ADMINISTRATIVE REVIEW COUNCIL

THE COERCIVE INFORMATION-GATHERING POWERS OF GOVERNMENT AGENCIES

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The Hon. Robert McClelland MP
Attorney-General
Parliament House
Canberra ACT 2601

Dear Attorney-General

I have pleasure in submitting to you the Administrative Review Council’s report entitled *The Coercive Information-gathering Powers of Government Agencies*.

Coercive information-gathering powers are important powers possessed and widely used by many government agencies. In this report the Council describes a range of best-practice principles it considers will ensure that agencies use the powers effectively, efficiently and with due regard to individual rights.

Yours sincerely

Jillian Segal AM
President
The Administrative Review Council

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The Council thanks all past and present members of the Secretariat who assisted with the development of this report.
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Preface

Coercive information-gathering powers are important administrative and regulatory devices for government. At the national level in Australia many agencies use them to compel the provision of information, the production of documents and the answering of questions.

In this report the Administrative Review Council considers in detail these powers, using as its reference point the powers of six agencies—the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Australian Taxation Office, Centrelink, and Medicare Australia.

These agencies provided to the Council valuable insights into the operation of their coercive information-gathering powers. Details of the main statutory powers of each agency are set out in the summary presented as Appendix A. This information, as well as information provided by other agencies and bodies in response to a draft report released for comment in December 2006, provides the basis for this report. The Council also had regard to the work of other reform, review and advisory bodies to the extent that it is relevant to agencies’ coercive information-gathering powers.

Submissions the Council received make it clear that across-the-board legislative uniformity is neither feasible nor desirable in this area. The Council does, however, consider that application of the administrative law values of fairness, lawfulness, rationality, transparency and efficiency does point to 20 best-practice principles that are generally applicable. These principles seek to strike a balance between agencies’ objectives in using coercive information-gathering powers and the rights of those in relation to whom the powers are exercisable.

Among the topics covered by the principles are the appropriate ‘trigger’ threshold for the use of coercive information-gathering powers, who should delegate the powers and to whom the powers should be delegated, training, notices, examinations and hearings, privilege, and exchange of information both within and between agencies. Although the principles themselves do not have legislative backing, they represent minimum standards and good administrative practice; in some cases they are suggestive of desirable legislative practice.

The Council puts forward the principles as an important guide to fair, efficient and effective use of coercive information-gathering powers. Government should take them into account when offering such powers to new agencies, when reviewing the powers of existing agencies, and when determining the annual expectations of agencies.

In the report the Council also identifies several aspects of agency legislation and practice relating to coercive information-gathering powers where there is uncertainty and lack of definition in the legislation. Two such areas are the privilege against self-incrimination or self-exposure to penalty and client legal privilege. In the legislation
the Council examined it was sometimes unclear whether the privileges applied and, if so, the extent to which they have been abrogated.

There was little guidance—particularly legislative guidance—on how to claim and to adjudicate a claim of privilege. (The Council notes here the Australian Law Reform Commission’s recent report entitled *Privilege in Perspective: client legal privilege in federal investigations.*) For its part, the Council is of the opinion that the uncertainties arising from the lack of clarity in relation to privilege cause inefficiencies and are costly for agencies using coercive information-gathering powers; nor are they in the best interests of those in relation to whom the powers are used.

Another area that could be worthy of investigation is information sharing between and within agencies. Simplification and rationalisation of the relevant legislative provisions might be possible without compromising the functions of agencies or the rights and interests of those to whom the information relates.
**The principles**

The Council puts forward the following principles as a guide to government agencies, to ensure fair, efficient and effective use of coercive information-gathering powers.

**Setting the threshold and scope**

**Principle 1**

The minimum statutory trigger for the use of agencies’ coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.

If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has ‘reasonable grounds’ for the belief or suspicion that is required before the power can be exercised.

If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform the subject of the investigation of that change in status.

**Principle 2**

**Before using the powers**

Before using coercive information-gathering powers agency officers should do two things:

- consider alternative means that could be used to obtain the information sought and

- weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.

**Drafting notices**

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

To the extent operationally possible, it is desirable that agency officers consult proposed notice recipients in order to determine the probable scope and nature of information held.
Exercising the powers

When exercising coercive information-gathering powers agency officers must choose the most efficient and effective means of obtaining the information. For example, if information is held on computer, the issuing of a notice requesting identification of records held on the system could in the first instance be the most effective and efficient course of action. This could then be followed by a notice requesting the production of relevant documents.

Record keeping

Principle 3

When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.

If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.

Transparency

Principle 4

To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or reveal details of important investigatory methods.

Contempt of court

Principle 5

Agencies should regularly monitor developments in case law relating to contempt of court. In this regard, training and support for officers exercising coercive information-gathering powers are essential.

Authorisation and delegation

Principle 6

Legislation should specify who may authorise the exercise of an agency’s coercive information-gathering powers.
If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.

**Principle 7**

It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.

The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

**Training**

**Principle 8**

If the right to exercise coercive information-gathering powers were linked to training or accreditation programs this would help agency officers exercising the powers to gain the requisite competency.

For an agency with a large number of officers exercising coercive information-gathering powers, development of an accredited training program specific to the agency would represent good administrative practice.

**Accountability**

**Principle 9**

When an agency confers authority to exercise coercive information-gathering powers on people who are not officers of the agency — for example, state officials or employees of agency contractors — the agency should remain accountable for the use of those powers.

**Principle 10**

Senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency. In addition to ensuring the continuing suitability and accuracy of delegations, the senior officers should ensure that officers exercising the powers have received the necessary training, possess the requisite skills, and have continuing access to assistance, advice and support.
Sharing resources and experience

**Principle 11**

Subject to considerations of privacy and confidentiality, agencies are encouraged to share their ideas and experiences in relation to the exercise of coercive information-gathering powers in the following ways:

- establishing an agency network for the exchange of educational materials, including training manuals and ideas. Discussion and circulation of information about relevant cases and the content and upgrading of instructional materials would be useful—especially for smaller agencies
- establishing an informal peer network within and between agencies for discussion, training and information sharing
- conducting periodic meetings between ‘like agencies’
- identifying important across-agency or sectoral topics for inclusion in agency training programs and manuals.

Conflict of interest

**Principle 12**

Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.

*Decision Making: natural justice*, guide 2 in the Council’s series of best-practice guides for administrative decision makers, provides an overview of the law in this area and of its practical application.

Identity cards

**Principle 13**

If face-to-face contact is involved, at a minimum officers or external experts exercising coercive information-gathering powers should carry official photographic identification and produce it on request.

In a formal investigative procedure it is good administrative practice if officers and external experts are also able to produce written evidence of the extent of their authority.
Notices

**Principle 14**

All coercive information-gathering notices should do the following:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- in relation to specific investigations, set out the general nature of the matter in relation to which information is sought
- consistent with the requirements of the *Privacy Act 1988* (Cth) in relation to personal information, clearly state whether it is the usual lawful practice of the agency to hand information collected in response to notices to another area of the same agency or to another agency
- provide details of a contact in the agency to whom inquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege.

**Notices to provide information or produce documents**

It is good administrative practice to specify how the notice recipient should provide the information or how the document should be produced and to whom.

**Notices to attend an examination or a hearing**

Notice recipients should be told whether they may be accompanied by a lawyer or third party and, to the extent possible, the name of the person who will be conducting the examination.

**The time frame for compliance**

Agency legislation should specify a minimum period for the production of information or materials or for attendance for examination or hearing. The legislation should also allow for exceptions to the rule in specified circumstances.

**Materials covered by a notice**

To facilitate compliance, a notice or its supporting correspondence should clearly identify the sorts of materials covered by the notice, including materials held on computer.

