

RULE OF LAW
INSTITUTE OF AUSTRALIA

Regulator Power and Accountability

Presentation to BFSLA Conference

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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

RoLIA advocates:

- On legislation which respects the rule of law.
- On the need for education on the rule of law.
- Against excessive use of power by the executive.
- On enhanced parliamentary scrutiny of our regulators
- On the need for a free press
- On the independence of open courts

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

The *Building & Construction Industry Improvement Amendment Act 2005*

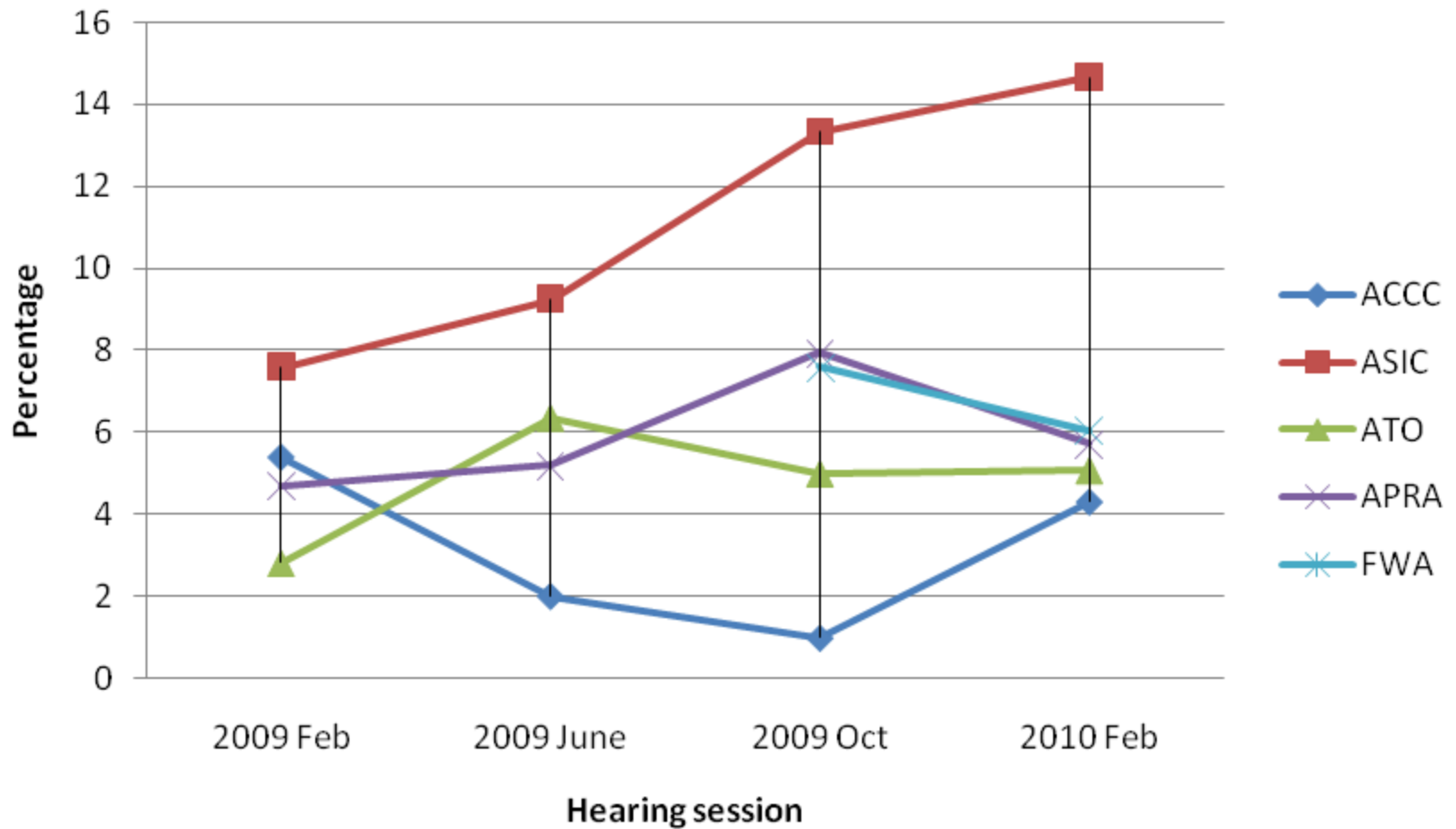
Senator Penny Wong on the ABCC coercive powers (Second reading speech for Bill introducing above Act, Thurs 18 August 2005 – Bill later passed without amendments):

