

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

31 May – 2 June 2011

Question No: BET 111

Topic: Formal and informal powers

Hansard Page: Written

Senator Bushby asked:

- Does ASIC acknowledge that the use of a formal coercive power to require certain information to be disclosed can in many circumstances protect a company etc from allegations of breaches of other duties it might have, such as confidentiality, privacy or secrecy? Where a company is requested to informally disclose information to ASIC and that company refuses because of such a duty, does this have any impact on how ASIC would subsequently conduct its investigation or otherwise treat that company? Why would ASIC use an informal request for such information when it has formal powers under which it can conduct investigations?

Answer:

The use of a formal power to require information to be disclosed can protect recipients from allegations of breaches of confidentiality and privacy by third parties. ASIC fully understands that, for this reason, many organisations would prefer to be (or indeed insist that they are) served with a compulsory notice rather than provide books or information voluntarily. In ASIC's experience this is the case for all banks and many other organisations that hold client details.

There are many instances where ASIC has issued notices at the request or the insistence of the party holding relevant books or information. This has been identified as one of the principal reasons why ASIC's use of compulsory powers is relatively high. This situation is common and ASIC staff's understand the duties which the relevant party may have towards their clients, staff and other parties. ASIC does not treat parties differently on the basis that they have requested or insisted that ASIC use its compulsory powers.

Following ASIC's recent review of its use of compulsory powers, ASIC is placing a greater emphasis on prior consultation with recipients of notices where appropriate. It has also introduced a requirement that staff consider alternatives to compulsory powers, including voluntary assistance. These initiatives were prompted by stakeholder comments received during the review. There would clearly be some circumstances in which prior consultation and/or voluntary production are inappropriate. These would include some investigations of serious wrongdoing. They would also include circumstances where the holder of books or information has expressed a preference that compulsory powers are used. The recent initiatives are designed to ensure that ASIC staff consider

all available options for obtaining books and information and select the method that is most appropriate in the circumstances.