**Principle 15**

Compliance would be further encouraged if terms such as ‘information in the possession of’, ‘in the custody of’ or ‘under the control of’ the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency.
Examinations and hearings

**Principle 16**

Unless there are special reasons to the contrary, examinees should be entitled to:

- a private hearing—subject to the presence of authorised individuals
- in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.

The reason for holding a public examination or for denying legal or other representation should be explained and a record of this kept.

Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.

Among other matters that may be dealt with without legislation are provision for viewing and correction by the examinee of a transcript of proceedings and, where relevant, the circumstances in which a third party may be given a copy of the transcript within the scope of agency privacy and secrecy provisions.

Examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing. Agencies should clearly differentiate this situation from one in which where there is no such legislative restriction.

**Privilege**

**Principle 17**

Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.

Agencies should keep written records of the situations in which the privileges apply, and especially when they are waived. Agency guidelines to supplement legislative directions should also be developed in relation to privilege; among the topics covered should be the procedures to be adopted by agencies in responding to a claim of privilege and the nature and effect of a waiver of privilege.
Disclosure of information

**Principle 18**

The complexity and inconsistency of agencies’ secrecy provisions mean that special care is needed when dealing with inter-agency disclosure of information.

In notices and requests it is necessary to carefully describe the information agency officers require in the exercise of their coercive information-gathering powers and the probable uses of that information.

Agencies should provide to their officers guidance about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information might be contemplated.

Guidelines and training for agency officers in both these areas and in relation to the effect of and interaction between the *Privacy Act 1988* (Cth) and agencies’ secrecy provisions are essential.

It is good administrative practice to develop memorandums of understanding between agencies, clarifying the responsibilities of agency officers in disclosing information obtained through, among other things, the use of coercive information-gathering powers.

**Principle 19**

Subject to limited exceptions, it is desirable that inter-agency disclosure of information obtained in the exercise of coercive information-gathering powers be subject to a threshold trigger of the same calibre as that governing the initial issuing of a notice (see principle 1). Additionally, privilege and use immunity should be taken into account when the release of information to another agency is being considered.

Examples of situations in which exceptions to the threshold trigger would be apposite are when there is an immediate and serious risk to health or safety and when limited information is required for a royal commission.

As noted, the discretion to disclose information obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.

**Record management**

**Principle 20**

Agency strategies and guidelines should operate to ensure the integrity, proper management and accurate recording of information received in the exercise of an agency’s coercive information-gathering powers. Wherever possible, receipts should be given for documents and materials furnished to the agency.
An agency that has used its information-gathering powers to obtain information or documents from someone should keep under continuing review the need to keep the person informed, as appropriate, about whether an investigation is still current, when documents can be returned to the person, or whether other arrangements can be made for the person to be given interim access to the documents or a copy of the documents.
Introduction

Coercive investigative powers are statutory powers conferred on many government agencies to enable them to obtain information associated with the performance of their statutory functions. Such powers typically permit agency officers to enter and search premises, to require the production of information or documents, and to require provision of information relevant to their statutory functions by way of oral examination or hearing without the issuing of a warrant or other external authorisation.

Such powers have already been the subject of detailed examination by law reform bodies and parliamentary committees. The Council’s report focuses, however, on coercive powers relating to the production of information or documents and the provision of information by way of oral examination or hearing. These powers have not previously been the subject of such detailed scrutiny; they are referred to in this report as ‘coercive information-gathering powers’.

Agencies can use coercive information-gathering powers for monitoring legislative compliance and in the context of formal investigations where there has been or could be a breach of the law. Legislative powers allowing agencies to collect information in order to determine a person’s initial entitlement to gain access to a government program or benefit do not fall within the ambit of this report. Sometimes all three sorts of uses of information-gathering powers are provided for in a single legislative provision.1

Section 194 of the Social Security (Administration) Act 1999 (Cth) is an example of a coercive information-gathering power. The section provides that, if the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs believes a person might have information or a document that would help locate someone (a ‘debtor’) who owes a debt to the Commonwealth ‘under or as a result of the social security law’ or ‘that is relevant to the debtor’s financial situation’, they may require that person ‘to give the information, or produce the document’.

Similarly, s 264 of the Income Tax Assessment Act 1936 (Cth) provides that the Australian Taxation Office may issue to any person a notice requiring them to furnish such information as the ATO may require, to attend and give evidence concerning their or anyone else’s income or assessment, and to produce all related books, documents and other papers in their custody or under their control.

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1 Sections 63 and 64 of the Social Security (Administration) Act 1999 (Cth), discussed in detail in Chapter 2, are illustrative.
The coercive information-gathering powers of government agencies

The purpose of this report

In this report the Council provides advice to the Attorney-General—in accordance with its functions under s 51 of the Administrative Appeals Tribunal Act 1975 (Cth) (see Appendix B)—in connection with agency coercive information-gathering powers.

An important purpose of the report is to identify a set of best-practice principles that are consistent with the administrative law values of fairness, lawfulness, rationality, openness (or transparency) and efficiency and that are relevant to all agencies using coercive information-gathering powers. The Council identifies 20 principles. It recommends them as a guide to fair, efficient and effective use of such powers. It also considers that government should take them into account when providing the powers to new agencies, when reviewing the powers of existing agencies, and when determining expectations of agencies.

A further purpose of the report is to establish whether more consistency in legislation relating to coercive information-gathering powers might lead to greater efficiencies in the use of such powers. The Council concluded that, although across-the-board uniformity is generally neither feasible nor desirable, efficiencies would probably be achieved if differences in legislation affecting a single agency were removed.

The overriding objective of the report is, however, to secure the correct balance between the interests of agencies and the rights of individuals in relation to the scope and use of coercive information-gathering powers.

The agencies chosen

The Council’s analysis focused on the coercive information-gathering powers of six agencies—the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Australian Taxation Office, Centrelink, and Medicare Australia. These agencies are representative of Commonwealth agencies involved in revenue collecting (the ATO), revenue spending (Centrelink and Medicare) and corporate regulation (the ACCC, APRA and ASIC). Despite their different functions, the agencies share the objective of administering their statutory information-gathering powers as efficiently and effectively as possible with regard to their own objectives and the rights and interests of those in relation to whom the powers are exercisable.

The report does not consider the coercive information-gathering powers of agencies involved in criminal investigation and prosecution or national security; examples are

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2 The Council considers these values fundamental to the Commonwealth administrative system and has used them as benchmarks for analysis in a number of its reports and other publications.

3 See, for example, s 1(2) of the Australian Securities and Investments Commission Act 2001, s 8(2) of the Australian Prudential Regulatory Authority Act 1998, and s 8 of the Social Security (Administration) Act 1999. See also the ACCC’s 2007–08 Corporate Plan and Priorities, where, ‘working on the fundamental principle that this benefits consumers, business and the wider community’, the aim is to bring greater competitiveness and fair trading to the Australian economy; see further the ATO’s Taxpayer Charter and the address about its Easier, Cheaper, More Personalised program by Michael D’Ascenzo, Commissioner of Taxation, to the Australasian Tax Teachers’ Association 18th Annual Conference, Melbourne, 30 January 2006.
the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the Australian Commission for Law Enforcement Integrity. Nor does it consider the coercive information-gathering powers of monitoring bodies such as the Commonwealth Ombudsman.

Finally, the Council does not seek to recommend amendment of the coercive information-gathering powers of any particular agency.

Other work done in relation to coercive information-gathering powers

In developing its report the Council took into account other bodies’ work to the extent that it pertains to coercive information-gathering powers. Such work includes the 2000 and 2006 reports of the Senate Standing Committee for the Scrutiny of Bills\(^4\), the government’s response to the earlier of those reports, the 2003 report *Review of the Competition Provisions of the Trade Practices Act*\(^5\), and work done by law reform bodies such as the Australian Law Reform Commission in the areas of the privilege against self-incrimination or self-exposure to penalty and client legal privilege.\(^6\) The Council also took into account the ALRC’s work on client legal privilege and privacy.\(^7\)

Consultation

In addition to the information provided by the six agencies, the Council was mindful of the 36 submissions received in response to the draft report it released for discussion in December 2006. (Appendix C lists the organisations that presented submissions.) The Council extends particular thanks to the six agencies; it also thanks all who presented submissions.

