

Dealing with ASIC Investigations

Investigative Powers

Agencies

ASIC Interviews

Coercive Powers

DOOGUE
GEORGE
defence lawyers

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Introduction

Defending Australian Securities and Investments Commission charges requires a thorough understanding of the reach and scope of ASIC's investigatory and coercive powers.

As one of Melbourne's leading defence law firms, we have run some of the largest criminal trials in Victoria and have had experience and exposure to many corporate crime matters. Many firms seek advice from their own corporate lawyers, however, when matters are possibly headed to Courts, it is imperative to seek advice from criminal experts. We specialize in pre-investigation work and have performed this work with a number of Senior Queen's Counsels.

The Authors



Andrew George Director Accredited Criminal Law Specialist

"Using a consistent strategy is key. The main strategic imperative is not to be passive but to work out our client's defence and pursue it."

Andrew George is a Director of Doogue + George with over 25 years of defence experience.

Andrew is one of a number of Doogue + George lawyers who are experienced in preparing client strategy for engagement with ASIC investigations.

An informed and strategic approach to an ASIC investigation is essential to the best client outcome. Responding to notices to produce, preparing statements to serve and advice on evidence not only require the application of legal skill but also the skills that can only come from the experience of actual engagement in the investigation process.

Andrew has appeared as Counsel and instructing solicitor in a number of cases involving allegations of Bribery of Foreign Officials and money laundering.

Bill Doogue Director Accredited Criminal Law Specialist

"We're not here to be bystanders, we're here to win for our clients and unless you have that drive to succeed for your client, you can't help them properly."

Bill Doogue has over 25 years experience as a defence Lawyer and has been an Accredited Criminal Law Specialist for almost 20 years. He was awarded a Law Institute of Victoria Service Award in 2013.

Bill oversees most of the major criminal trials and has appeared for and advised current and former Liberal and Labour Politicians from both State and Federal parliaments, high ranking church officials and many high profile cases. He has worked with Queen's Counsel and Chief Corporate Counsel for one of Australia's biggest corporations to provide strategic advice about potential issues that were faced.

Bill particularly enjoys the strategic challenges that come from being involved in corporate crime and ASIC investigation matters.



ASIC Investigations

ASIC have extraordinary investigative powers, governed by the Australian Securities and Investments Commission Act 2001.

Section 13 of the Act outlines that ASIC's general powers of investigation authorise them to conduct an investigation where it has reason to suspect that there has been a contravention of state or Commonwealth laws under the ASIC Act or Corporations Act.

An ASIC investigation is typically slow, methodical and thorough. ASIC will pursue an enquiry, employing all available resources and personnel. There can be many people working on any given case and their resource pool is rich, robust and global. They can call upon assistance from other national and international agencies including US-SEC and Interpol. They have the power to attempt to compel production of documents from anyone and to interrogate anyone.

Notice to Produce Records

One of the first steps in an ASIC investigation will be to serve a notice for the delivery of books, records and documents of the company being investigated.

This notice is compulsory.

Regardless of whether this information incriminates you or others, you must comply.

Division 3 Part 3 of the ASIC Act outlines ASIC's power to seek these records. Most often the notice will be addressed directly to the company or to an eligible addressee, usually a director, and will order the delivery of specified books and documents. The term 'books', as outlined in the Act is a broad term that can be defined as any form of stored information.

Should the books be in the possession of a third party, such as an accountant or in storage, the order will be made under section 33 of the ACT. This is the only difference and your obligation to comply still stands.

After receiving a notice from ASIC you should:

- Read the notice thoroughly.
- Ensure the person undertaking the task understands the importance of adhering to the specific instructions outlined.
- If you have received multiple notices, ensure each is dealt with separately and individually.
- Take note of the specific documents and timeframes of information requested. Ensure you only provide the documents that have been outlined in the notice. You are being investigated. Providing ASIC with more information than they requested is rarely a good idea.
- The timeframe that ASIC provides for the delivery can often be too short to compile lengthy or complex documentation. If you feel that you cannot provide the documents within the given timeframe, then you must communicate with ASIC and request an extension or risk being charged with non-compliance.
- Consider legal professional privilege. This will require you to provide information to ASIC that will justify your request and they will assess your submission.
- Get proper legal advice. Involving a lawyer early on can safeguard you against providing ASIC with sensitive information that could be damaging to the company.
- Ensure you create copies of everything you provide to ASIC. As ASIC require you to furnish all original copies, you need to ensure you have a copy of everything you have provided.



