

**SENATE STANDING COMMITTEE ON ECONOMICS QUESTION**  
**(Supplementary Budget Estimates 20 October – 21 October)**

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Question: SBT 191

Topic: Coercive powers – calling individuals and materials to appear before ASIC

Senator Bushby asked:

**Senator BUSHBY**—I would like to ask some questions about coercive powers. Last estimates I asked you some questions about your use of legislatively granted corrosive powers and the internal policies you have surrounding their use, and I note that answers to how often some of those powers have been exercised have now been provided. But I do not recall seeing anything in those answers about your thoughts in response to the question on whether you need to extend the record keeping and the transparency around the use of those powers. Do you have any thoughts on that now?

**Mr D'Aloisio**—We take the use of coercive powers seriously, because you are balancing public interest and individual rights, and we need to balance the use of those powers in the range of investigations that we have. In the last three years, I think we have had something like 792 investigations on foot, so we have quite a wide remit. The powers, as you know, fall under two key headings: the power to examine individuals and the power to require production of documents and so on. We are hearing the debate and the issues that are being raised, and, as part of that, quite clearly I would like to talk more fully to the Rule of Law Association and also to the law councils that are raising some issues about seeing where they are, because we do not believe the powers have been abused. We believe the powers are needed.

ASIC has itself asked our staff to prepare papers for review for us to re-examine the processes we follow and to examine whether we need to be more transparent in reporting in the way that the powers are used. So from a public interest point of view we recognise the seriousness of this issue and the need to reassure the community that there is no abuse, that we use the powers properly, that there are checks and balances in place when powers are used and that individuals have the right to claim certain privileges when they answer questions. So we see it initially as an exercise in just redoing a fresh stock take on powers that have been given to ASIC over many years since the Corporations Act has been in its current form.

**Senator BUSHBY**—I am pleased to hear that you are—

**Mr D'Aloisio**—So that is what where we are at, and we will be very pleased to report further to you in future meetings about what we have done and what the outcome of those discussions has been. In providing the figures to you that we provide, we are well aware of the fact that when you see those sorts of numbers you say 'that is a lot of notices', but when we go into the complexity of the cases, the number of people we need to see, the evidence that is needed in running a case and the actual probity of that evidence that is needed to stand up to cross examination, the use of these powers is very important for ASIC discharge its functions.

**Senator BUSHBY**—I am pleased to hear that you are looking at the processes around it. I think the last time I asked you sort of a surprise question that did not appear—and I apologise if I am putting words in your mouth—to be something that you had thought of in terms of a process of oversight, and I am pleased to hear that ASIC is looking at that.

**CHAIR**—Are you still on coercive powers.

**Senator BUSHBY**—Yes, it will be a while before I finish on this. Currently are there any policies and procedures within ASIC to ensure internal compliance with the law and that coercive powers are only used to further the legitimate objectives of the organisation?

**Mr D'Aloisio**—Before an officer of ASIC can issue a notice or use a coercive power there are internal processes that have to be followed that are document in our enforcement—

**Senator BUSHBY**—This is for the use of all coercive powers, even the most—

**Mr D'Aloisio**—Yes—

**Senator BUSHBY**—We went through this last time, what you needed to do and I think the most commonly used one was up to the discretion of the investigator to some extent.

**Mr D'Aloisio**—The investigator has to make a judgement about what they need from an individual or in terms of material that has to be produced. What we say is that you make that judgement and then you have to go through a process of a form of document that is then used and needs to be settled. That becomes the request, if you like—the document of demand. In the processes leading up to that the investigator makes a

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judgement, a lawyer in the team generally will review that, the document will be settled, it will then be signed  
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by the appropriate delegate and then it will be served. You cannot sort of get a bit of paper and write out, 'Please give me this'; you have to go through these processes.

**Senator BUSHBY**—I understand. You have these processes you need to go through.

**Mr D'Aloisio**—And then what comes in and how it is recorded is there as well. I am more than happy, if you like, to take it on notice and for us to outline to you just what that process is both in respect to calling individuals to come before us and calling for material. The notice needs to be used for proper investigation, but also in a lot of cases does need to be used to override possible confidentiality obligations that may exist between parties that are responding to those. So as a matter of law they are required to provide information they may regard as confidential but we do not think is confidential and it is in the public interest of the investigation that it be given to us. There are a range of reasons. As I say, we can outline those.

**Senator BUSHBY**—I would appreciate it if you would do that. Thank you.

#### Answer:

Guidance on and outline of processes in relation to s19 examinations and reasonable assistance is contained in Chapter 8 of ASIC's internal Enforcement Manual.

