

RULE OF LAW
INSTITUTE OF AUSTRALIA

Coercive Powers & ASIC

ASIC Summer School 2011

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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)

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)

What are politicians have said

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.

Senator Penny Wong ABCC legislation 2005

Given their gravity they need:

- Due process
- Checks and balances
- Transparency both in process and outcome
- Accountability
- Data is critical – regulatory impact and outcomes – useful indicator of activity

ASIC Coercive powers

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

1. Section 33 of the ASIC Act- notice to produce documents in person's possession (6984 occasions);
2. Section 30 of the ASIC Act- notice to produce books about affairs of body corporate or registered scheme (5687 occasions);
3. Section 19 of the ASIC Act- notice requiring appearance for examination (3354 occasions);
4. Section 31 of the ASIC Act- notice to produce books about financial products(1430 occasions); and
5. 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.

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

* ATO and APRA do not disclose use of their compulsory examination powers.

Administrative Review Council

20 Principles on coercive powers

May 2008

Record keeping

Principle 3

Transparency

Principle 4

In relation to information - to ascertain industry trends

- 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

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Thank you