What Happens Next?

After you have complied with the Notice to Produce, it is not uncommon for there to be a long delay before hearing a response, if you receive one at all. No response is good news and may indicate that the investigation has ceased. However, you may receive further notices to produce additional documents or ASIC may employ other means within their power to gather information.

What Would Non-Compliance Mean?

Failure to comply with the notice to produce may result in ASIC issuing a final notice to comply. After issuing a final notice, ASIC have the power to obtain warrants to seize the required documents from your premises. Should the documents not be in your possession, ASIC can demand that you divulge where they are being kept. Intentionally or recklessly failing to comply with the notice is an offence under s63 ASIC Act and carries a maximum penalty of two years imprisonment.

ASIC Interviews

Under section 19 of the ASIC Act, ASIC has the power to compel any person to appear for ASIC investigators to take part in ASIC interview. ASIC will call upon any person they suspect is able to provide them with information relevant to any matter they are investigating. This may include the person who is the target of their investigation or any associate. It is not uncommon for ASIC to call on company employees, wives of directors, lawyers, accountants, financial advisors to attend a compulsory interview when a company is being investigated for any breach of the corporations law or any potential offences.

ASIC interviews are compulsory.

You have the right to have your lawyer present.

You must answer every question. You can choose to claim that the answer is privileged.

What is Privilege?

Claiming privilege against self-incrimination is your legal right in ASIC interviews, however, you must claim privilege for all questions put to you. It is not sufficient to claim privilege at the beginning of the interview.

It must be claimed before each answer:

Q: "What is your current place of employment?"

A: "Privilege. I work at ..."

Q: "What is your position there?"

A: "Privilege. I am the General Manager..."

Understanding how to claim privilege is imperative before undertaking the interview. Failure to state "privilege" before giving your answer means that without privilege, ASIC can use the information against you in future criminal proceedings.

Why Do I Assert Privilege?

If you claim privilege, then your answers cannot be used against you in a Court, even if they disclose criminal offending.

Giving false or misleading information to ASIC in an interview is an offence and you will be prosecuted by ASIC. Even if you are not the primary target of the investigation, anything you say in an ASIC interview must be considered carefully.

What To Do If You Have Received a Notice To Attend an ASIC Interview

Remain calm. Read the notice thoroughly.

Try to gain as much understanding of what ASIC are interested in speaking to you about.

Speak to a lawyer and consider having them attend the interview with you.

Your lawyer cannot be involved in the questioning, but can clarify things with ASIC, ensuring your interests are protected during ASIC interviews. Also, having legal support there may alleviate some of the anxiety that an interview of this nature can initiate.

Allow quite a few hours for the interview. Often the interviews continue over a number of days.

The process can be long and trying, it takes some time for the investigators to advise you of your rights and set up the recording equipment before the interview commences. It will only exacerbate any stress you may be under to be running late for another appointment.

What To Expect In The Interview

The interview takes place in private and will commence with a number of warnings.

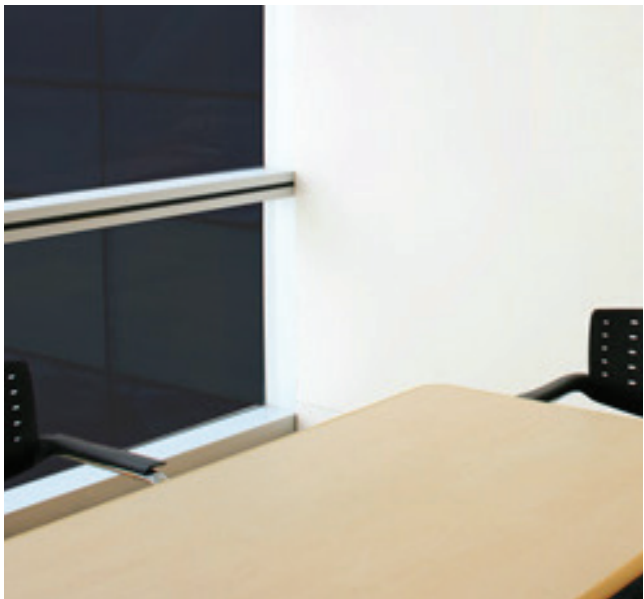
One of them will relate to the confidentiality of the interview. Discussing your interview with any person is forbidden for a prescribed period of time. This does not extend to your lawyer if they are with you during the interview. You have the right to have a lawyer present at the interview. If your lawyer is not present, you should ask that the confidentiality notice is amended so that you can discuss your interview with your appointed lawyer.