Chapter 6 of the Enforcement Manual provides guidance on and outlines the process for the issue of notices for the production of documents.

#### **Power to conduct an examination (s19 ASIC Act, s253 National Consumer Credit Protection Act 2009)**

The power to require a person to attend a private examination to answer questions on oath may only be used where ASIC has commenced a formal investigation, or intends to commence one. In practice, ASIC does not conduct examinations other than where there is a formal investigation on foot. The fact that a formal investigation needs to have been commenced, or is intended to be commenced (under ss13, 14 or 15 of the ASIC Act or ss247 and 248 of the National Consumer Credit Protection Act) is an important precursor to the use of this power.

A decision to commence an investigation is usually made under s13 of the ASIC Act. That section requires an ASIC officer to have reason to suspect that a contravention of the law has occurred. The decision under s13 is recorded in a file note that sets out the specific provisions suspected of having been contravened, the scope of the investigation to be conducted and a broad description of the material relied upon in formulating the reason to suspect. Decisions to commence a s13 or s247 investigation may only be made by officers responsible for an investigation who are at Executive Level 1 or higher.

Before a formal investigation is commenced a matter will have gone through a thorough assessment process (using ASIC's confidential case selection criteria) and been considered by a Senior Executive Leader as appropriate to resource for investigation. Chapter 5 of the Enforcement Manual provides guidance in respect of the circumstances in which ASIC can commence and conduct a formal investigation.

During the course of a formal investigation, the investigation team will consider whether it is necessary to formally interview people who are likely to have information materially relevant to an investigation. This is usually done after there has been a detailed review of available documentary material. The request to attend the examination is sent by notice, setting out details of the time and place and subject of the examination, and containing detailed information about the examinee's obligations and rights, including the right to have a lawyer present. In most cases, the investigator will have spoken to the examinee prior to issuing the notice to

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discuss the intended examination. A voluntary interview is considered as an alternative to an examination in appropriate circumstances eg, where the person to be interviewed consents and is considered to be willing to provide a statement in the future, and it is appropriate in light of the information to be obtained.

At the commencement of an examination the ASIC officer conducting the examination provides the examinee and his or her lawyer with a detailed explanation of the examinee's rights and obligations, how to claim legal professional privilege and privilege against self-incrimination. During the examination relevant documents are shown to the examinee and questions asked. The examinee and his/her lawyer have an opportunity to ask any questions, and make any statements they wish to make. There are frequent breaks in examinations. In due course, the examinee is provided with a transcript of the examination and asked to review it and sign it as a correct record of the examination.

Chapter 8 of the Enforcement Manual provides detailed guidance on the use of this power, including:

- when it is appropriate to use the power;
- how to conduct an examination;
- confidentiality obligations and who may attend an examination;
- the rights of examinees to claim legal professional privilege and privilege against self-incrimination;
- the examinee's rights to legal representation, and to fairness;
- preparation of a transcript of the examination and provision of it to the examinee; and
- use of the transcript in litigation.

There are a number of judicial decisions (where exercise of the power has been challenged) which provide guidance on the scope of this power, and these are all incorporated in the practice guidance provided to ASIC staff in the Enforcement Manual.

#### **Powers to request documents**

The powers to require production of documents may be exercised to obtain documents from an entity or an individual. They are used to enable ASIC to assess and analyse documents relevant to a regulatory function or power being exercised.

For example, if there are concerns about possible insider trading, notices would need to be issued on the person whose trades are being considered and their broker and probably employer, people who may have provided or received the inside information and their brokers and employers, the other party to the securities transactions and their broker, ASX (for trading data, official announcements and CHESS material), and the person's bank to trace the funds received. This may amount to more than 10 notices in relation to the one discrete surveillance/investigation. More complex investigations would require a greater range of notices.

Powers to require production of documents are used for analysing complaints from a member of the public, for surveillances/to test compliance, and for formal investigations of a suspected contravention. In the life of one matter notices may be issued:

- when a complaint is received by ASIC and an initial assessment of it requires further information about the particular entity/ transaction/investment being considered (ASIC issued 237 notices in the 2009-10 financial year to assist in assessing the 13,372 complaints received that year. Of those complaints, some 21% (2808) were referred for compliance, investigation or compliance);
- there appear to be concerns and for example, ASIC wants to conduct a surveillance of the entity to see whether it is offering financial products outside the regulatory regime;

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- where the surveillance or complaint gives rise to suspicions that the Corporations Act and the ASIC Act are being contravened – to gather evidence of a wide range, eg from the entity's auditors and advisors, its directors, its bankers, financial advisors/agents through whom the entity provided the products, investors, and the entity itself.

