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## Who watches the watchers? Richard Gilbert on the coercive power of regulators

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**On 15 June 2011, the Rule of Law Institute of Australia CEO Richard Gilbert addressed a Federal Parliamentary Joint Committee on the coercive powers of ASIC. He argued that the regulators also need to be scrutinised to ensure their actions are open and transparent.**

Parliament has conferred on our regulators extensive coercive powers to give them access to information and documents that might assist their market enforcement functions. These powers include the right to request documents from individuals, the right to question citizens in the absence of a right for that citizen to exercise a right of silence, the right to enter property and seize documents and computer files, and the right to conduct telephone taps and electronic eavesdropping.

Some of these incursions into fundamental rights and liberties must first be sanctioned by a judicial officer. Others can be exercised via a non-reviewable administrative decision of the regulator.

It is important that regulators are given sufficient powers to ensure that our markets and commercial activities operate with integrity and certainty, and that compliance with the law is the norm. However, it is equally important that due respect is paid to the rule of law and that regulators are accountable for their actions, that citizens have access to the courts to challenge a regulator's decision, and that the regulator can be held accountable to the body which conferred that power: the Parliament.

Beginning with the publication of a report on the exercise of coercive powers in 2008 by the Administrative Review Council (ARC), the Parliament has taken a more intense interest in coercive powers and their use by regulators.



**With great power comes great responsibility:** Richard Gilbert, chief executive of the Rule of Law Institute of Australia

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Principally, this has happened in the Senate Economics Committee during Estimates hearings (led by Senator David Bushby), but more recently, the oversight committee for ASIC - the Joint Parliamentary Committee on Corporations and Financial Services (PJCCFS) - has taken a special interest. In a departure from past practice, the PJCCFS called on a non-government agency, the Rule of Law Institute of Australia (RoLIA), to give evidence. RoLIA made the following points when it appeared on 15 June 2011:

- Commonwealth regulators need to respond to the recommendations of the 2008 ARC report. The report contains 20 well-formulated best practice principles which should be adopted by each and every regulator;
- There is no consistency of approach for regulators to report to Parliament on the use of their coercive powers. Some agencies do it well, others not at all;
- Regulators need to be more open in the administration of their powers. They need to publish detailed annual statistics on the use of their powers in their annual reports. The PJCCFS needs to access data on key regulatory indicators as this data could assist the committee and ASIC to assess whether the regulatory risk quotient might be on the rise and/or signal the need for tougher regulation;
- In the absence of reliable data, regulators and their parliamentary overseers will be prone to making decisions on hunches rather than facts. In relation to ASIC's enhanced and keenly-sought additional surveillance powers (search and wire taps) which the Parliament passed in November 2010, it was discovered at the June Estimates 2011 that these powers had not been used since they took effect in December 2010;
- Regulators need to publish policy statements on how they use their powers - some have these on their web sites but most do not;
- Regulators need to develop decision-making procedures which include at least some separation of powers between the officer making a recommendation on an exercise of coercion and the officer who makes the final decision;
- Agencies need to be careful when conducting market intelligence projects, and avoid "fishing expeditions", as these can be costly for businesses and, at the same time, diminish the respect which those regulated have for their regulators;
- In the new age of open and accountable corporate governance it is time for all of the key economic regulators to take the lead of APRA and publish codes of practice and governance. There should be disclosure of material interests for those who preside over our regulatory agencies, and statements of compliance should be included in annual reports to parliament.

To ASIC's credit, it wrote to the Committee on the day of RoLIA's appearance and reported on its review of its powers, which included consultations with external stakeholders. Importantly, ASIC reported that it complies with 18 of the 20 ARC best practice rules, and that it was working towards full compliance by addressing the transparency and accountability principles. In coming months, ASIC will post on its website a plain English guide to how it uses its powers. It will also design and deliver new training programs, and it will provide statistics on the use of its powers in its 2011 Annual Report to Parliament.

### Offshore learning

The Committee will now prepare its next report on ASIC oversight, assisted by ASIC's submissions and also a supplementary submission by RoLIA which the Committee requested, and which covers some of the recent offshore developments in this facet of regulatory oversight.

RoLIA advised the Committee that in the US, section 961 of the *Dodd-Frank Act* requires that the SEC provide the Senate Committee on Banking, Housing and Urban Affairs, and the House Committee on Financial Services, a report on the "supervisory controls" over the conduct by the SEC of examinations of registered entities, enforcement investigations, and reviews of corporate financial securities filings. The report is required to be provided not later than 90 days after the end of each fiscal year. That report was given to Congress on 30 September 2010.

In the UK, there is also a system of checks on the regulator, the Financial Services Authority (FSA). The FSA is an independent non-governmental body, given statutory powers by the *Financial Services and Markets Act 2000*. In 2010 the FSA was given new statutory powers to enable it to require a person to provide information and documents that the FSA considers are or might be relevant to the stability of the UK financial system.

The grant of these new powers was accompanied by statutory safeguards, which require the FSA to prepare a statement of its policy with respect to the exercise of the new powers for approval by the Treasury, and that the FSA may not exercise the new powers until the approved policy statement has been published.

The PJCCFS's oversight of ASIC is both proactive and diligent. It reflects well on a Committee which does its business in a non-partisan manner. By signing up to the ARC report, ASIC has provided quality leadership to other regulators who now need to be more proactive in this area.