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\(^7\) In 2007 the ALRC released two discussion papers, *Review of Australian Privacy Law* (Discussion paper no. 72) and *Client Legal Privilege and Federal Investigatory Bodies* (Discussion paper no. 73), in relation to these references. In January 2008 it released its report of this review, *Privilege in Perspective: client legal privilege in federal investigations*, Report no. 107, ALRC, Sydney.
The structure of the report

Chapter 2 of this report considers the statutory and agency triggers for the use of coercive information-gathering powers.

Chapter 3 discusses other factors influencing the decision to use the information-gathering powers—for example, whether there are alternative ways of obtaining information, the costs of compliance, and contempt of court.

Chapter 4 considers who may exercise coercive information-gathering powers and concludes with a discussion of agency guidelines and training.

Chapter 5 looks at the notice provisions in the agencies’ legislation. It also discusses agencies’ legislation and practice in relation to examinations and hearings.

Chapter 6 deals with the disclosure of information, including the privilege against self-incrimination or self-exposure to penalty and client legal privilege.

Chapter 7 considers inter- and intra-agency transfer of information, agency secrecy provisions, confidentiality provisions and the privacy legislation.

Appendix A sets out a summary of the main coercive information-gathering powers of the six agencies reviewed.

Appendix B reproduces s 51 of the *Administrative Appeals Tribunal Act 1975*.

Appendix C lists the organisations that presented submissions in response to the Council’s draft report released in December 2006.
2 Statutory triggers

Providing a balance

Coercive information-gathering powers are important administrative and regulatory devices. It is essential that, when using them, agencies impinge on the rights of individuals only in a proportionate and justifiable way. Among the individual’s rights are those associated with the protection of property and privacy, the right to silence, and statutory rights to the protection of personal information. Related rights are the right to privilege against self-incrimination or self-exposure to penalty and client legal privilege.

There is often a statutory trigger or legislative threshold for the use of coercive information-gathering powers. The trigger is important for maintaining a suitable balance between the statutory objectives of agencies and the interests of those in respect of whom the information-gathering powers are exercisable. Triggers also constitute an important accountability mechanism.

The statutory triggers for the use of coercive information-gathering powers in the agency legislation the Council considered for this report are as follows.

The Australian Competition and Consumer Commission

Under s 155 of the Trade Practices Act 1974 the ACCC may issue a notice requiring a person to provide information, to produce documents or to give evidence orally or in writing. The statutory trigger for use of this power is:

… if the Commission … has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that … is relevant to the making of a decision by the Commission …

[emphasis added]

Historically, the focus was on the right to private property, but more recently this has shifted to privacy—George v Rockett (1990) 170 CLR 104, 110.

9 See R v Director of Serious Fraud Office; Ex parte Smith [1993] AC 1, 31 (Mustill LJ). Mustill LJ’s comments have been noted with approval in several Australian cases—Azzopardi v The Queen (2001) 205 CLR 50; A v Boulton (2004) 204 ALR 598; Commonwealth Director of Prosecutions v Xu 154 Crim R 173. See also Legislative Review Committee 2006, The Right to Silence: response to the discussion paper, Report no. 4, NSW Parliament, Sydney, p. 2.
The Australian Prudential Regulation Authority and the Australian Securities and Investments Commission

APRA’s powers are conferred (or enabled) under a number of statutes, among them the Australian Prudential Regulation Authority Act 1998 (Cth), the Superannuation Industry (Supervision) Act 1993 (Cth), the Banking Act 1959 (Cth), the Retirement Savings Accounts Act 1997 (Cth) and the Insurance Act 1973 (Cth).

For monitoring purposes, ss 254(2) and 255 of the Superannuation Industry (Supervision) Act provide that the regulator may require the provision of information and the production of books ‘for the purposes of this Act’. There are similar provisions under ss 131 and 132 of the Life Insurance Act 1995 (Cth). APRA uses these powers in a supervisory, rather than investigative, context.

Investigations are authorised by s 263 of the Superannuation Industry (Supervision) Act. Subsequent provisions relate to the powers and processes applicable to those investigations. They include s 269 (Production of books) and s 270 (Provision of reasonable assistance and/or to appear for examination). Such powers are exercisable ‘if it appears’ to APRA that, for example, a contravention of the Act might have occurred or be occurring or the financial position of a superannuation entity might be unsatisfactory.

ASIC is established under and administers the Australian Securities and Investments Commission Act 2001 (Cth) and carries out most of its work under the Corporations Act 2001 (Cth). It has coercive information-gathering powers under both Acts. For the purposes of the ASIC Act the information-gathering power can be used for three reasons.

First, ASIC may issue a notice for the production of books under ss 30, 31, 32A and 33 of Division 3 of the Act. Use of this power is governed by s 28, which provides that powers may be used:

- for the purposes of the performance or exercise of any of ASIC’s functions and powers under the corporations legislation
- for the purposes of ensuring compliance with the corporations legislation
- in relation to certain alleged or suspected contraventions of corporations legislation and other legislation

or

- for the purposes of a s 13 investigation—that is, where ASIC has ‘reason to suspect’ that a contravention might have occurred. The power is not confined by property rights in documents or legal entitlement to possession.

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This is located in Division 2 of Part 25 of the Act (Monitoring superannuation entities).

Sections 672A and 912C of the Corporations Act relate to ASIC’s power to issue disclosure notices and to direct entities to provide a statement.

The Corporations Act and the ASIC Act.

The coercive information-gathering powers of government agencies

The production powers can therefore be used as part of a general audit or monitoring of a company’s affairs, as well as in the course of an investigation with a view to taking enforcement action. Section 28(a) provides that no formal investigation or suspicion of wrongdoing is required in order to issue a notice to produce books.

Second, investigations may be conducted under Division 1, Part 3, of the ASIC Act. Section 13 of that part provides that, for ASIC to make investigations, it must have ‘reason to suspect’ that there may have been a contravention of the corporations legislation or certain other legislation. The ambit of the investigation is not confined to determining whether the suspected contravention occurred. Once triggered, the provision gives ASIC the scope to conduct an investigation at least as broad as any of its functions under s 1(2) of the ASIC Act.\(^{14}\)

Third, appearance for examination under s 19 applies where ASIC ‘on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate’ [emphasis added]. This is a stricter threshold than that applying to the production of documents.

Both ASIC and APRA may use monitoring powers under ss 254(2) and 255 of the Superannuation Industry (Supervision) Act, which provides that the regulator may require the provision of information and the production of books ‘for the purposes of this Act’.\(^{15}\) Sections 131 and 132 of the Life Insurance Act make similar provision.

**Centrelink**

For Centrelink, an important information-gathering power resides in s 192 of the Social Security (Administration) Act 1999 (Cth), which provides that the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs may require that a person give information or produce a document that is in the person’s custody or under their control to the department if the Secretary ‘considers’ that the information could be relevant to a person’s eligibility for benefit.\(^{16}\)

There is no statutory trigger for notices issued by the Secretary under s 193 to obtain information directly from a person who owes a debt to the Commonwealth. In contrast, as noted, s 194 requires that the Secretary ‘believe that a person may have information or a document’ that would help the department locate another person who owes a debt to the Commonwealth or is relevant to the debtor’s financial situation [emphasis added].

