

RULE OF LAW
INSTITUTE OF AUSTRALIA

Coercive Powers & ASIC

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on Corporations and Financial Services*

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RoLIA

The Rule of Law Institute is an independent non-profit association formed to uphold the rule of law in Australia.

The Institute's objectives are:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws

Coercive powers of Federal Regulators

- Require compulsory attendance at examination to answer questions
- Require production of documents/books
- Require reasonable assistance (including preparing documents/statements)
- Require person to allow search of premises without prior notice (ATO only)
- Departure prohibition orders (ATO only)
- Phone taps and phone records access

Significance for rule of law

- Risk of significant penalty for non-compliance (eg 100 penalty units, 2 years imprisonment or both for not complying with requirement of appearance at examination)
- Abrogated right against self-incrimination (even with s 68(3) ASIC Act use immunity meaning that evidence cannot be used in subsequent criminal or civil penalty proceedings).
- However justified, coercive powers diminish fundamental rights and freedoms
- Coercive powers are powers which would normally be sanctioned by an independent judiciary
- Coercive powers are extraordinary powers which in most cases even the police do not have access to
- Only recent confirmation that there is application of legal professional privilege to ASIC coercive powers (Dec 2007)

The *Building & Construction Industry Improvement Amendment Act 2005*

Senator Penny Wong on the ABCC coercive powers (Second reading speech for Bill introducing above Act, Thurs 18 August 2005 – Bill later passed without amendments):

“...They were very substantial coercive powers—powers that Labor still says are inappropriate. **They certainly give very substantial rights to the task force, arguably rights far greater than police have, so you have the bizarre situation where building union officials and employees in the construction industry actually have fewer rights in relation to investigation by the task force than a criminal might have in relation to investigation by police....”**

Given their gravity they need:

- Questions as to whether they are really needed
- Due process
- Checks and balances
- Transparency both in process and outcome
- Accountability

ASIC Coercive powers

The five most frequently used powers by ASIC over the period 1 July 2007 to 17 June 2010 are:

Section 33 of the ASIC Act- notice to produce documents in person's possession (6984 occasions);

Section 30 of the ASIC Act- notice to produce books about affairs of body corporate or registered scheme (5687 occasions);

Section 19 of the ASIC Act- notice requiring appearance for examination (3354 occasions);

Section 31 of the ASIC Act- notice to produce books about financial products(1430 occasions); and

Section 912C of the Act- direction to provide a statement (939 occasions).

Source: Senate Economics Committee answers to questions on notice, June 2010 session, Question BET 24.

So what re the numbers!

- A low number of power uses could indicate a lazy regulator?
- An rapidly increasing number could show that the regulator is out of control (few internal controls)?
- Dissected numbers could show systemic issues in one area of ASIC.
- What happens at the interview stage – procedural rules and equity?
- Over-use of powers can impact on the cost of compliance and efficiency – not a rule of law issue.

Publication of data in annual reports 2009-2010

Reporting item	ACCC	ACC	APRA	ATO	ASIC	ABCC
Number of notices	x	x				x
Notices by type (for interview or document production)	x	x				x
Notices by area of compliance		x				
Challenges to the validity of notices	x	x				x
Search warrants sought	x					
Warrants executed/granted	x			x*		
Description of matters for which warrants sought	x					
Explanation of the powers and how they work		x				x
State by state breakdown						x
Proceedings begun for failure to attend examination		x				x
Breakdown by type of examinee Eg management or employees						x
Outcome of examinations (proceedings commenced, investigation closed etc).						x
Legal representation at interview						x
Explanation of why increase/decrease in number of notices		x				
Telecommunications warrants						

Information disclosed about coercive powers

Regulator	Specific information/ document on website	Coercive powers Policy available on website	Some information on website	No information on website	Disclosed information at Senate estimates hearings	General statistics in annual report on use of powers
ACCC	☑	☑				☑
APRA				☑		
ATO	☑	☑			☑	Mention of access- without notice powers only
ASIC				☑	☑	
ABCC	☑	☑				☑

Examinations/notices to attend examinations per Federal Regulator

	2007/2008	2008/2009	2009/2010
ASIC	1175	1065	1069 (till 17 June 2010)
ACCC	163	35	75
ACC	895 summons, 760 exams	627 summons, 527 exams	169 exams
ABCC	54	60	27

Administrative Review Council

Principles

The ARC May 2008 report on The Coercive Information Gathering Powers of Government Agencies produced 20 principles on how coercive powers should be used. The Government has not responded. In particular the two following are important:

Record keeping

Principle 3

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.

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.

Transparency

Principle 4

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.

The other principles

Principle 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.

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.

If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform the subject of the investigation of that change in status.

Principle 2

Before using the powers

Before using coercive information-gathering powers agency officers should do two things:

- consider alternative means that could be used to obtain the information sought

and

- 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.

Drafting notices

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

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.

Exercising the powers

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.

Contempt of court

Principle 5

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.

Authorisation and delegation

Principle 6

Legislation should specify who may authorise the exercise of an agency's coercive information-gathering powers.

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.

Principle 7

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.

The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

Training

Principle 8

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.

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.

Accountability

Principle 9

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.

Principle 10

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.

Sharing resources and experience

Principle 11

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:

- 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
- establishing an informal peer network within and between agencies for discussion, training and information sharing
- conducting periodic meetings between ‘like agencies’
- identifying important across-agency or sectoral topics for inclusion in agency training programs and manuals.

Conflict of interest

Principle 12

Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.

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.

Identity cards

Principle 13

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.

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.

Notices

Principle 14

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 held on computer.

Principle 15

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.

Examinations and hearings

Principle 16

Unless there are special reasons to the contrary, examinees should be entitled to:

- a private hearing—subject to the presence of authorised individuals
- in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.

The reason for holding a public examination or for denying legal or other representation should be explained and a record of this kept.

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.

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.

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 there is no such legislative restriction.

Privilege

Principle 17

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.

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.

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.

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 obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.

Record management

Principle 20

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.

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.

In relation to information gathering generally

- Consider voluntary surveys first and/or sample surveys
- Seriously test the cost and benefits of complex and onerous data collection
- Use questionnaires which can be easily completed and collated
- Try to publish data so that it benefits the market
- Publish composite data only
- Avoid secrecy and confidentiality clauses where possible

First steps

- ASIC to report in Annual Report detailed statistics on its use of coercive powers, along with a discursive statement their use noting key trends.
- ASIC to post on web site a Policy Statement on how it uses its coercive powers, including details on procedures, delegations of powers, checks and balances and any other information which might assist ASIC clients (without prejudicing ASIC statutory obligations).
- PJCCFS to use ARC report of 2008 on Coercive Powers as a template for supervision.

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Thank you