

18 October 2010

The Secretary
Senate Economics Committee
Parliament House
CANBERRA ACT 2600

Dear Sir

Submission on Corporations Law Amendment Bill No 1 of 2010

The Rule of Law Institute of Australia wishes to make a submission on the above Bill.

The provisions about which we have a concern are described in the Explanatory Memorandum as follows:

- Enable an interception agency, such as the Australian Federal Police (AFP) to apply for telecommunications interception warrants in the course of a joint investigation into these offences.
- Enhance ASIC's search warrant power, to enable ASIC to apply for a search warrant under the ASIC Act without first having to issue a notice to produce the material.

Our concern is that this Bill confers on a regulator even more coercive powers than it already has. Especially is this a concern when it has come to light, very recently, that the Parliament is not apprised of the extent to which the existing powers are

used, and with what safeguards, to ensure that individual rights and liberties are respected and upheld.

Conferring additional powers on a regulatory agency is a serious matter. First, the Parliament needs to be assured that the regulator will not act in an arbitrary manner. Second, it is important that the community respect the actions of a regulator as cooperation and respect is critical for a good regulator, especially if the regulator relies on members of the public coming forward and giving it intelligence on instances of genuine breaches of the law.

In this regard we refer to answers from the June round of Estimates which revealed for the first time that ASIC had issued more than 18,600 coercive orders during the last three years. However, media comment would suggest that this number does not reflect all instances of its use of coercive powers, and it could be substantially more. For example, ASIC did not disclose the use of its powers under section 912E of the Corporations Act, nor did it report on the number of ASIC and/or AFP search warrants it executed, number of telephone intercepts and access to phone and bank account records

As under the great majority of these orders individuals are not permitted to reveal the extent of such orders, it is important that the Senate be apprised of ASIC's use of its current suite of powers. This is a matter on which other agencies such as ACC, ACC and ABCC report to Parliament in their annual reports.

In relation to ASIC and this Bill, the committee should seek advice from ASIC which reassures the Senate that ASIC has in place appropriate central records, procedures and safeguards to ensure that it does not act in an arbitrary manner. 18,600 coercive

Rule of Law Institute of Australia Level 4 131 Macquarie Street Sydney NSW 2000 Australia

Telephone: (02) 9251 8000 Fax: (02) 9251 5788

notices in three years, or 26 per week, appears at first glance to be a large number, and it is difficult to understand how an agency of ASIC's size could make optimal and beneficial use of such a large and growing data set. The use of coercive powers needs to be accompanied by demonstrated capability improvement and performance monitoring, viz:

- Adherence to Australian Government Investigation Standards.
- Effective intelligence processes to ensure that resources are not wasted and that there is no unnecessary intrusion.
- Evidence that the issuance of a coercive notice has a reasonable probability of a successful enforcement outcome.
- Adequate training to ensure knowledgeable and appropriate conduct by investigations staff.

There is no published information on how ASIC executes its current powers. In this regard it would be beneficial to know the answers to the following questions:

- When does ASIC initiate a coercive order?
- Does ASIC do so based on there being a 'reasonable suspicion' that there has been a breach of the law?
- How does the Commission ensure that the approving officer is a different person and in a different division from the initiating or recommending officer – thereby guaranteeing some impartiality in any coercive action?

- How often does the Commission conduct an internal review of its extensive set of coercive powers and what have these reviews concluded.

Search Warrants

ASIC's information-gathering and inspection powers (including its current power to obtain a search warrant) are contained within Division 3 of Part 3 of the *ASIC Act*.

Section 28 of the *Act* requires that those powers only be exercised by ASIC:

- in connection with the performance or exercise of ASIC's functions or powers under the corporations legislation;
- for the purposes of ensuring compliance with the corporations legislation;
- in relation to an alleged or suspected contravention of the corporations legislation, or a contravention of another law which relates to a corporation; or
- in connection with an investigation under Division 1 of the *ASIC Act*.

The parameters within which ASIC may exercise its powers, as set out in section 28, are broad but not unlimited. The limitations on ASIC's powers are important in ensuring that ASIC exercises its powers for a proper purpose, and in proper circumstances. The limitations apply to each of ASIC's powers in Division 3, including relatively unobtrusive powers such as ASIC's power to require a corporation to produce to ASIC specified corporate records, or to require a person to produce specified records in the person's possession that relate to the affairs of a corporation.

