



**ASIC**

Australian Securities & Investments Commission

**BELINDA GIBSON**

Deputy Chairman

Level 5, 100 Market Street, Sydney  
GPO Box 9827 Sydney NSW 2001  
DX 653 Sydney

Telephone: +61 2 9911 2398

Facsimile: +61 2 9911 2010

15 June 2011

Mr Bernie Ripoll MP  
Chair  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Mr Ripoll

I am writing to you to advise that ASIC has recently made available the findings from a review of our procedures and policies in relation to coercive powers. Overall, the review concluded that ASIC's policies and procedures are appropriate, and subject to a number of internal controls.

During external consultations, we also heard some suggestions for improvements. All of the recommendations that were made by the review team from these suggestions have been accepted by the Commission. This includes additional training, greater reporting on our use of coercive powers and the forthcoming publication of general guidance about information gathering. That publication is expected to be finalised in July.

In the interim, I attach for your information and that of the Committee a copy of our findings and look forward to updating members at subsequent hearings as these measures are implemented.

Yours sincerely

Belinda Gibson

Enc.



# **ASIC's Review of its Compulsory Information Gathering Powers**

## **Summary of Findings and Recommendations**

### **1. Introduction**

#### **1.1 Background to review**

The Australian Securities and Investments Commission (ASIC) is the Australian government agency responsible for the regulation of companies and financial services and the promotion of investor, creditor and consumer protection in the financial markets and financial services industry. ASIC has powers and responsibilities under a range of Commonwealth legislation, most particularly the *Corporations Act 2001* (Corporations Act) and the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Much of this legislation also confers compulsory information gathering powers upon ASIC which enable it to fulfil its statutory responsibilities.

ASIC has a wide range of investigative and information-gathering powers. ASIC considers that these powers are necessary to achieve ASIC's goal of ensuring that investors, financial consumers and business have confidence in Australia's markets. ASIC seeks to achieve this through outcomes which include:

- Confident and informed investors and financial consumers; and
- Fair and efficient markets.

Ensuring that misconduct is dealt with and deterred is necessary to achieve these outcomes.

This review was initiated following public comment on the need for further examination of the use of compulsory information gathering powers by regulators such as ASIC.

At a Senate Estimates Committee hearing on 21 October 2010, in response to questions concerning the use of ASIC's compulsory information gathering powers, ASIC's then Chairman undertook to conduct an internal review of ASIC's procedures and policies.

This document sets out the review team's findings and recommendations.

#### **1.2 The review**

The review was led by ASIC's Commission Counsel and conducted by staff from across ASIC including members of ASIC's Professional Standards Unit and staff from the deterrence and stakeholder teams which are key users of ASIC's powers.

The purpose of this review was to consider ASIC's use of powers and (if appropriate) to make recommendations to the Commission for improving the effectiveness, transparency and therefore public confidence in the use of powers by ASIC.



There were three main parts to the review:

- external and internal consultation on the scope and use of ASIC's compulsory information gathering powers. External consultation included discussions with relevant industry bodies<sup>1</sup> as well as groups which have expressed concerns about the use of regulatory powers<sup>2</sup>, such as the Rule of Law Institute of Australia (RoLIA);
- a comparison of ASIC's use of powers with the use of similar powers by other domestic regulators and overseas securities regulators; and
- a review of ASIC's policies, procedures and practices.

### **1.3 Which powers?**

This review applies to the use of any of ASIC's powers to compel a person or entity to assist, produce documents, provide information or attend for a compulsory examination.

Although we are mindful of ASIC's powers under other legislation, for the purposes of this review we concentrated on the core powers provided to ASIC by the ASIC Act and Corporations Act. These powers are the ones most frequently used (and are the subject of the statistical data given in response to questions taken on notice at the Senate Estimates Committee hearing in June 2010).

## **2. Summary of findings and list of recommendations**

### **2.1 Summary of findings**

In general the review found that ASIC's policies and procedures are appropriate. ASIC has a number of internal controls on the use of its powers. During our external consultation, some valid suggestions were made as to areas in which ASIC can improve its practices.

Specific findings of the review include the following:

- Comments received from industry associations suggest that they are more concerned with certain procedural aspects of ASIC's use of notices rather than the number of times notices are used. Specific procedural matters which were raised with the review team included:
  - the need for greater consultation with participants prior to service of notices; and
  - the need for the nominated ASIC contact officer to be in a position to respond to queries about the notice.
- Industry associations also expressed concerns about the time, cost and logistical burdens of compliance with some directions issued under compulsory powers.
- Industry groups called for more information about the outcomes of industry wide surveillance projects which involved the use of compulsory powers.
- Other interested groups, such as RoLIA, raised issues about transparency and called for reporting on the frequency of use of ASIC's powers.
- The frequency of ASIC's use of notices and ASIC's processes for using notices differs from other domestic regulators and overseas securities regulators but ASIC's practices reflect the breadth of its statutory mandate.

