

Vigilance can prevent state incursions

A group set up to defend the rule of law has regulators in its sights, writes **James Eyers**.

The rule of law emerged after the great constitutional battles in 17th-century England, but the war to entrench it is far from over.

The Rule of Law Association of Australia (RoLAA) was established last year to monitor government agencies and parliamentary bills and comment when the rule of law was being contravened. There has been no shortage of targets.

Around 1000 people, including many politicians, are receiving regular emails from RoLAA, which is housed in the Sydney law firm of Speed and Stracey. Its chief executive is Richard Gilbert, who is well known in Canberra from his time at the helm of the Investment and Financial Services Association, from which he retired last year.

Within days of the Queensland government's proposal last month to amend the state's Valuation Act, rushed through to circumvent a Court of Appeal decision, Mr Gilbert was on Brisbane radio, arguing against its retrospective nature and lack of consultation.

Last week the government capitulated on the retrospective nature of the laws, which were also described by the Bar Association of Queensland as "the antithesis of good government" and by the property industry as a blatant tax grab.

But the about face also represented an early win for RoLAA, which was one of the first bodies to identify the issue and point out how it breached the newly amended Queensland constitution, which says in its opening paragraphs that the parliament will respect the rule of law.

RoLAA, which is funded by ad hoc donations from supporters and occasional conferences (it hosted one last year with the NSW Bar Association),



Richard Gilbert, left, and Malcolm Stewart . . . keeping a watch on the expanding power of regulators.

Photo: ROB HOMER

was formed after lawyers Robin Speed and Malcolm Stewart were incensed at the lack of opposition to the Foreign Evidence Amendment Bill when it was introduced to federal parliament last year.

The government said the bill's purpose was "streamlining", although it is believed that difficulties with Project Wickenby, the Australian Taxation Office's investigation into tax havens, were at least one motivator behind the bill, which sought to reverse the onus of proof for adducing evidence obtained from overseas by the government in court proceedings in Australia, and passed the House of Representatives without dissent.

But after Mr Speed and Mr Stewart convinced key Greens and Liberal senators, including shadow

attorney-general George Brandis, to oppose the bill, the government has not pursued it (although it is currently listed in the Senate for debate in the autumn sitting).

The expanding power of regulators, including the ATO, has become a key area of activity for RoLAA.

"More so now than at any time in Australia's history, regulators such as the ATO, ASIC and ACCC exercise extraordinary powers to obtain information and documents, compulsorily examine witnesses, tap telephones, execute search warrants and determine who should be referred for a possible criminal prosecution," Mr Stewart said.

"Every day, Australians are subject to more and more regulations by existing and newly formed regulators. Like it or not, regulators have

become an important part of the legal system. To act in accordance with the rule of law a regulator must administer the law in a manner that is predictable, fair and where the regulator is indifferent to the outcome. If that doesn't occur there will be a loss of confidence and respect for the regulator."

Following its success in Queensland, RoLAA notched up another victory last week when a Senate committee called for additional privacy protections in the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill.

In a submission earlier this month, RoLAA called on the Senate economics committee to recommend amendments to the bill. The bill would allow the ATO to disclose to other agencies tax-related informa-

tion where "the public benefit of disclosure outweighs taxpayer privacy".

RoLAA said the bill provided insufficient detail about who would make a determination of public benefit and on what that decision would be based. It was the only group that provided critical comments on this aspect of the bill.

In its report, released last week, the committee recommended that the government consider amending the bill to require the determination of public benefit "to be made by an appropriately authorised tax officer".

In one of many letters to the AFR this year, Mr Speed responded to the litigation strategy of ASIC: "There is a growing trend in Australia for government agencies to work out a theory of what they believed happened and then work the facts to be consistent with the theory."

The ATO and ACCC had too much discretion to apply the law, Mr Speed argued at RoLAA's conference in Sydney late last year. He said this had created a perceived, and sometimes actual, lack of impartiality and placed the rule of law under serious threat.

Mr Stewart said that, from time to time, regulators might perceive the need to obtain convictions to stop some particular conduct. "But the decision to prosecute must only be based on a proper determination by the regulator of whether or not a person has contravened the law," he said.

"If the action is unsuccessful the regulator's response is often to ask the government for more and more powers. Following ASIC's three highly publicised losses in December, the government announced that it would legislate to give ASIC even greater powers to obtain search warrants and tap phones.

"One of the main functions of the Rule of Law Association of Australia is to review legislation to ensure regulators must exercise their powers in accordance with the rule of law," he said.