

RULE OF LAW

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RoLIA calls for judicial inquiry into use of coercive powers

The Rule of Law Institute of Australia expresses grave concern at the reported excessive use of powers by Federal Government agencies in the dawn raid on the family home of the financial adviser to Paul Hogan (*The Australian*: Susannah Moran, September 4-5 2010). *The Australian* reported that the adviser's wife answered the door to face ten armed Federal Police officers. She asked them to wait while she woke up her sleeping children. But they rushed past and began searching the home. A police officer woke her younger daughter by shining a torch in her face and demanding she get out of bed.

The raid cannot be dismissed as an isolated instance in respect of an isolated taxpayer. It was not.

A pattern is emerging of raids and abuses of other coercive powers by Federal Government agencies against Australians. For example, the Queensland Court of Appeal recently heavily criticised the ATO for trying to bankrupt a taxpayer so that the taxpayer could not contest the tax assessment on which bankruptcy was sought (Denlay's case; [2010] QCA 217).

Nor can the abuses be dismissed with the "Trust Us" line. Only too frequently government agencies attempt to avoid scrutiny by asserting – "if only the media knew the 'real facts' it would not criticise us – but the law prevents us disclosing the position." Mr Justice Graham Hill had this to say in McCallum's case (1997: 36 ATR 256) on that subject:

"The view which the majority of the court has reached in the present case gives the Commissioner powers which are capable of abuse. It is no answer, in the remaining days of this century, to say that the Commissioner can be trusted. That is an argument which betrays a lack of realism and experience with tax administration. In so saying, I do not suggest that the present incumbent of the office of the Commissioner would in any way abuse his powers. But it is possible, as the report of the tax Ombudsman makes clear, that some officers might."

Today, Australians have every reason to fear speaking out against the misuse by government agencies of their powers. First, the powers are so widely drawn that any legal challenge on the ground of absence of power is rarely available. Second, there is no proper review system by an independent body of the merits of the exercise of a power (courts have only a limited power of review). Third, government agencies have such large financial and other resources that only a few Australians can afford to stand up and defend themselves. Fourth, and perhaps most significantly, government agencies have become in practice the effective makers of law. For example, the tax law has become so complex and uncertain (with severe penalties for getting it wrong) that the ATO in effect makes the rules when it interprets a law in a particular way. In reality, there is an overwhelming necessity for taxpayers to take whatever terms of settlement the ATO offers.

Tax laws also exemplify what has happened in other areas. First, the Federal Government made the tax laws so complex that few could understand them. Then the Government introduced self assessment and threw the onus and responsibility on taxpayers of knowing, understanding and correctly applying the tax laws. Now the Government has criminalised tax laws so that if a taxpayer makes a mistake, he or she faces the risk of a jail sentence.

The Federal Parliament has conferred extraordinary coercive powers on a range of government agencies such as raiding private homes, interrogating, accessing premises and withdrawing the right to travel. These powers were conferred on the assumption that they would be exercised responsibly, sparingly, fairly and reasonably. That assumption is now under serious threat.

We are witnessing government agencies using the powers for collateral improper purposes e.g. to put pressure on Australians to settle with the government agency or to deny Australians access to their own assets to defend themselves or for the agency to selectively quote from the extensive information in their possession to pursue the person concerned.

The power, for example, to raid a person's home should only be exercised bona fide in extreme circumstances where there is a real and substantial threat that unless it is done evidence will be destroyed. A court should issue a warrant authorising any such intrusion. It will be interesting to know whether, in the dawn raid of Paul Hogan's financial adviser, there was any objective evidence of risk of destruction of evidence to support such extraordinary action. Further it is not known who authorised the raid, why at dawn, why ten armed police officers and why with no apparent safeguards for those being raided.

Senator George Brandis has already undertaken in the 43rd Parliament to refer to the Australian Law Reform Commission for review the coercive powers of Federal Government agencies. That is a very important step. But what needs to happen at the same time is a full scale judicial inquiry into the extent to which ordinary Australians have been the subject of the excessive use by particular government agencies of their coercive powers. Under that inquiry those giving evidence should be given appropriate immunities, as often people are too scared to speak out for fear of regulatory retribution. Unless this happens, justice will not be done to those the subject of the abuses or to the alleged abusers, the public light will not be shone on the abuses and the extent of the required removal of the powers will not be known.

CONTACT:

Richard Gilbert
Chief Executive Officer
Rule of Law Institute of Australia
Tel: 0417 247 998