

# Senate Standing Committee on Economics

## ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

19 – 20 October 2011

Question No: SBT 316 - 319

Topic: Administrative Review Council (ARC) Good Practice Principles

Hansard Page: Written

Senator Bushby asked:

316. Please provide a tabulated statement which itemises each of the 20 ARC good practice principles on the use of coercive powers by agencies against the various statements in the recent ASIC policy statement.

Answer:

316

Principle	ASIC Policy
<p>1. The minimum statutory trigger for the use of agencies' coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.<sup>1</sup></p> <p>If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has 'reasonable grounds' for the belief or suspicion that is required before the power can be exercised.</p> <p>If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform</p>	<p>ASIC can only use its powers for a 'proper purpose' meaning that the use of a power must be designed to advance our inquiry.</p> <p>ASIC recognises that it must use these powers responsibly and that it is important that there are safeguards in place to ensure these powers are not misused.</p> <p>ASIC uses compulsory information-gathering powers in two broad areas of regulatory activity:</p>

<sup>1</sup> The Coercive Information Gathering Powers of Government Agencies; Report No. 48 May 2008 Principle 1. p. vi

<p>the subject of the investigation of that change in status.</p>	<p>-surveillances; and - investigations of suspected breaches of the law.<sup>2</sup></p>
<p><i>Before using the powers</i></p> <p>Before using coercive information-gathering powers agency officers should do two things:</p> <ul style="list-style-type: none"> <li>• consider alternative means that could be used to obtain the information sought</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>• weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.</li> </ul> <p><i>Drafting notices</i></p> <p>When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.</p> <p>To the extent operationally possible, it is desirable that agency officers consult proposed notice recipients in order to determine the probable scope and nature of information held</p> <p><i>Exercising the powers</i></p> <p>When exercising coercive information-gathering powers agency officers must choose the most efficient and effective means of obtaining the information. For example, if information is held on computer, the issuing of a notice requesting identification of records held on the system could in the first instance be the most effective and efficient course of action. This could then be followed by a notice requesting the production of relevant documents.<sup>3</sup></p>	<p>Before using its powers, ASIC will consider whether there are other avenues for obtaining the information or assistance should be considered before a notice is issued or other power is exercised;</p> <p>Information and documents sought under a notice should be no more than what is reasonably needed for the investigation and/or surveillance and the time for compliance should be adequate having regard to all the circumstances<sup>4</sup></p>

<sup>2</sup> Information sheet 145 ASIC's Compulsory Information Gathering Power, ASIC September 2011 p 2

<sup>3</sup> The Coercive Information Gathering Powers of Government Agencies; Report No. 48 May 2008 Principle 2 p. xi

<sup>4</sup> Information sheet 145 ASIC's Compulsory Information Gathering Power, ASIC September 2011 p 4

<p><i>Principle 3</i></p> <p><i>When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.</i></p> <p><i>If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.<sup>5</sup></i></p>	
<p><i>Transparency</i></p> <p><i>Principle 4</i></p> <p>To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or reveal details of important investigatory methods.<sup>6</sup></p>	
<p><i>Contempt of court</i></p> <p><i>Principle 5</i></p> <p><i>Agencies should regularly monitor developments in case law relating to contempt of court. In this regard, training and support for officers exercising coercive information-gathering powers are essential<sup>7</sup>.</i></p>	<p><b>New Mandatory Training</b></p> <p>A new and more extensive training program on ASIC's information gathering powers is being finalised. Staff members who are involved in:</p> <ul style="list-style-type: none"> <li>• a decision about the use of an information gathering power;</li> <li>• the drafting or settling of a notice; or</li> <li>• the execution of an information gathering power,</li> </ul> <p>will be required to participate in at</p>

<sup>5</sup> The Coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008, Principle 3, p.xii

<sup>6</sup> The Coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008, Principle 4 p. vii

<sup>7</sup> The Coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 , Principle 5 p. vii