Listen carefully to the questions you are asked.

Answer the questions as clearly and briefly as possible. Do not add, elaborate or clarify. The less you say, the better. If the investigators need clarification of an answer, let them ask.

Tell the truth.

ASICs powers are far-reaching, so if you try to mislead them, they will catch you out as chances are they are already in possession of a document or have already interviewed other parties involved that can substantiate a line of questioning or allegation. If the interview is taking a considerable amount of time and you feel that you are losing focus, you may ask for the interview to reconvene at another time. It is not uncommon for an investigation to comprise many interview sittings.



After an ASIC Interview

You may be requested in the interview to gather documents to present to ASIC.

If you have not engaged a lawyer at this point, now may be the time to consider it. Confidentiality prevents you from discussing the interview with anyone other than your lawyer, who can contact ASIC and ask permission to discuss the interview with you in a lawyer-client capacity. This type of request is rarely opposed.

A transcript of the interview will be sent to you to review and sign. You may correct any typographical or clerical errors only. It may be used in evidence against you or others in criminal proceedings, except for answers where you have claimed privilege.

Any errors that you become aware of post-interview should be clarified directly with ASIC in writing immediately after conferring with your lawyer.

Subpoenas in ASIC Cases

Subpoenas in ASIC cases need to be treated with caution.

When issuing a subpoena that is held by a company or employer, the subpoena should be addressed appropriately to the company or specific person with the authority over the documentation. An employee may not be compelled as they cannot not be imposed upon to violate any duty to their employer.

It is also important to note that the Court may order the amount of any losses or expenses incurred in complying with the subpoena to be paid by the issuing party.

Defending ASIC Charges

Defending these cases require a thorough understanding of the reach and scope of ASICs investigatory and coercive powers. You need to sit with lawyers who deal with Court prosecutions and are experienced in the area. Call our Melbourne Office on (03) 9670 5111 and speak to one of the partners today. Firstly it is imperative to establish that there is no further opportunity for civil penalty. As demonstrated in the case *Australian Competition and Consumer Commission v Pratt (No 3) [2009] FCA 407*, it was determined that the successful civil action against Visy and Richard Pratt for price-fixing could not be used to pursue criminal proceedings. There is a vast difference in defending ASIC charges of a criminal nature versus civil charges. The main point being that criminal charges entail a greater burden of proof than civil. Secondly, fact finding and analysis is crucial. Obtain copies of the ASIC (section 19) interview, draft statements and investigators' notes.

Pleading Guilty and Sentencing in ASIC Cases

Should an early plea of guilty be deemed the best outcome for your particular case, there are advantages. An early guilty plea may prevent ASIC investigators from creating a damaging paper trail. Your co-operation and concession is advantageous. Where there are others involved in the investigation your account will be given first. The quality and intensity of an ASIC investigation and coercive powers may lead to other findings. Prosecutors regard an early plea highly and charges can be negotiated when there is co-operation.

Further negotiation is possible where charges under the Corporations Act carry lesser penalties than those under the Crimes Act (VIC). As prosecutions for Commonwealth offences are conducted in State Courts, exercising federal jurisdiction, sentencing in ASIC cases can vary and is dependent on many factors. Mitigatory factors such as prospects of rehabilitation, character or community standing will not override the principal sentencing factor of general deterrence.

If you are charged as a continuing criminal enterprise offender, i.e. if the charges amount to over \$50,000, you are liable to be sentenced much higher. Case law, *R v Murray [2011]*, suggests that totality is still an issue to be considered.

It is considered that sentencing for offences such as insider trading should reflect the damage the integrity of the entire market, therefore sentencing reflects ASIC responsibilities to instil and protect the confidence of the investing public.

A conviction for offences resulting in a disqualification from managing a corporation is considered a penalty and will be taken into account upon sentencing.

Legal Support

You have a right to be legally represented. If you are being investigated by ASIC, you should seek legal advice from experts who understand the process and procedure of an ASIC investigation.

Doogue + George is a leading defence law firm.

Our lawyers have extensive practical experience in preparing for and defending ASIC charges. Visit www.dobg.com.au or call **03 9670 5111** for more information.

You will need expert advice and support if you are being investigated by ASIC.

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