinese investment in the South Pacific, but I shall deal now with "the elephant in the room".

"Foreign activity" is easily interpreted as "Chinese activity" and, in Australia at least, regarded with a degree of suspicion.

However, the reality is much more complicated than many realise.

For both Australia and China, national interest is a frontline reason for contributing development funding.

However, a significant area of difference is in the kinds of activities that governments invest in.

[9] https://dfat.gov.au/geo/nauru/development-assistance/Pages/development-assistance-in-nauru.aspx
[10] UN Sustainable Development Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels, https://sustainabledevelopment.un.org/sdg16

Looking at aid and development assistance, the proportion of Chinese aid spent on "Government and civil society" – the category most closely associated with the institutions that support Rule of Law – is about 13% compared to Australia's 29.7%.

The reason for this can be traced to the Chinese Government's philosophy about how aid should be delivered and what kinds of aid should be funded first.

For the Chinese Government, "fundamental physical and material needs must be met before anything else can be considered" leading to a preference for infrastructure projects.

There is a significant infrastructure deficit across the Pacific.

Arguably, a higher level of support for infrastructure projects by one donor allows other donors to focus on other areas of need.

However, as is frequently observed, Chinese government funding is often provided through concessional loans, rather than grants.

These can have a negative impact on effective governance and the rule of law, especially in the context of the ability of Pacific island economies to repay loans and the leverage this gives China over its aid partners.

However, as the Lowy Institute observes:

> *China [also] provides support to key regional organisations, particularly the Pacific Islands Forum Secretariat. In addition to its bilateral aid program and support for regional organisations, China also provides scholarships for Pacific islands students and significant human resources training for government officials.*

So there are aspects of the story of Chinese activity in the South Pacific that frequently go unrecognised.

While resisting the temptation to oversimplify, I might offer some thoughts by reflecting on Australia's experience in Nauru.

While foreign activity must consider the interests of the foreign actors driving those activities, it is of at least equal importance that local interests are taken into account.

As with any relationship, it is also important that the benefits and risks of the relationship are fairly distributed, at the commencement of that relationship and into the future.

As was observed by the Australian Ambassador to Rome, Dr Greg French, in the course of this year's IBA Annual Conference, it is no longer the case that "the strong do as they will, the weak do as they must".

This has been replaced by a "profound commitment to freedom, fundamental human rights, and the rule of law"

Foreign activities should therefore be founded upon fair and equitable terms and should reflect a commitment to the rule of law."

As we have seen in respect of some of Australia's activities in Nauru and PNG, there can be potential, negative implications for the rule of law in the South Pacific should we fail to do so, as well as reputational consequences for local and foreign partners.

There is nothing to suggest this lesson should not apply to foreign activity more broadly.

Foreign activity by the South Pacific

Again, however, we should remind ourselves that Pacific actors are not "passive dupes" to foreign influence.

There is an active, post-colonial reimagining of the Pacific islands and their place in the world.

In 2012, the Honourable Henry Puna, Prime Minister of the Cook Islands, encouraged students of the University of the South Pacific, Suva, Fiji to "think outside the rocks", to develop a concept of Pacific statehood that focusses on "Large Ocean Island States", saying:

> *"our collective territories are nearly two times the size of Russia, and more than three times the size of the People's Republic of China."*

This growing awareness of significance, especially when acting as a bloc, means that Pacific islanders are increasingly present internationally and seeking to have global influence.

A common, cynical response from non-Pacific actors is that their increasingly confident and independently minded counterparts in the Pacific encourage and seek to benefit from chequebook diplomacy by playing foreign actors off against each other, looking for the best deal and the biggest cut.

But from the perspective of the Pacific, this apparent problem of donors and investors being played off against each other looks quite different.

Mr Puna has said:

> *"For me, as a leader, and us as governments, our collective interests are being pressured and shaped toward a new Pacific order — one that won't necessarily meet the expectations of others — or the perceptions of outsiders.*
>
> *I think the time is right that we take on a more concerted effort, as a region, to define ourselves on our own terms.*
>
> *What is important is that we choose what's best for us. We have the ability to define what's good, and we have the right to take commanding ownership of our future."*[11]

According to Peter O'Neill, Prime Minster of Papua New Guinea:

> *"it is healthy that there are competing sources of finance for infrastructure projects"*
>
> *"competition between China, Australia, and the United States leading to funds being made available to the Pacific is in the best interest of our countries."*[12]

Seen from this perspective, there is a legitimate rule of law purpose behind encouraging a degree of tension and competition between different foreign actors.

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[11] The Hon Henry Puna, "Thinking 'Outside the Rocks': Reimagining the Pacific", in Greg Fry and Sandra Tarte (eds), *The New Pacific Diplomacy* (2015) 285, 286.
[12] David James, *Business Advantage PNG* (7 August 2018) https://www.businessadvantagepng.com/prime-minister-gives-upbeat-take-on-papua-new-guineas-economy/

Australians would be rightly outraged if our Government entered into any agreement with a foreign actor that did not result in the best available outcome for Australia.

Or, if through silence or inaction, our national interests were compromised.

We should not, as foreign actors in the Pacific, expect a different standard to apply in the South Pacific to the standard we expect for ourselves.

Nor should we be surprised when Pacific actors, such as Mr Tong, attempt to use their new-found influence to apply pressure for policy change in the Pacific region and beyond.

In his address at the Launch of the Pacific International Relations Forum of the School of Government, Development and International Affairs of the University of the South Pacific, Mr Tong said:

> *"…we have no choice but to engage even more aggressively internationally, because the key to our survival will depend on whether international action is taken on climate change or not.*

I also wish to add that our strength is in our solidarity.

We can and must continue to work diligently together to influence world opinion on these issues, because they matter to us."[13]

As foreign actors, we should welcome the fact that people in the South Pacific are raising their voices and the opportunities that this will bring.

Thankyou.

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[13] H.E. President Anote Tong, "'Charting its Own Course': A paradigm shift in Pacific diplomacy", in Greg Fry and Sandra Tarte (eds), *The New Pacific Diplomacy* (2015) 21, 24.