	<p>least some part of the new training program.</p> <p>In the case of a deterrence team, it would be expected that the vast majority of the team would attend at least some part of the new training.</p>
<p><i>Authorisation and delegation</i></p> <p><i>Principle 6</i></p> <p><i>Legislation should specify who may authorise the exercise of an agency's coercive information-gathering powers. The coercive information-gathering powers of government agencies xiii</i></p> <p><i>If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.</i></p> <p><sup>8</sup></p>	<p>This is the approval given at the outset of a project that notices will be issued, or other information gathering powers will be exercised, as part of the project. Additional general approval may also be given as the project progresses. General approval is approval in principle as to the likely recipients of notices (or other persons the subject of information gathering powers) and of the information or assistance to be obtained through notices (or other exercise of information gathering powers).</p> <p>General approval provides the framework within which the issue of a notice or the exercise of another information gathering power occurs.</p> <p>Senior Managers and Senior Specialists (or staff at a higher level) are responsible for general approval of use of ASIC's information gathering powers by their team in accordance with this policy.</p>
<p><i>Principle 7</i></p> <p><i>It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.</i></p> <p><i>The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated</i></p>	<p><b>Settling of Notices</b></p> <p>A notice must be settled by a lawyer at Executive Level 1 level or higher who has attended the mandatory training on ASIC's information gathering powers. Settling is the final review and approval given after the notice has been prepared and prior to it being served. As well as having regard to</p>

<sup>8</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 6 p. vii

<p>with procedural fairness and privilege that can arise in the conduct of examinations and hearings.<sup>9</sup></p>	<p>drafting considerations, settling should include consideration of whether the notice is valid.</p> <p>Prior to the use of an information gathering power which does not require a notice, details of the proposed use of the power (such as the documents which are to be inspected) must be approved by a lawyer at Executive Level 1 level or higher who has attended the mandatory training on ASIC's</p> <p>information gathering powers</p> <p>After the transitional period referred to below, a lawyer will not be authorised to settle a notice (or approve the use of an information gathering power which does not require a notice) unless he or she has completed the required new training..</p>
<p><i>Training</i></p> <p><i>Principle 8</i></p> <p>If the right to exercise coercive information-gathering powers were linked to training or accreditation programs this would help agency officers exercising the powers to gain the requisite competency.</p> <p>For an agency with a large number of officers exercising coercive information-gathering powers, development of an accredited training program specific to the agency would represent good administrative practice.<sup>10</sup></p>	<p>New mandatory training</p> <p>A new and more extensive training program on ASIC's information gathering powers is being finalised. Staff members who are involved in:</p> <ul style="list-style-type: none"> <li>• a decision about the use of an information gathering power;</li> <li>• the drafting or settling of a notice; or</li> <li>• the execution of an information gathering power,</li> </ul> <p>will be required to participate in at least some part of the new training program.</p> <p>In the case of a deterrence team, it would be expected that the vast majority of the team would attend at</p>

<sup>9</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 7 p.xiii

<sup>10</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 8 p xiii

	least some part of the new training.
<p><i>Accountability</i></p> <p><i>Principle 9</i></p> <p>When an agency confers authority to exercise coercive information-gathering powers on people who are not officers of the agency—for example, state officials or employees of agency contractors—the agency should remain accountable for the use of those powers.<sup>11</sup></p>	Senior Executive Leaders, Senior Managers and Project Managers are all responsible for ensuring that ASIC's information gathering powers are used appropriately and responsibly in accordance with these principles.
<p><i>Principle 10</i></p> <p><i>Senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency. In addition to ensuring the continuing suitability and accuracy of delegations, the senior officers should ensure that officers exercising the powers have received the necessary training, possess the requisite skills, and have continuing access to assistance, advice and support. xiv The coercive information-gathering powers of government agencies<sup>12</sup></i></p>	Senior Executive Leaders, Senior Managers and Project Managers are all responsible for ensuring that ASIC's information gathering powers are used appropriately and responsibly in accordance with these principles.
<p><i>Sharing resources and experience</i></p> <p><i>Principle 11</i></p> <p><i>Subject to considerations of privacy and confidentiality, agencies are encouraged to share their ideas and experiences in relation to the exercise of coercive information-gathering powers in the following ways:</i></p> <ul style="list-style-type: none"> <li><i>• establishing an agency network for the exchange of educational materials, including training manuals and ideas. Discussion and circulation of information about relevant cases and the content and upgrading of instructional materials would be useful—especially for smaller agencies</i></li> <li><i>• establishing an informal peer network within and between agencies for discussion, training and</i></li> </ul>	