Sections 63 (Requirement to attend the department etc) and 64 (Requirement to undergo a medical examination) require the Secretary to be ‘of the opinion’ that someone should attend or contact the department or provide information. Notices under these provisions can be issued only to individuals who are receiving or have

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\(^{14}\) See, for example, Little River Goldfields NL v Moulds (1991) 32 FCR 456.

\(^{15}\) This is in Division 2 of Part 25 of the Act (Monitoring superannuation entities).

\(^{16}\) Note that, since the Departments of Education, Employment and Workplace Relations and Families, Housing, Community Services and Indigenous Affairs share portfolio responsibility for administration of social security law, the corresponding Secretaries are entitled to exercise the power within their department’s portfolio responsibility.
made a claim for a social security payment or other benefit (ss 63(1) and 64(1)). Failure to comply with a notice without a reasonable excuse will result in the non-payment of a benefit a person currently receives or has applied for.

To the extent that these provisions are used for the collection of information for the purpose of determining an individual’s initial entitlement to a benefit, they fall outside the scope of the information-gathering powers under consideration in this report.

**Medicare Australia**

Under the *Medicare Australia Act 1973* (Cth) an authorised Medicare officer can require a person to give information or produce documents, can enter premises, can conduct searches, and can seize evidential material. Section 8P of the Act provides that there must be ‘reasonable grounds for believing’ an offence has been committed and the information or document is relevant to the offence.

**The Australian Taxation Office**

There are access provisions in many of the Acts administered by the Commissioner of Taxation. The commissioner’s rights under the access powers can be used only by an officer acting in good faith and for the purposes of the Act.

Section 264 of the *Income Tax Assessment Act 1936* (Cth) is one of the main access provisions. As noted, s 264 provides that a person can be required to ‘furnish [the Commissioner] with such information as he may require’ (s 264(1)(a)) and ‘to attend and give evidence … concerning his or any other person’s income or assessment and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto’ (s 264(1)(b)).

Section 264(1)(a) is broader than s 264(1)(b). It allows the ATO to ask for more general information—for example, an accountant’s client list. In comparison, s 264(1)(b) is limited to evidence or documents ‘concerning [a] person’s income or assessment’. This means the ATO must determine that the evidence or documentation it is seeking relates to a taxpayer’s income or assessment.

Although the proper position of s 264(1)(a) can be seen as a preliminary information-gathering procedure on which a more directed request under s. 264(1)(b) can be based, s 264(1)(a) is not restricted to that function. The two provisions can operate independently.

As a matter of construction, the courts have implied the prerequisite that the power in s 264(1)(a) is used only for the purposes of that Act. These purposes have, however, been widely construed. It has been suggested that any bona fide inquiry

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18 Federal Commissioner of Taxation v Australian and New Zealand Banking Group Ltd (1979) 143 CLR 499.
19 ibid, 535 (Mason J).
about the operation of the Income Tax Assessment Act would be for the purposes of the Act.²⁰

**Triggers in legislation**

The submissions presented in response to the Council’s draft report overwhelmingly supported the inclusion of triggers in legislation, rather than in subordinate legislation. The Office of the Privacy Commissioner submitted that clear legislative authority assists with regulation of the disclosure and secondary use of personal information.

**Consistency in triggers**

When the agencies were asked whether there should be greater consistency in the triggers for activating coercive information-gathering powers, the predominant response was that it is important that such triggers reflect the regulatory objectives and the risk profiles of each agency. As a corollary to this, it was noted that consistency should not be sought at the expense of operational need. Moreover, respondents were unconvinced that across-agency consistency in this area would lead to greater efficiencies.

The ATO said, for example, its considerable degree of discretion in relation to the use of its coercive powers complements the ‘self-assessment’ approach on which the Australian tax system is largely based. It noted, too, that this wide discretion and the ability to compel people to provide information work as a strong deterrent to non-compliance with tax laws.

It was said that one area in which consistency is desirable is in relation to thresholds for the use of comparable powers in different statutes administered by a single agency. Both ASIC and APRA pointed to differences between the ASIC Act and the Superannuation Industry (Supervision) Act and the triggers in other legislation they administer.²¹ These differences seem to be historical rather than operationally necessary and in practice can be inconvenient to comply with.

It was also suggested that consistency in the practical application of legislative triggers in an agency is important, especially where an agency’s information-gathering powers are exercised in different states or territories or in overseas offices.

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Setting the threshold

Monitoring powers

The agencies studied stressed the role of monitoring powers in the execution of their regulatory responsibilities. Used to assess general levels of legislative compliance, these powers are often not referable to particular investigations. Further, it might not always be apparent when monitoring activities escalate into a more formal investigation. Whether to use the powers for monitoring or in relation to a more specific investigation is often a practical decision made case by case.

A number of agencies pointed to inefficiencies that could arise if the threshold for the use of monitoring powers were set too high. There was, however, broad agreement that, as a minimum, monitoring powers should be exercised in a manner consistent with the objects of the relevant legislation.

More specific investigations

The submissions expressed broad support for the idea of tying triggers for the use of agencies’ monitoring powers to the legislative objectives of each agency. In the case of specific investigations, though, the prevailing view was that there should be a higher trigger, determined on the basis of objectively assessable criteria. What the criteria should be was less clear. Several submitters suggested that a threshold of ‘reasonable belief’ for powers used in a criminal context and ‘reasonable suspicion’ for powers exercisable in a civil context might be appropriate.

The terms ‘suspect’ and ‘believe’ have been considered by the courts. In George v Rockett the Full Court of the High Court defined ‘suspicion’ as ‘a state of conjecture or surmise where proof is lacking’.22 As Kitto J noted in Queensland Bacon Pty Ltd23, a ‘suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a “slight opinion, but without sufficient evidence”’.25

On the other hand, the High Court considered in Rockett that ‘belief’ needs to ‘point more clearly to the subject matter’.24 Although belief is not required to establish the existence of the relevant fact on the balance of probabilities, the Court held:

Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.25

Where either the suspicion or the belief must be based on ‘reasonable grounds’, it has been held that, although the notion imports an objective test, “‘reasonable” involves a value or normative judgment’.26 This does not mean the issuing officer has a non-

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23 Queensland Bacon Ltd v Rees (1966) 115 CLR 266, 303.
25 ibid.
examinable discretion, but it has been held that the issuing officer’s decision is open to challenge only if the decision was one that the officer could not lawfully have made on the basis of the materials before him or her.\textsuperscript{27}

In \textit{Rockett}, the High Court held that when the legislation provides that there must be ‘reasonable grounds’ for a particular state of mind, including a suspicion or belief, this ‘requires the existence of facts which are sufficient to induce that state of mind in a reasonable person’.\textsuperscript{28} The court also held that ‘the facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief’, although ‘some factual basis for the suspicion must be shown’.\textsuperscript{29}

The reasonable grounds test enunciated in \textit{Rockett} relates to the decision maker’s state of mind, which, whether a suspicion or a belief, must be based on supporting facts or circumstances.

The Council’s view

The Council’s view is that in most instances it is desirable that there be a distinction between the threshold for the use of an agency’s coercive information-gathering powers for monitoring and for more specific investigations. For monitoring, the Council considers the minimum threshold trigger should be that the powers are exercised in accordance with the agency’s statutory objectives. For more specific investigations, the test should be correspondingly more specific, requiring establishment of a requisite state of mind on reasonable grounds. Both tests should be applied objectively.

