

ASIC's coercive powers

2.24 ASIC has been granted facilitative, regulatory and enforcement powers consistent with its responsibility to enforce and give effect to relevant Commonwealth law. These include the power to enter premises and seize documents pursuant to a warrant, and to compel persons to provide ASIC all reasonable assistance in connection with an investigation and to appear before ASIC to answer questions on oath.²⁹ A person may commit an offence if he or she refuses to comply with ASIC's directions or otherwise hinders ASIC in exercising its powers.³⁰

2.25 The Rule of Law Institute of Australia commented that such coercive powers are 'intense and broad ranging' and 'diminish fundamental human rights'.³¹ The Institute suggested that such powers require transparent and accountable use:

Given the gravity of the powers which we give our regulators, including ASIC, we say we need to question first of all whether they are really needed. We need to question whether they have due process around them, whether there are checks and balances, whether there is transparency both in process and in outcome and, finally, [whether] there is accountability on the regulator about how they use those powers.³²

2.26 It was noted that the accountable use of coercive powers is consistent with the Administrative Review Council's 20 best-practice principles regarding the use of coercive power by Commonwealth agencies.³³ The principles are based on administrative law values of fairness, lawfulness, rationality, transparency and efficiency, and seek to balance agencies' objectives and individual rights.³⁴

2.27 The Institute reported that compared with other Commonwealth regulators, 'ASIC does not exactly come up as the model disclosure regulator'.³⁵ The Institute argued that, where appropriate, ASIC should attempt to obtain information from third parties on a voluntary rather than a compulsory basis,³⁶ and also recommended that:

²⁹ Australian Securities and Investments Commission Act 2001, s.19, s. 35.

³⁰ *Australian Securities and Investments Commission Act 2001*, s. 63–67

³¹ Mr Richard Gilbert, Chief Executive Officer, Rule of Law Institute of Australia, *Committee Hansard*, 15 June 2011, pp 1–2.

³² Mr Gilbert, Rule of Law Institute of Australia, *Committee Hansard*, 15 June 2011, p. 2.

³³ Mr Gilbert, Rule of Law Institute of Australia, *Committee Hansard*, 15 June 2011, p. 3.

³⁴ Administrative Review Council, Report 48: The coercive information-gathering powers of Government agencies, p. ix.

³⁵ Mr Gilbert, Rule of Law Institute of Australia, *Committee Hansard*, 15 June 2011, p. 3.

³⁶ Mr Gilbert, Rule of Law Institute of Australia, *Committee Hansard*, 15 June 2011, p. 3.

- ASIC publish in its annual reports 'detailed statistics on its use of coercive powers, along with a discursive statement that notes their use and key trends'
- ASIC's website contain 'a policy statement on how it uses its coercive powers', and
- ASIC's use of its coercive powers be reviewed against the Administrative Review Council's best-practice principles.

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2.28 ASIC advised that the Commission has recently reviewed its procedures and policies regarding coercive powers. The committee was informed that '[o]verall, the review concluded that ASIC's policies and procedures are appropriate, and subject to a number of internal controls'.³⁸ Ms Belinda Gibson, Deputy Chairman, ASIC, elaborated, stating '[b]y and large, as a result of the discussions with our stakeholders...we did not identify grave concerns'.³⁹ Regarding ASIC's adherence to the Administrative Review Council's 20 best-practice principles, the committee was advised that ASIC complies with all bar the two principles concerning transparency and accountability.⁴⁰

2.29 However, the committee was informed that the review has prompted ASIC to undertake several measures to improve the Commission's use of its coercive powers. The measures appear to address the Administrative Review Council's best-practice principles and the Institute's recommendations, and include additional training for relevant ASIC staff, amendments to ASIC's internal policies to include additional guidance regarding appropriate use of the powers, and publication of guidance material and statistics.⁴¹ As Ms Gibson further explained:

[w]e have committed to provide information in our annual reports about the exercise of our coercive powers. That will be in this upcoming annual report...We are close to completing a notice about transparency—that is, setting out what our powers are, the scope for those powers and so on. At

37 Mr Gilbert, Rule of Law Institute of Australia, Committee Hansard, 15 June 2011, p. 3.

38 Ms Belinda Gibson, Deputy Chairman, ASIC, Letter to Mr Bernie Ripoll MP, Chair, Parliamentary Joint Committee on Corporations and Financial Services, 15 June 2011, p. 1, http://www.aph.gov.au/senate/committee/corporations_ctte/asic/Additional_Information/ASIC_110615_Coercive_Powers.pdf.

39 Ms Gibson, ASIC, Committee Hansard, 24 June 2011, p. 16.

40 Ms Gibson, ASIC, Letter to Mr Bernie Ripoll MP, Chair, Parliamentary Joint Committee on Corporations and Financial Services, 15 June 2011, p. 1, http://www.aph.gov.au/senate/committee/corporations_ctte/asic/Additional_Information/ASIC_110615_Coercive_Powers.pdf.

41 Ms Gibson, ASIC, Letter to Mr Bernie Ripoll MP, Chair, Parliamentary Joint Committee on Corporations and Financial Services, 15 June 2011, pp 4–5, http://www.aph.gov.au/senate/committee/corporations_ctte/asic/Additional_Information/ASIC_110615_Coercive_Powers.pdf.

the moment they appear at the bottom of our notices but we will put that on our website.⁴²

2.30 With regards to seeking information on a voluntary, rather than a coercive, basis, ASIC stated that 'in terms of surveillance we generally take a voluntary approach where possible'.⁴³ However, it was noted that a voluntary approach could not be taken where ASIC is 'investigating a criminal prosecution or a civil prosecution', or in circumstances where 'companies cannot do it voluntarily because they need a direction of law to provide...information'.⁴⁴

Committee view

2.31 The committee considers that it is best practice for regulators to exercise powers necessary to fulfil their regulatory responsibilities in a transparent and accountable manner. The committee also considers that regulators should exercise powers cautiously, giving due regard to individual rights and ensuring that the most appropriate power is utilised.

2.32 The transparent and accountable use of coercive powers is consistent not only with the Administrative Review Council's best-practice principles but also with the requirement, under section 1 of the ASIC Act, for ASIC to ensure that information is available as soon as practicable for access by the public. The committee encourages ASIC to disclose appropriate information regarding its use of coercive powers without compromising its activities as a regulator. The committee considers that it is appropriate for ASIC to make available, for example through its annual reports, data regarding the incidence of ASIC's use of its coercive powers, the kinds of powers used and the outcomes of the use of those uses of power.

2.33 The committee notes ASIC's advice that the Commission is currently implementing measures to significantly improve the transparency of its use of coercive powers. The committee approves these measures, and will routinely revisit this matter in future oversight hearings following the release of ASIC's annual reports.

⁴² Ms Gibson, ASIC, Committee Hansard, 24 June 2011, p. 16.

⁴³ Mr Medcraft, ASIC, Committee Hansard, 24 June 2011, p. 17.

⁴⁴ Ms Gibson, ASIC, Committee Hansard, 24 June 2011, pp 16, 17.