

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

Question: SBT 194

Topic: Use of Coercive Powers

Senator Bushby asked:

Senator BUSHBY—I have one final question on coercive powers. Of the matters in which your powers have been used—and you have outlined those in the answers to questions on notice, particularly those ones in respect of investigations of potential breaches—what percentage have actually resulted in action being taken against those investigated? You might want to take that on notice.

Mr D'Aloisio—I would have to take that on notice.

Answer:

ASIC does not keep statistics on which uses of compulsory powers result in action being taken. ASIC coercive powers are used in surveillances and preliminary assessments, as well as matters the subject of investigation. In some instances material obtained by notice at the assessment or surveillance stage may ultimately be used in an investigation.

Some information can, however, be extracted from information about our investigations. In almost every investigation, ASIC's compulsory information-gathering powers are used. In the 3 financial years ending with the 2009/10 year, a total of 471 investigations were commenced.

As at 29 October 2010, 345 of these investigations had been completed, of which 51% (175 of 345) concluded with an enforcement outcome, ranging from a negotiated outcome such as an enforceable undertaking, to administrative, civil or criminal action.

Where an investigation does not result in action being taken against an entity or individual, it may be that the investigative team concludes that there was no contravention, or there may be insufficient evidence for action to be taken. This does not mean that it was inappropriate to use coercive powers, nor that the investigation should not have occurred.

There are many instances where positive outcomes have been a result of the use of coercive powers in the conduct of surveillances and compliance action. For example, ASIC's National Insolvent Trading Program, reported on in October 2010, focused on companies that ASIC intelligence had revealed may have been experiencing signs of financial distress. As a result of that program, ASIC visited 1,533 companies identified to be at risk, using a notice to produce documents to access records in each case.

As a result of this program, 242 (15%) of those companies were placed into external administration—mostly by the directors, although in some cases by ASIC. The appointment of external administrators is likely to have occurred at an earlier stage as a result of this program. Notices to produce financial records (not otherwise publicly available) were used to ensure that all relevant information was obtained in a timely fashion, that the information could be used in any compliance action to be taken, and to ensure there were clear parameters around the way in which ASIC could use the information, and the protections for the companies and company officers involved.

Senate Standing Committee on Economics

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Additional information

Each time a notice is served is counted as one use of power. The greater use of coercive powers by ASIC is due to:

- lack of voluntary cooperation;
- the large number of inquiries/surveillances and investigations taken;
- the complex nature of the areas regulated – financial transactions are inherently document based and often large scale;
- the broad range of ASIC's regulatory mandate.

In addition, it is important to note that in many instances (e.g. with banks) the recipient of the notice to produce requires a formal notice from ASIC. The entity can then point out to its clients or customers that it has been compelled by law to produce.

ENDS