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Information collected at each stage of this example would be used in later stages of the matter. If a matter was to be resourced and a formal investigation commenced, material may also be gathered at this stage in order to prove each element of the offence at trial.

Processes in relation to and guidelines on the use of these powers are contained in Chapter 6 of the Enforcement Manual. Safeguards on the use of these powers include that their exercise requires a written notice that specifies the reason for production, what is required to be produced and the place and time of production. For s31, 32A and 33 ASIC Act notices the ASIC Regulations provide a form. Other notices are issued by standard ASIC template that notifies recipients of their obligations and protections. Chapter 6 of the Enforcement Manual covers the use of powers to request documents and it covers such topics including:

- the scope of the powers and when they should be used;
- consultation with the recipient around the scope of material sought and time for compliance;
- approval processes for the issue of a notice (approval by a lawyer and team manager);
- how to deal with the books and information obtained;
- claims of legal professional privilege and confidentiality;
- what is a reasonable basis for non-compliance.

As outlined above, notices to produce documents are issued in a variety of circumstances where ASIC seeks access to material to enable it to discharge its functions. In many instances notices are issued after some discussion with the proposed recipient about the scope of material requested, and the time for compliance. ASIC's procedures require that notices to produce documents are approved by the team leader of the matter and reviewed by a lawyer. The notices are sent with a covering letter that sets out the recipient's rights and obligations, and provides a contact name and phone number if the recipient has any questions.

In cases where it is considered likely that there will be voluntary production, this is requested. The notice will require production of the material to a named ASIC office at a particular time and date. In many instances ASIC is willing to extend the time for production. When the documents are produced, the producer is issued with a receipt. The notice and the documents provided are registered on an ASIC evidence management system, which allows the notice and the documents to be recorded and access to them tracked.

Once the documents are no longer required by ASIC, they are returned to the producing party. While the documents are held by ASIC, any person who would have an entitlement to access them if they were not in ASIC's possession may do so.

#### **Checks and balances to ensure the public interest in calling for that evidence outweighs the confidentiality obligations that exist.**

Apart from the protections outlined above, additional general checks and balances in place to ensure that any decision to use coercive powers is made carefully are set out below.

#### **Enforcement Manual and Technical and Procedures Library**

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Guidance on the use of ASIC's coercive powers is provided in both the internal Enforcement Manual and ASIC's Technical and Procedures Library. These are regularly updated by senior staff with expertise in the relevant area, to take account of changes in the law (either legislative or through judicial decisions, or internal decisions on changes in practice or procedure).

#### **Oversight of matters**

Investigations and surveillances are carefully planned and overseen by an officer at team leader level or higher. Major matters are overseen by a Senior Manager, or a Senior Executive Leader.

#### **Professional Standards Unit**

The Manager of the Professional Standards Unit reviews serious complaints from members of the public about misuse of ASIC powers (Information Sheet 107) and makes recommendations where ASIC's policies or procedures need to be updated or additional training is needed. There are approximately 1-2 complaints per year in relation to the use of coercive powers that are reviewed by the Professional Standards team.

#### **Regular review of powers**

ASIC may from time to time review the use of its powers. For example, in mid 2008 ASIC conducted internal reviews of the policies and procedures surrounding its powers to obtain documents and to commence formal investigations. For those reviews the Administrative Review Council's 2008 report on *Coercive Information Gathering Powers of Government Agencies* was used as a benchmark. ASIC's view was that, by and large, its written guidelines and practice accorded with the 20 principles set out. ASIC also benchmarked its practices with other regulators, including overseas regulators.

Other layers of review include:

- application for a court order to set the notice aside;
- if enforcement action is taken, an application to the court for an order that the evidence is inadmissible as it was obtained by misuse of power;
- complaint to the Commonwealth Ombudsman;
- Parliament, parliamentary committees and other inquiries/reviews.

#### **Challenges to the use of ASIC's compulsory powers**

Since 1 July 2007, ASIC's use of compulsory powers has been challenged in court 7 times. Two instances concerned examinations, the balance were in relation to the use of notices to produce documents. In 3 instances the proceedings were settled, in 2 ASIC's actions were upheld and in 2 ASIC's use of powers was found to have been invalid.

While court oversight of the use of compulsory powers is fundamental to the protection of private rights, in ASIC's experience many issues raised following the use of compulsory notices are tactical actions by people or entities who are the subject of investigation as opposed to people who are contacted in a witness capacity. For example, the 7 court challenges to notices included actions by Firepower (2 instances) and AWB (2 instances).

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