If a monitoring process escalates to a more specific investigation of someone, it is good administrative practice, to the extent operationally possible, to inform that person of the change in status.

\begin{table}
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\textbf{Principle 1} \\
\textbf{The minimum statutory trigger for the use of agencies’ coercive information-gathering powers for monitoring should be that the powers can be used only to gather information for the purposes of the relevant legislation.} \\
\textbf{If a coercive information-gathering power is used in connection with a specific investigation, the minimum statutory trigger for using the power should be that the person exercising it has ‘reasonable grounds’ for the belief or suspicion that is required before the power can be exercised.} \\
\textbf{If an information-gathering process escalates from monitoring to specific investigation, agency officers should, to the extent operationally possible, inform the subject of the investigation of that change in status.} \\
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\textsuperscript{27} \textit{Minister for Immigration & Ethnic Affairs v Wu Shan Liang} (1996) 185 CLR 259, 275–6.
\textsuperscript{28} \textit{George v Rockett} (1990) 170 CLR 104, 112.
\textsuperscript{29} ibid, 115.
3 Deciding whether to use the powers

In addition to the legislative thresholds for the use of coercive information-gathering powers, other important factors are relevant to the question of whether the use of the powers is appropriate.

Alternative ways of obtaining information

An agency’s decision to issue a notice in exercising its coercive information-gathering powers is not to be made lightly considering that failure to comply with an information-gathering notice can be punishable by a fine or imprisonment, or both.

The six agencies under consideration for this report emphasised that they exercise their coercive information-gathering powers only after careful assessment of the need to do so, and this includes consideration of alternative ways of obtaining the desired information.

A number of agencies identified other important statutory sources of information—for example, annual and other reporting requirements. ASIC also noted the obligations the Corporations Act imposes on trustees for debenture holders, auditors, receivers, administrators and liquidators to inform it of possible irregularities.

The agencies said that where it is appropriate they try to obtain information informally and voluntarily. This approach is reflected in some agencies’ practice manuals.

The ACCC said that before issuing a notice it considers the following:

- whether the information is otherwise available—including voluntarily
- the degree of risk that the information may be destroyed, not provided or provided on terms unacceptable to the ACCC
- whether it is appropriate for the ACCC to obtain information formally
- whether the information is necessary and relevant to the ACCC’s investigation
- the time and cost implications of a s 155 process for the ACCC and for the notice recipient.30

There are also important reasons why in some cases the issue of a notice might be the preferred option, both for agencies and for notice recipients.

If information is sought from a third party the Privacy Act 1988 (Cth) might preclude that person’s disclosure of personal information31 unless, among other things, the

30 ACCC policies and guidelines.
disclosure is authorised by law.  

Disclosure in accordance with an agency’s coercive information-gathering powers would fall within this exception.

Formal notices can also offer statutory protection to individuals subject to contractual confidentiality clauses. Similarly, protection in relation to self-incrimination under s 68(3) of the ASIC Act is not available for information provided voluntarily — although it might exist at common law — and does not give rise to immunity from suit under s 92.

Additionally, concern was expressed that information provided voluntarily could sometimes be incomplete or offered to further the person’s own interests. For this reason an agency’s use of its coercive powers gives it clear and effective remedies if there is doubt about whether all the necessary information has been produced. Several submissions also noted the evidentiary benefits arising from the formal issue of a notice. For example, if an examination is under oath the proceedings are usually recorded, a transcript is produced, and the question of admissibility is usually dealt with.

The Council’s view

Alternative ways of obtaining information are not practical in every case — for example, if time is a crucial factor or the person is unlikely to provide the information voluntarily. There are also legitimate legal grounds on which the issuing of a formal notice can represent the preferable approach.

As a matter of good administrative practice, however, the Council considers that before they issue a notice agencies should carefully consider alternative ways of obtaining information. The ACCC’s approach illustrates the sorts of factors that are relevant in this regard. Other sources of publicly available information should be considered.

Compliance costs

Common law, legislation and practice

At common law, the courts may consider whether a notice is unduly burdensome only as evidence that it was issued unreasonably or without taking relevant factors into account. Otherwise, notices must be complied with regardless of the inconvenience, disruption and expense involved. It has, however, been suggested that the degree of harshness and related factors in a notice might be such as to suggest that the notice was not imposed in good faith or was imposed for a collateral

31 ‘Personal information’ is defined in s 6 of the Privacy Act as ‘information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’.

32 See Information Privacy Principle 11.1(e), s 14 of the Privacy Act; National Privacy Principle 2.1(g); Schedule 3 to the Privacy Act.

The coercive information-gathering powers of government agencies

purpose or without regard to burden.\textsuperscript{34} There appears to have been no decision supporting the proposition that it is appropriate to relieve the burden by requiring a payment to cover the individual’s costs.

The legislation the Council reviewed reveals that there is no across-the-board approach to costs. The broadest approach is that under s 89(3) of the ASIC Act, which provides that ASIC has discretion to pay ‘such amount as it thinks reasonable on account of the costs and expenses (if any) that a person incurs in complying’.

Several statutes permit payments to individuals attending for examination; examples are the Income Tax Assessment Act and the ASIC Act.\textsuperscript{35} The ATO’s \textit{Access and Information-gathering Manual} provides, however, that expenses are not to be paid if a person is providing evidence in respect of their own income or assessment or the income or assessment of a person they represent.

Some legislation provides for the supply free of charge of the record of an examination to examinees.\textsuperscript{36} Under s 131 of the Life Insurance Act a company is entitled to be paid reasonable compensation for making copies of documents.

The obligation to comply with a notice is qualified in some instances, notice recipients being required to give all ‘reasonable’ assistance. This qualification is, however, found only in provisions relating to attendance for examination.

\textbf{Consultation on costs}

Costs can be an important and sensitive matter, especially when coercive information-gathering notices are issued to third parties against whom an agency has no intention of taking regulatory action.

Several submissions expressed the view that there is little awareness on the part of agencies of the pressures placed on notice recipients by requests for large amounts of information. Moreover, the purposes for which information was being sought were often said to be unclear.

It was also suggested that, even if a decision is made to issue a notice, an agency might do better to adopt a consultative approach in order to help determine what type of notice would best secure the information sought. Further, it was said that if agencies were required to compensate notice recipients for the cost of compliance they would more carefully consider other options and refine the scope of the information sought.

Despite these views, agencies said they are not indifferent to the potential cost of compliance with a notice. For example, the ATO said if information is available from multiple sources officers are required to consider the person who is most suited to bearing the cost of providing that information. Similarly, the ACCC’s ‘Reason to

\textsuperscript{34} \textit{Re Pyneboard Pty Ltd v Trade Practices Commission} (1982) 57 FLR 368.

\textsuperscript{35} See \textit{Income Tax Assessment Act 1936} (Cth), s 264(3), and the Income Tax Regulations 1936, rr 168 and 174 and Schedule 5; the \textit{Australian Securities and Investments Commission Act 2001} (Cth), s 89, and the Australian Securities and Investments Commission Regulations 2001, r 8 and Schedule 2.

\textsuperscript{36} See, for example, the \textit{Insurance Act 1973} (Cth), s 58.
The coercive information-gathering powers of government agencies

believes paper requires officers to specifically look at whether the proposed exercise of the information-gathering power is disproportionate to the value of the information, documents or evidence sought. A number of submissions agreed with the suggestion made in the Council’s draft report that the cost of compliance should be proportional to the potential importance of the sought-after information.

In relation to electronic material the ATO suggested that a notice ‘to provide’ information can be used to determine what documents are on a computer system and which ones are relevant to the investigation. A notice ‘to produce’ the documents can then be issued in order to gain access.

The Council’s view

Providing the requisite statutory trigger has been met, coercive information-gathering powers notices can be issued against a very broad range of people. For this reason, and having regard to the views just expressed, the Council considers that before a notice is issued agencies should weigh the probable importance of the information sought against the probable cost to notice recipients of providing it.

When issuing notices it is essential that agencies seek only information that is relevant to the immediate information-gathering requirement. To seek information beyond this is outside agency powers and inconsistent with the principles enunciated in the Privacy Act—see, for example, Information Privacy Principle 1. It is essential that agencies do not impose unnecessary cost and compliance burdens on notice recipients by seeking information beyond what is required at the time.