<sup>11</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 9 p xiii

<sup>12</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 10 p xiii

<p><i>information sharing</i></p> <ul style="list-style-type: none"> <li>• <i>conducting periodic meetings between 'like agencies'</i></li> <li>• <i>identifying important cross-agency or sectoral topics for inclusion in agency training programs and manuals.</i> <sup>13</sup></li> </ul>	
<p><i>Conflict of interest</i></p> <p><i>Principle 12</i></p> <p>Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.</p> <p>Decision Making: natural justice, guide 2 in the Council's series of best-practice guides for administrative decision makers, provides an overview of the law in this area and of its practical application.</p> <p>Identity cards <sup>14</sup></p>	
<p><i>Principle 13</i></p> <p><i>If face-to-face contact is involved, at a minimum officers or external experts exercising coercive information-gathering powers should carry official photographic identification and produce it on request.</i></p> <p><i>In a formal investigative procedure it is good administrative practice if officers and external experts are also able to produce written evidence of the extent of their authority. The coercive information-gathering powers of government agencies xv</i> <sup>15</sup></p>	
<p><i>Notices</i></p> <p><i>Principle 14</i></p>	<p>The quantity and nature of the material or assistance sought should be consistent with the strategy and objectives of the overall investigation</p>

<sup>13</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 11 p xiv

<sup>14</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 12 p xiii

<sup>15</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 13 p xiii

All coercive information-gathering notices should do the following:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- in relation to specific investigations, set out the general nature of the matter in relation to which information is sought
- consistent with the requirements of the Privacy Act 1988 (Cth) in relation to personal information, clearly state whether it is the usual lawful practice of the agency to hand information collected in response to notices to another area of the same agency or to another agency
- provide details of a contact in the agency to whom inquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege.

Notices to provide information or produce documents

It is good administrative practice to specify how the notice recipient should provide the information or how the document should be produced and to whom.

Notices to attend an examination or a hearing

Notice recipients should be told whether they may be accompanied by a lawyer or third party and, to the extent possible, the name of the person who will be conducting the examination.

The time frame for compliance

Agency legislation should specify a minimum period for the production of information or materials or for attendance for examination or hearing. The legislation should also allow for exceptions to the rule in specified circumstances.

Materials covered by a notice

To facilitate compliance, a notice or its supporting correspondence should clearly identify the sorts of materials covered by the notice, including materials

or project.



held on computer. <sup>16</sup>	
<p><i>Principle 15</i></p> <p>Compliance would be further encouraged if terms such as 'information in the possession of', 'in the custody of' or 'under the control of' the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency. xvi The coercive information-gathering powers of government agencies<sup>17</sup></p>	<p><i>Settling of notices<sup>1</sup></i></p> <p>A notice must be settled by a lawyer at Executive Level 1 level or higher who has attended the mandatory training on ASIC's information gathering powers. Settling is the final review and approval given after the notice has been prepared and prior to it being served. As well as having regard to drafting considerations, settling should include consideration of whether the notice is valid.</p> <p>Prior to the use of an information gathering power which does not require a notice, details of the proposed use of the power (such as the documents which are to be inspected) must be approved by alawyer at Executive Level 1 level or higher who has attended the mandatory training on ASIC's information gathering powers.</p>
<p><i>Examinations and hearings</i></p> <p><i>Principle 16</i></p> <p>Unless there are special reasons to the contrary, examinees should be entitled to:</p> <ul style="list-style-type: none"> <li>• a private hearing—subject to the presence of authorised individuals</li> <li>• in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.</li> </ul> <p>The reason for holding a public examination or for denying legal or other representation should be</p>	

<sup>16</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 14 p xv

<sup>17</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 15 p xv

<p>explained and a record of this kept.</p> <p>Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.</p> <p>Among other matters that may be dealt with without legislation are provision for viewing and correction by the examinee of a transcript of proceedings and, where relevant, the circumstances in which a third party may be given a copy of the transcript within the scope of agency privacy and secrecy provisions.</p> <p>Examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing. Agencies should clearly differentiate this situation from one in which where there is no such legislative restriction.<sup>18</sup></p>	
<p>Privilege</p> <p>Principle 17</p> <p>Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.</p> <p>Agencies should keep written records of the situations in which the privileges apply, and especially when they are waived. Agency guidelines to supplement legislative directions should also be developed in relation to privilege; among the topics covered should be the procedures to be adopted by agencies in responding to a claim of privilege and the nature and effect of a waiver of privilege. The coercive information-gathering powers of government agencies<sup>19</sup></p>	<p>Not in the policy</p>

<sup>18</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 16 p xvi

<sup>19</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 17 p xvi

*Disclosure of information*

*Principle 18*

The complexity and inconsistency of agencies' secrecy provisions mean that special care is needed when dealing with inter-agency disclosure of information.

In notices and requests it is necessary to carefully describe the information agency officers require in the exercise of their coercive information-gathering powers and the probable uses of that information.

Agencies should provide to their officers guidance about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information might be contemplated.