---

<sup>1</sup> The industry associations consulted were: Australian Financial Markets Association, Australian Banker's Association, Institute of Chartered Accountants, Chartered Secretaries Australia, Australian Institute of Superannuation Trustees, Stockbrokers Association of Australia, Financial Services Council, Financial Planning Association of Australia, Association of Superannuation Funds of Australia.

<sup>2</sup> The interested groups consisted of Rule of Law Institute of Australia, Australian Corporate Law Association, NSW Council of Civil Liberties and Law Council of Australia.

- ASIC complies with all but two of the 20 best-practice principles set out in the Administrative Review Council's report: *"Coercive information-gathering powers of government agencies"*. The two outstanding principles concern transparency and accountability and are addressed in the recommendations of this review.
- ASIC complies with the Australian Government Investigation Standards except in relation to the requirement for Certificate IV training. Many ASIC staff hold higher qualifications and ASIC's training of staff is at or above Certificate IV level.
- ASIC's use of compulsory information gathering powers is overseen by senior staff and is subject to a number of internal controls. Most ASIC teams comply with these controls but some teams have developed alternative control processes for approval of notices. While these alternative processes still include appropriate controls, they have led to some inconsistencies in approach. This is addressed in the recommendations of this review.

## 2.2 Recommendations

The review team's recommendations have all been accepted by the Commission and are now being implemented.

Recommendations	Implementation status
General plain language information about the use of ASIC's compulsory information gathering powers should be published on ASIC's website	Preparation of this information is underway
The specific training course on use of ASIC's compulsory information gathering powers, which is currently under development, should be finalised as soon as possible. Attendance at this course should be mandatory for ASIC lawyers involved in settling notices or conducting the final review and approval of any use of compulsory powers.	The course is being finalised and will be delivered over the next six months. Staff have already been advised of the requirement that lawyers involved in settling notices or in the final review and approval process must attend training. This course will replace an existing module in ASIC's broader deterrence training program.
The current two-step approval process for the use of powers should be refined and re-published. General approval of the use of ASIC's powers in a specific investigation or project is required from a Senior Manager or Senior Specialist. After any notice has been prepared, and prior to the use of the power, final review and approval will be given by an executive lawyer who has attended the training course on use of ASIC's compulsory powers.	This recommendation has been implemented apart from the requirement for training. Training is being delivered over the next six months.



---

ASIC's internal policies, procedures and training should place additional emphasis on the following:

- |   |  |
|---|--|
| <ul style="list-style-type: none"> <li>• Prior consultation with the recipient of the notices in appropriate cases.</li> </ul>  | <p>To be included in forthcoming training and currently being incorporated in ASIC's procedures.</p> |
| <ul style="list-style-type: none"> <li>• The need for ASIC contact officers to be prepared to deal with queries from notice recipients.</li> </ul>  | <p>To be included in forthcoming training and currently being incorporated in ASIC's procedures.</p> |
| <ul style="list-style-type: none"> <li>• 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 reasonable having regard to all the circumstances.</li> </ul> | <p>Now part of ASIC's internal policy and will be included in forthcoming training.</p>              |

---

In addition to the detailed guidance on determining the general scope of investigations and surveillances, ASIC's policies, procedures and training should specifically emphasise the need to ensure that the quantity and nature of the material or assistance sought is consistent with the strategy and objectives of the overall investigation or project.

This is now part of ASIC's internal policy and will be included in forthcoming training.

---

ASIC's policies, procedures and training should include a requirement to consider alternatives to the use of compulsory powers, such as voluntary production.

This is to be included in forthcoming training and is currently being incorporated in ASIC's procedures.

---

ASIC should report to the public on its use of its powers from 2010-2011 onwards.

This will be included in relevant annual reports commencing this year.

---

Modifications should be made to ASIC's evidence management system to facilitate retrieval of statistical data for the purposes of reporting on the use of our compulsory information gathering powers.

This recommendation has been implemented.

---

An electronic creation and approval system for notices should be developed. This database is to have a search facility to enable the retrieval of data for statistical purposes.

To be implemented in the longer term, subject to funding.

---

Another internal review should be conducted in the 2011/12 year to check compliance (and thereafter as required).

To be implemented.

---