To the extent that it is operationally possible, agency officers should be encouraged to consult proposed notice recipients to determine the scope and nature of information held and the most cost-effective way of obtaining it.

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37 See the discussion in the next section.
38 Recommendation 13.1 of the Dawson report said the ACCC should continue to give careful consideration to the financial implications of requests for information that are made to business, consistent with the ACCC’s guidelines on this matter (Trade Practices Act Review Committee 2003, Review of the Competition Provisions of the Trade Practices Act, Commonwealth of Australia, Canberra). Government accepted the recommendation.
39 A similar technique can also prove useful for obtaining non-electronic documents.
40 Information Privacy Principle 1.1 (Manner and purpose of collection of personal information) provides that personal information shall not be collected for inclusion in a record or generally available publication unless the information is collected for a purpose that is a lawful purpose directly related to a function or activity of the collector and the collection of the information is necessary for or directly related to that purpose.
Principle 2

Before using the powers

Before using coercive information-gathering powers agency officers should do two things:

consider alternative means that could be used to obtain the information sought

and

weigh up whether the probable importance of information obtained through using coercive information-gathering powers is justified, having regard to the cost of compliance for the notice recipient.

Drafting notices

When drafting information-gathering notices agency officers should seek only the information that is necessary for their current information-gathering requirements.

To the extent operationally possible, it is desirable that agency officers consult proposed notice recipients in order to determine the probable scope and nature of information held.

Exercising the powers

When exercising coercive information-gathering powers agency officers must choose the most efficient and effective means of obtaining the information. For example, if information is held on computer, the issuing of a notice requesting identification of records held on the system could in the first instance be the most effective and efficient course of action. This could then be followed by a notice requesting the production of relevant documents.

Keeping a record of the decision to use the power

Generally, when an agency decides to use coercive information-gathering powers for the purpose of an investigation, decision makers should keep a written record of the facts and circumstances relevant to the decision.41

The Council sought agencies’ views on whether the ACCC’s practice of requiring its officers to submit a ‘Reason to believe’ paper to it or the chairperson or deputy chairperson before any s 155 notice may be issued provides a useful precedent in this regard.42 Designed to ensure that the requisite ‘belief’ exists under s 155, the paper deals with the following:

• the allegations—a summary of the conduct the person in question is suspected to have engaged in and the provisions of the Act that might be contravened. Staff

42 Medicare has a similar process in operation.
are required to formulate the allegations in such a way as to take account of any gaps in their information

- background to the investigation—a chronology of the investigation undertaken so far, including details of any efforts made to gather the requested information voluntarily or, where this has not occurred, why the information has not been sought voluntarily

- staff opinions—a clear indication of where particular opinions have been reached, based on specific facts or specific construction of the facts as known, and reasons for the opinions so formed

- the details of the addressee and why it is believed they are a suitable person from whom to seek the information

- the burden of the notice on the addressee—consideration of whether the time for compliance with the notice is reasonable and whether the searches and inquiries required are disproportional to the value of the information, documents and evidence sought.

Consultation on record keeping

The majority of submissions agreed that when an officer decides to use an agency’s coercive information-gathering powers they should make a written record of that decision. A number of agencies, however, saw practical difficulties associated with the requirements of the standard adopted by the ACCC. For agencies such as Centrelink and Comcare, both of which issue large numbers of notices daily, preparation of such a paper for each notice was seen to impose an unacceptably onerous administrative load.

It was also submitted that, although such a paper would be useful at the initiation of a formal investigation, it would not be practical to require that one be prepared before the exercise of information-gathering powers in every instance.

The Council’s view

If an officer decides to use their agency’s coercive information-gathering powers in conducting a specific investigation, they should make a written record of the basis on which they considered the statutory threshold for the use of the powers to have been met.

The Council accepts that a record as detailed as that of the ACCC would be impractical for agencies regularly issuing large numbers of notices. Some record of the use of the powers is necessary, but in the Council’s view a record as detailed as that of the ACCC is not necessary when the powers are used for monitoring purposes.
Principle 3

When an agency uses its information-gathering powers for the purpose of a specific investigation it is good administrative practice for the agency officer concerned to prepare a written record describing the basis on which the threshold trigger for the use of the powers was deemed to have been met.

If the powers are used for monitoring or if an agency regularly issues large numbers of notices, a written record of the fact of the use of the powers is also desirable; it should name the officer who authorised the use of the powers.

Consultation on annual reporting

Some agencies said that at present they report annually on the number of occasions on which they use their coercive information-gathering powers. Several other agencies considered such a practice resource intensive and wondered whether it would offer any practical administrative benefit.

In submissions it was noted that raw data on the number of occasions where coercive information-gathering powers were used would be of little value and could be misleading. On the other hand, publication of more information could be operationally disadvantageous to an agency. It was submitted that, for reporting to be effective, agencies should release enough information to ensure that interested observers can gain a clear picture of the way the powers have been exercised but at the same time safeguard continuing investigations and important investigatory methods.

The Council’s view

The Council agrees that agencies should publish meaningful information—including some statistical data—on the use of their coercive information-gathering powers. This would help with internal agency monitoring and auditing as well as facilitate external scrutiny of the use of the powers. It is essential that the general community can be confident that agencies will exercise their powers professionally and judiciously.

Principle 4

To facilitate internal and external scrutiny of the use of coercive information-gathering powers and to engender community confidence in the exercise of those powers, each agency should regularly publish information about its use of the powers. The information provided should be sufficient to allow anyone seeking to assess the use of the powers to do so, yet should not be such as to jeopardise continuing investigations or reveal details of important investigatory methods.
Contempt of court

Agencies’ powers to order the production of documents and to summon people for questioning bear some resemblance to court powers. Although the executive arm of government is entitled to exercise investigatory powers, use of the powers can constitute contempt of court if an agency and a court are investigating the same matter.

The courts will not construe a general investigatory power as authorising what would otherwise be contempt. Whether a particular use of an investigatory power is or would be a contempt of court is a question of fact, depending on a variety of things. The ultimate concern is whether use of the power interferes with the administration of justice or creates a real risk of such interference.

In the context of this report, the most likely form of interference is if a party were to gain an unfair advantage by obtaining information that could not otherwise be obtained through court processes. In contrast, if the information sought would also be available through court processes there is no reason to preclude the use of agency investigative powers to achieve the same outcome.

A power must be exercised for a purpose permitted by the legislation. In fact, many of the examples of alleged contempt considered by the courts would also, as a matter of statutory construction, be beyond the agency’s power. For example, on at least one occasion a power has been construed as being unavailable once proceedings have begun because the power was conferred for the purpose of deciding whether to commence proceedings and once that decision was made the power was exhausted. More recent decisions have, however, sought to confine this precedent to its facts, and the current interpretation seems to be to allow at least some investigatory work to continue after proceedings are instituted.

The fact that information obtained through investigation might be used in a current proceeding is not sufficient to attract a finding of contempt. The courts will look at the purpose of the investigation and, generally speaking, contempt will arise only if the use of an investigative power impinges directly on the proceeding. As a result, questioning a defendant to establish whether they are guilty of an offence is not

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43 An early attempt to have a coercive investigatory power declared judicial in nature, and therefore only exercisable by the judiciary because of the separation of powers doctrine, was rejected by the High Court in Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330.
45 Where, for example, discovery of documents was not permitted, an investigatory power could not be used for the purpose of circumventing that restriction – see Brambles Holdings Ltd v Trade Practices Commission (No 2) (1980) 32 ALR 328 or 44 FLR 182 and Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission (1982) 152 CLR 460.
47 Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333.
permitted, whereas questioning a defendant for another purpose is acceptable in principle (although individual questions might be disallowed).\textsuperscript{49}

It is also permissible to question a potential witness about their own involvement in a particular activity.\textsuperscript{50} This has practical significance in complex investigations where numerous people are suspected of involvement in illegal activity. If the power to investigate ceased as soon as proceedings against one person began, agencies might have to delay court action in order to avoid compromising a wider investigation. This would be highly undesirable for agencies with a function of protecting the general public—for example, ASIC, APRA and the ACCC—since they might need to take action as quickly as possible in order to perform their duties.