Guidelines and training for agency officers in both these areas and in relation to the effect of and interaction between the Privacy Act 1988 (Cth) and agencies' secrecy provisions are essential.

It is good administrative practice to develop memorandums of understanding between agencies, clarifying the responsibilities of agency officers in disclosing information obtained through, among other things, the use of coercive information-gathering powers.<sup>20</sup>

*Principle 19*

Subject to limited exceptions, it is desirable that inter-agency disclosure of information obtained in the exercise of coercive information-gathering powers be subject to a threshold trigger of the same calibre as that governing the initial issuing of a notice (see principle 1). Additionally, privilege and use immunity should be taken into account when the release of information to another agency is being considered.

Examples of situations in which exceptions to the threshold trigger would be apposite are when there is an immediate and serious risk to health or safety and when limited information is required for a royal commission.

As noted, the discretion to disclose information

<sup>20</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 18 p xvii

<p>obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.<sup>21</sup></p>	
<p><i>Record management</i></p> <p><i>Principle 20</i></p> <p>Agency strategies and guidelines should operate to ensure the integrity, proper management and accurate recording of information received in the exercise of an agency's coercive information-gathering powers. Wherever possible, receipts should be given for documents and materials furnished to the agency. xviii The coercive information-gathering powers of government agencies</p> <p>An agency that has used its information-gathering powers to obtain information or documents from someone should keep under continuing review the need to keep the person informed, as appropriate, about whether an investigation is still current, when documents can be returned to the person, or whether other arrangements can be made for the person to be given interim access to the documents or a copy of the documents.<sup>22</sup></p>	<p>There is nothing in the policy.</p>

317. Do these projections factor in the last four to five years of poor returns?

a) Are the ads comparing like with like?

b) Did the industry funds seek ASIC approval for the placement of these adverts?

Answer

In relation to question 317, we assume this is a reference to the Industry Fund Services Pty Ltd (IFS) "Compare the Pair" advertising campaign. The assumptions behind this advertising campaign are provided to IFS by SuperRatings, and further details should be available on the SuperRatings website. The advertising is comparing retail funds with industry funds on the basis that industry funds do not pay commissions to advisers. There may be other differences between the funds.

ASIC does not approve advertisements before they are run by any issuer. However, ASIC may take issue with advertising if it appears to be misleading or deceptive. When these advertisements were originally run in 2005, ASIC was concerned with some of the statements made, including that the projections were insufficiently qualified. ASIC entered into an Enforceable Undertaking with IFS who

<sup>21</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 19 p xvi

<sup>22</sup> The coercive Information Gathering Powers of Government Agencies, Report No. 48 May 2008 Principle 20 p xvi

included additional disclaimers in their advertising material to indicate that fees and charges may change over time and this would have an impact on the fee outcomes outlined in the advertising: see MR 05 – 148 *Industry Fund Services agrees to change advertising*.

318. What discussions has had ASIC had with the industry during the past 6 months on the matter of false and misleading advertising which makes projections of returns for the next 20-30 years?

Answer

ASIC is unable to comment on specific operational matters. However, ASIC is generally involved in ongoing discussions with the industry about advertising on a range of different topics. In August 2011, ASIC also released its Consultation Paper 167 *Advertising financial products and advice services: Good practice guidance*.

We note that if there are particular advertisements that are currently being run that are of concern, ASIC would be pleased to receive further information about them.

319. Is it fair and efficient if one sector of an industry is able to run these adverts whereas other sectors sees such an approach as false and misleading conduct and therefore does not feel it appropriate to run such adverts?

a) And what does this sort of conduct do to 'build investor confidence'?

Answer

ASIC may take action if it finds advertisements that are misleading or deceptive and considers each matter on a case by case basis. However, requirements in relation to matters such as forecasts do not vary across the different sectors. Representations about future matters are taken to be misleading if made without reasonable grounds: see section 769C of the *Corporations Act 2001*.

As ASIC does not pre-vet advertising before its release, there may be advertising campaigns that are currently running that are of concern. ASIC monitors advertising in the market and responds to complaints or concerns raised with us by others in the industry. If an industry participant is concerned that another participant's advertising is misleading or deceptive, we would encourage them to raise their concerns with ASIC.

To promote confident and informed investors and financial consumers, ASIC seeks to ensure that advertising will promote consumer knowledge about the range and choice of financial product and services available and that the advertising fairly represents the financial product or its key features. ASIC seeks, by its guidance, to present advertisements that are accurate, balanced and help promoters and publishers to not make false or misleading statements or engage in misleading or deceptive conduct.