

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

23 – 24 February 2011

Question No: AET 134

Topic: SBT 191

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Senator Bushby asked:

Senator BUSHBY—Okay. In SBT 191, which talks about the challenges to the use of ASIC's compulsory powers, you noted that, since 1 July 2007, ASIC's use of compulsory powers has been challenged in court seven times and you also noted that in two instances ASIC's use of powers was found to be invalid. What were those circumstances?

Ms Gibson—I cannot remember exactly. We will need to come back to you.

Senator BUSHBY—If you could, please. You also go on to note that some of these challenges are tactical actions by people or entities who are subject to investigation and they are trying to delay or do whatever. You refer to those seven court challenges and notices included actions by Firepower, two instances, and AWB, two instances. Of those four out of seven, were any of those four the two where your use was found to be invalid?

If that is the case, it does not sound like they are tactical.

Mr D'Aloisio—No, I understand.

Answer:

The two instances referred to in SBT 191 are:

Collard v Australian Securities & Investments Commission (No 3) [2008] FCA 1681

ASIC summonsed three persons to be examined by inspectors under s19 of the ASIC Act. All three examinees proposed to be represented at the examination by one lawyer. A direction was made by the inspector, the effect of which prohibited the examinees from being commonly represented. The examinees sought judicial review of the decision under the *Administrative Decisions Judicial Review Act*.

In this particular case, the inspectors were concerned that the three different examinees were known to have different accounts of relevant events, and the inspectors wanted to hear the examinees' stories without the possibility of their lawyers steering their accounts towards divergence.

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The court found that the burden of proof fell on the ASIC inspectors to establish that there was a reasonable need to require separate representation to ensure the integrity of the examination.

In this case there was inadequate evidence to establish this and the inspectors' decision was set aside.

ASIC revised its processes and procedures following this decision.

ASIC v Sigalla (No 2) [2010] NSWSC 792

ASIC obtained freezing orders September 2009 to prevent Mr Sigalla dissipating funds while it investigated his conduct as executive chairman of the listed company TZ Ltd from April 2004 to June 2009.

It appeared to ASIC that Mr Sigalla was not complying with the court freezing orders. ASIC served notices to obtain material to assess whether this was the case. Ultimately ASIC laid 43 charges of contempt of court against Mr Sigalla. Mr Sigalla challenged the validity of ASIC's notices used to gather evidence of the alleged contempt on the basis that ASIC had no express power to bring proceedings for contempt.

Justice Richard White ruled that ASIC could gather information in relation to contempt of court charges, but that some of the notices used were invalid as they did not adequately state the contraventions that were the basis of the investigation, that is, they referred to the suspected contraventions of the main investigation, not the suspected conduct which constituted the contempt.

In response to this decision, ASIC reviewed its processes and procedures and found that no changes needed to be made as this was an isolated incident.

The challenges to ASIC's powers by AWB and Firepower were not instances where ASIC's use of power was found by a court to be invalid.