Agencies are generally aware of the risks associated with the use of their powers when a matter is before the courts. For example, the ATO requires that its officers obtain legal advice before exercising investigative powers during proceedings if the Taxation Commissioner or another party has instigated legal proceedings or if contempt of court is a potential problem. The ATO also advises caution when trying to gain access to documents that have entered the court process, regardless of who the parties involved are.

The Council’s view

In practice, it can be difficult to determine whether or not to proceed with an investigation in the light of potential contempt proceedings. In the Council’s view, agencies should regularly monitor the case law in this area and provide regular training and support to front-line decision makers.

Principle 5

Agencies should regularly monitor developments in case law relating to contempt of court. In this regard, training and support for officers exercising coercive information-gathering powers are essential.

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4 Exercising the powers

Coercive information-gathering powers are most commonly devolved by delegation, although they can also be authorised. Both methods are used by the agencies under consideration in this report.

Delegation and authorisation

Delegation

Most of the common law principles relating to the delegation of power under an express power of delegation are codified in ss 34A, 34AA and 34AB of the Acts Interpretation Act 1901 (Cth).

Section 34A of the Act states that, where the exercise of a power or function by a person is dependent on the opinion, belief or state of mind of that person in relation to a matter and the power or function has been delegated, that power or function may be exercised by the delegate on the basis of his or her opinion, belief or state of mind in relation to the matter.

This does not preclude the issuing of non-binding guidelines, which the person to whom a power is delegated must take account of when exercising the power. All the agencies discussed in this report have guidelines to assist their officers in the performance of their statutory functions, including the exercise of their coercive information-gathering powers.

Authorisation

Authorisation can be express or implied. If someone is expressly authorised by statute to exercise a specified statutory power, that person exercises power in their own right.

In some circumstances, however, a person in whom a power is vested can authorise another person to exercise the power on his or her behalf. At law, the act of the authorised person is the act of the person in whom the power is actually vested. The High Court has held, for example, that, in the absence of a specific authorisation and having regard to ‘administrative necessity’, the Commissioner of Taxation does not have to personally exercise the power to issue notices under s 264 of the Income Tax Assessment Act but can act through a duly authorised officer. Generally, though, the scope of this precedent is limited in connection with the discretionary use of coercive powers because the exception relates mainly to routine administrative matters.

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51 Carltona Ltd v Commissioner of Works [1943] 2 All ER 560.
52 O’Reilly v State Bank of Victoria Commissioners (1983) 153 CLR 1, 12-13 (Gibbs CJ), 31 (Wilson J).
53 ibid. See also Carltona Ltd v Commissioner of Works [1943] 2 All ER 560.
Agency legislation

There appears to be little legislative consistency in relation to the devolution of agencies’ coercive information-gathering powers. In some instances devolution is achieved by way of a general power of delegation; in others there is specific reference to the agency’s coercive information-gathering powers or officers of the agency are authorised or appointed to specific investigatory positions.

The Council’s view

The Council agrees that, when coercive information-gathering powers are being developed, careful thought should be given to the position of the officer who should authorise the exercise of the powers and the position of the officers who should exercise the powers.54

Principle 6

Legislation should specify who may authorise the exercise of an agency’s coercive information-gathering powers.

If failure to comply with a notice would attract a criminal penalty, the legislation or administrative guidelines should specify the category of officer to whom the power to issue a notice can be delegated.

Who should exercise the powers?

The legislation the Council examined reflects a range of approaches. At the top end of the scale is s 155(1) of the Trade Practices Act, which provides that if ‘the Commission, the Chairperson or a Deputy Chairperson has reason to believe that a person is capable of furnishing information, producing documents or giving evidence’ a member of the commission may serve a notice on that person to furnish information to the commission, to produce documents to the commission or to a person specified in the notice, or to appear before the commission or before a Senior Executive Service employee or acting SES employee of the commission to give evidence and produce documents.

The legislation of other agencies leaves greater discretion in the hands of the agency itself. These agencies held the view that they were in the best position to determine the most suitable level of officer to exercise their coercive information-gathering powers. Because of the agencies’ differing statutory objectives, the predominant view was that a consistent across-agency approach in this area would not result in greater efficiencies. Agencies that issue large numbers of notices expressed concern that to pitch the exercise of the powers at too high a level would be to impose on the agency an unacceptable cost burden and would seriously impede program delivery.

The general view expressed in submissions was that adequate training and familiarity with the matter under investigation were more important than the officers’ seniority.

The Council’s view

Training and policy guidance are essential for agency officers exercising coercive information-gathering powers.\(^\text{55}\) The Council considers, however, that, because they can have major consequences for the people in relation to whom they are used, the powers should be delegated only to officers with sufficient seniority and expertise.\(^\text{56}\)

In particular, the Council considers that use of the powers for the purpose of examinations and hearings could give rise to difficult questions of procedural fairness and privilege, the successful management of which would call for considerable experience and sound judgment. This should be reflected in the more senior level of officer to whom the powers are delegated.

**Principle 7**

It is important that an agency has in operation procedures for ensuring that coercive information-gathering powers are delegated only to suitably senior and experienced agency officers.

The officers to whom the powers are delegated should be sufficiently senior and experienced to be able to deal effectively with questions associated with procedural fairness and privilege that can arise in the conduct of examinations and hearings.

**Skills, attributes and qualifications**

The Senate Scrutiny of Bills Committee expressed the view that in situations where wide powers are conferred the legislation should describe the skills, attributes or qualifications that are necessary.\(^\text{57}\) The Council raised this in its draft report.

The majority of submissions supported the suggestion the Council made in its draft report that formal training and accreditation programs be linked to the exercise of coercive information-gathering powers, to ensure that the people exercising the powers are competent to do so.

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\(^\text{55}\) This is also the view the Commonwealth Ombudsman put forward in 2007 — see *Lessons for Public Administration: Ombudsman investigation of referred immigration cases*, Report no. 11, Commonwealth Ombudsman, Canberra, Lesson 2, ‘Place adequate controls on the exercise of coercive powers’, p. 6.

\(^\text{56}\) This view is consistent with views expressed by the Senate Scrutiny of Bills Committee in its Report no. 20 of 1999, p. 508, and in *The Work of the Committee during the 39th Parliament, November 1998 – October 2001*, paras 3.15-3.16.

Principle 8

If the right to exercise coercive information-gathering powers were linked to training or accreditation programs this would help agency officers exercising the powers to gain the requisite competency.

For an agency with a large number of officers exercising coercive information-gathering powers, development of an accredited training program specific to the agency would represent good administrative practice.

Accountability

In addition to strategies agencies have deployed to ensure that coercive information-gathering powers are exercised by trained and experienced officers, all Commonwealth officers exercising such powers are accountable by virtue of legislation such as the Privacy Act 1988 (Cth), the Archives Act 1983 (Cth), the Freedom of Information Act 1982 (Cth), the Public Service Act 1999 (Cth) and the Ombudsman Act 1976 (Cth). Further, although not subject to merits review, decisions in relation to the exercise of the powers can in some circumstances be amenable to judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and under s 75(v) of the Constitution and s 39B of the Judiciary Act 1903 (Cth).