“...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....”**

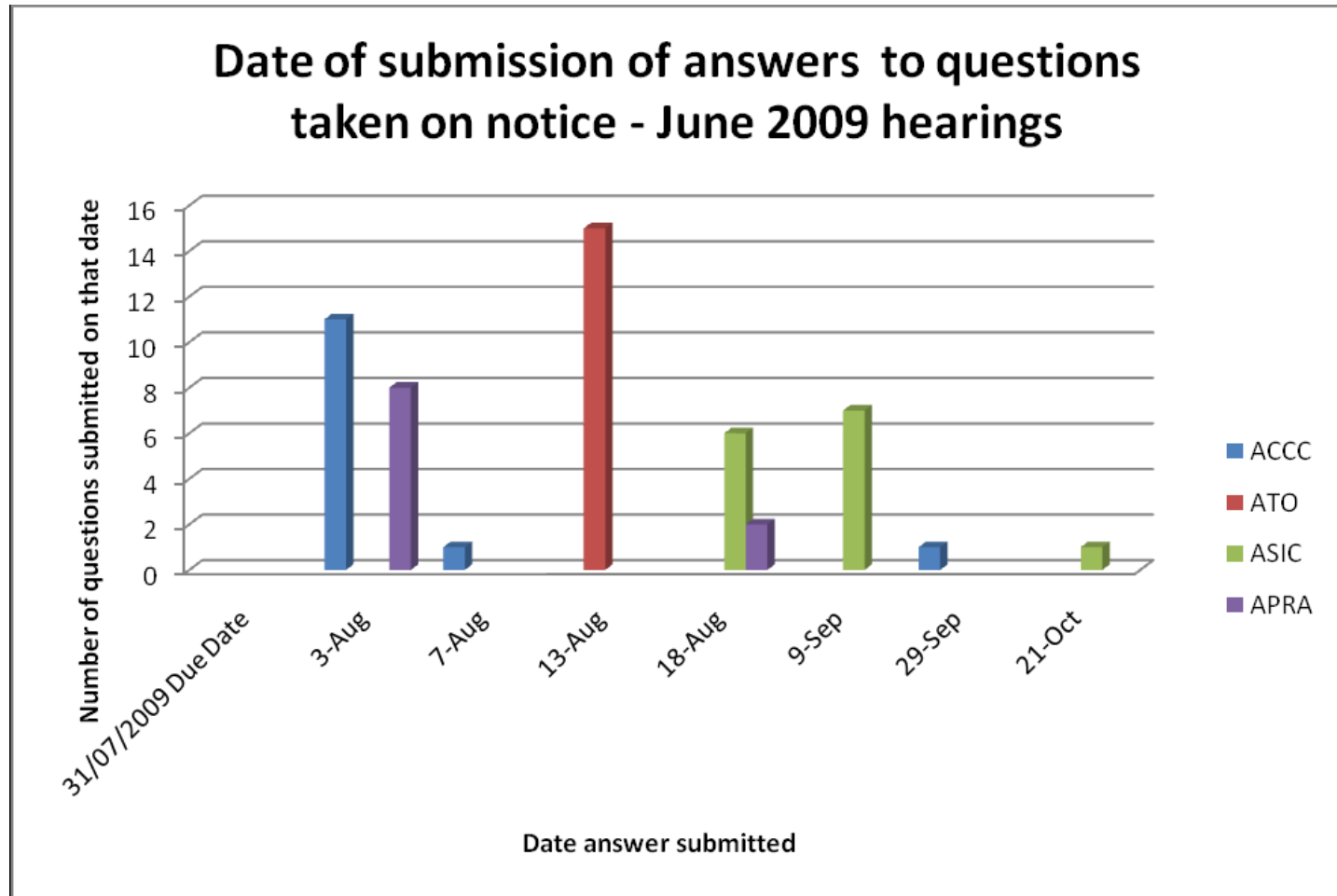
Regulators – accountable to who?

- The Parliament?
- The Minister?
- The community?
- Those who pay the freight?
- Consumers?

Questions taken on notice as a percentage of total questions



Adherence to Senate Orders



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?
- A 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.

ASIC has (to its credit).

The ARC principles

Principle 1 – ‘Last resort’ usage

Principle 2 - Cost benefit necessary

Principle 3 - Record keeping

Principle 4 - Transparency***

Principle 5 – Training re contempt of court

Principle 6 - Authorisation and delegation

Principle 7 – Delegation to senior officers

Principle 8 – Training

Principle 9 - Accountability***

Principle 10 – CP officer for each agency

Principle 11 - Sharing resources and experience

Principle 12 - Conflict of interest

Principle 13 - Identity cards

Principle 14 – Details in notices

Principle 15 - Specificity in notices

Principle 16 -Examinations and hearings

Principle 17 - Privilege to be upheld

Principle 18 - Disclosure of information

Principle 19 - Inter agency triggers

Principle 20 - Record management

***** ASIC reports it does not comply with these principles.**

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
- Respect privacy principles

Regulators and codes of ethics

- APRA Act 1998
SECT 48AC mandates a APRA Code of Conduct
- Report on operation of the code?
- Disclosure of interests – along lines of parliamentary register of pecuniary interest?
- What about the other regulators – where are their codes?

Rule of Law Institute of Australia

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Thank you