ASIC already has the power under the *Crimes Act 1914* to obtain a search warrant in relation to suspected criminal offences. ASIC's current power to apply for a search

Rule of Law Institute of Australia Level 4 131 Macquarie Street Sydney NSW 2000 Australia

Telephone: (02) 9251 8000 Fax: (02) 9251 5788

warrant under the *ASIC Act 2001*, and the power of a magistrate to grant ASIC's application, are set out in sections 35 and 36 of the *Act*. In its current form, section 35 obliges ASIC firstly to require the production of corporate records under another provision of Division 3, and only if those records are not produced to ASIC may ASIC then apply for the search warrant. The provisions apply in respect to any civil or criminal matter.

ASIC's power to apply for a search warrant pursuant to section 35 is not presently limited by the parameters set out in section 28, referred to above. However, the two-step process which ASIC is required to undertake before it may apply for a search warrant means that the parameters contained in section 28 still have a significant role to play in ASIC's search warrant power. That is because ASIC must have firstly exercised one of its powers in Division 3, pursuant to the parameters contained in section 28, before it may seek the same corporate records through the use of a search warrant.

The proposed amendments to section 35 seek to remove the current two-step process so that ASIC need not first require production of the corporate records using one of its other powers in Division 3 before it may apply for a search warrant for the same records. This has the effect that ASIC's power to issue a search warrant is no longer limited by the parameters contained in section 28. The absurd result is that ASIC would be required to come within section 28 when exercising relatively unobtrusive powers such as production of corporate records, but would arguably *not* need to come within section 28 when exercising the much more serious and invasive power of a search warrant.

One other power given to ASIC in Division 3, which is not subject to the safeguards of section 28, is ASIC's power to issue a notice for production of records to an Australian auditor under section 30A. However, in order to safeguard the exercise of power pursuant to section 30A, the Parliament has seen fit to impose a separate specific set of safeguards focussed on audit-related purposes in subsection 30A(2).

In the same way, ASIC's power to apply for a search warrant should be subject to specified safeguards with reference to the purpose for which the power is being exercised. Those safeguards should be drafted to recognise that:

- as with ASIC's other powers in Division 3, ASIC's power to apply for a search warrant should only be exercisable for proper purposes in connection with ASIC's statutory functions; and
- search warrants are a particularly invasive form of information-gathering power, which typically involve the attendance of armed Federal Police officers at premises which might include private residences or workplaces.

But even with this qualification Parliament will by this Bill be permitting ASIC to obtain a search warrant in circumstances where there may be no breach of the *Corporations Act* or any other law or provision. ASIC already has the power under the *Crimes Act 1914* to obtain search warrants in relation to all criminal offences under its jurisdiction. The search warrant power under proposed s36 of the Bill is not limited to circumstances where there is any suspected contravention of any criminal, civil or other provision. The potential use of this proposed power is in the

circumstances extraordinary. It should be referred to the Australian Law Reform Commission as part of a review by it of the exercise of coercive powers by federal regulators.

The power of ASIC to obtain a search warrant under the *Crimes Act 1914* for suspected criminal contraventions should be sufficient. The creeping expansion in coercive powers given to ASIC should be stopped until it has been carefully reviewed.

Recommendation

With the above points in mind RoLIA submits that the Committee recommends to the Senate that the Bill be amended as follows:

- That the proposed amendments to the *ASIC Act* (see items 1-3 of Schedule 1 to the Bill) be excised from the Bill and referred to the ALRC as part of a review of the use of coercive powers by federal regulators.
- That ASIC include in each annual report an itemised list by statutory provision of the frequency of use of its coercive and investigative powers.
- ASIC publish on its web site a set of procedures which demonstrate that it has appropriate checks and balances to ensure that it uses its coercive powers sparingly and with appropriate discretion.
- That the Commonwealth Ombudsman and the Privacy Commissioner conduct a biennial audit of ASIC's use of its coercive powers and report to the Parliament.

- That ASIC's power to apply for a search warrant be subject to the safeguards contained in section 28 of the *ASIC Act*.

Yours sincerely

Malcolm Stewart
Vice President

Rule of Law Institute of Australia Level 4 131 Macquarie Street Sydney NSW 2000 Australia

Telephone: (02) 9251 8000 Fax: (02) 9251 5788