In several instances, agencies’ coercive information-gathering powers are exercisable by individuals appointed as inspectors or investigators. APRA may appoint actuaries in insurance matters because of their particular expertise in that area. For the period of their appointment such people are employed as APRA staff, and normal complaint and review processes apply. APRA’s coercive information-gathering powers are also sometimes exercised by external delegates on behalf of the agency; the delegates have specific skills—for example, technical specialists or barristers conducting examinations on behalf of an inspector.

The Council’s view

The Council considers that in all circumstances agencies should remain accountable under the relevant Commonwealth legislation when outsourcing their coercive information-gathering powers.

Principle 9

When an agency confers authority to exercise coercive information-gathering powers on people who are not officers of the agency—for example, state officials or employees of agency contractors—the agency should remain accountable for the use of those powers.

58 See, for example, Insurance Act 1973 (Cth), ss 55, 81; Retirement Savings Accounts Act 1997 (Cth), ss 99–101; Superannuation Industry (Supervision) Act (Cth), ss 265, 270.
59 See the Life Insurance Act, s 97.
60 See the Superannuation Industry (Supervision) Act, ss 257, 258.
61 ibid.
Scrubtny

Several submitters suggested that accountability could be improved if there were more avenues for external auditing of agencies’ use of their coercive information-gathering powers. It was envisaged that this would be in addition to external scrutiny by entities such as the Privacy Commissioner, the Auditor-General and the Commonwealth Ombudsman.

The Council’s view

If internal monitoring of the delegation and use of coercive information-gathering powers is done regularly, the Council sees no need for external monitoring additional to what already occurs.

Principle 10

Senior officers of an agency should regularly audit and monitor the exercise of coercive information-gathering powers within the agency. In addition to ensuring the continuing suitability and accuracy of delegations, the senior officers should ensure that officers exercising the powers have received the necessary training, possess the requisite skills, and have continuing access to assistance, advice and support.

Training

Training and policy guidance are essential if standards of decision making are to be high, particularly in an agency that has offices in a number of states and territories.

The six agencies studied all said they provide internal instruction and continuing training programs for officers exercising coercive information-gathering powers. In most cases these initiatives are supplemented by other forms of support, such as in-house manuals and legal advice.

Across-agency training

Across-agency training occurs in some areas. The Commonwealth Fraud Control Guidelines, issued under r 19 of the Financial Management and Accountability

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63 Subject to considerations of confidentiality and privacy, agency manuals should be readily available on an agency’s internet site. This conforms to the requirement in s 9 of the Freedom of Information Act 1982 (Cth) that manuals or documents containing rules, guidelines, practices or precedents should generally be available for inspection or purchase.
Regulations 1997 (Cth), exemplify such an approach. The guidelines stipulate that all employees who are primarily engaged in preventing, detecting or investigating fraud must gain a Certificate IV (Fraud Control Investigation) and a Diploma of Government (Fraud Control Investigation). All Australian government agencies required to comply with the guidelines must also comply with the Australian Government Investigation Standards.

Several agencies said they require officers exercising the agency’s coercive information-gathering powers to undergo such training. ASIC also noted its involvement in an exercise conducted by the Heads of Commonwealth Law Enforcement Agencies, where each agency did a stocktake of its investigation and enforcement courses with a view to identifying gaps and areas of common interest.

Consultation

The Council sought agencies’ views on the idea of an across-government training and accreditation package or an addendum to an existing package directed at officers who exercise coercive information-gathering powers. The proposed package would seek to instil in these officers an awareness of administrative law principles and rules and an understanding of privilege.

The agencies’ response was qualified, the predominant view being that it would be more cost-effective for agencies to run their own training programs, tailoring them to their own requirements. In this way the programs would be directly relevant to the operating environment and the specific outcomes for which the agency was responsible.

Among the areas in which training is of particular importance were said to be the respective obligations of agencies and notice recipients under the Privacy Act 1988 (Cth), the drafting of notices to ensure that they are accurately targeted and will not give rise to legal challenge, and in relation to the conduct of examinations.

An across-agency manual

The Council sought the agencies’ views about developing an across-agency manual providing guidelines on certain topics—for example, the application of administrative law principles and the handling of privilege claims and information provided by notice recipients.

64 Subject to the guidelines, it is for heads of agencies to determine the qualification levels for particular staffing positions, although the guidelines do recommend that managers achieve diploma status. Minimum qualification standards are set out in the guidelines, which also note that agencies should ensure that employees involved in fraud prevention, detection and investigation receive training in relation to the privacy legislation. The competency standards for the training packages are set out in the Public Service training packages (PSP99).

65 HOCLEA agencies administer and/or enforce a number of Acts of Parliament that seek to regulate behaviour and provide for a range of enforcement sanctions. The following departments and agencies are members of HOCLEA: the Attorney-General’s Department, the Australian Crime Commission, the Australian Federal Police, the Australian Customs Service, the Commonwealth Director of Public Prosecutions, the Department of Immigration and Citizenship, the ATO, ASIC, the ACCC, APRA, and AUSTRAC (the Australian Transaction Reports and Analysis Centre).
The coercive information-gathering powers of government agencies

The prevailing response was that, because there are so many differences in the agencies’ functions, only the most general topics could be covered. The manual would need to be supplemented by material designed to meet the needs of individual agencies. Most agencies instead favoured expanding their own manuals to cover the additional general areas, rather than developing a separate ‘generic’ manual.

Several respondents suggested that a whole-of-government approach could be fostered by encouraging the exchange of information among agencies, so that the benefits of investments already made could be tailored to particular agencies in the most cost-effective way. One submission in support of this approach noted, however, the need to maintain adequate standards of accountability, transparency and privacy.

The Council’s view

Having regard to these opinions, the Council considers that the use of peer networks for the purpose of information exchange on a formal or informal intra-agency basis is preferable to using an across-agency manual.

A good example is the ATO’s informal peer network of access and information-gathering specialists. The network provides a forum for discussion of ideas and developments in the law relating to information gathering, as well as offering training and information to other officers. The ATO said it would be happy to share its experiences with other agencies that are interested in establishing similar networks.

Principle 11

Subject to considerations of privacy and confidentiality, agencies are encouraged to share their ideas and experiences in relation to the exercise of coercive information-gathering powers in the following ways:

- establishing an agency network for the exchange of educational materials, including training manuals and ideas. Discussion and circulation of information about relevant cases and the content and upgrading of instructional materials would be useful—especially for smaller agencies
- establishing an informal peer network within and between agencies for discussion, training and information sharing
- conducting periodic meetings between ‘like agencies’
- identifying important across-agency or sectoral topics for inclusion in agency training programs and manuals.
Conflict of interest

A conflict of interest arises if someone’s personal interest in a matter would affect the discharge of their public duties. Such a situation can arise in connection with financial and non-financial interests, the important element being not the nature of the interest but the actual or apparent influence on the person’s ability to make an impartial decision. Conflicts of interest in the Australian Public Service must be managed in accordance with the APS Values and Code of Conduct.66

The Public Service Commission suggests that agencies have in operation procedures that:

- help all employees understand the importance of avoiding real and apparent conflicts of interest in public employment
- require all employees to notify managers about private interests—both financial and personal—if those interests could present a real or apparent conflict with their official duties
- provide guidance to managers and employees on strategies for and good practice in avoiding or managing conflicts of interest.67

The Council’s view

In relation to the use of coercive information-gathering powers, agencies should encourage their employees to immediately report any real or apparent conflict of interest to a senior officer and seek direction as to what, if any, future involvement they should have in the matter. Continued training is vital in relation to conflicts arising both before and during a coercive information-gathering process. The Council’s best-practice guide 2—Decision Making: natural justice—contains a useful summary of the law in this area and its practical application.

Principle 12

Agencies should adopt procedures and offer training aimed at avoiding conflict of interest in relation to the exercise of coercive information-gathering powers.

Decision Making: natural justice, guide 2 in the Council’s series of best-practice guides for administrative decision makers, provides an overview of the law in this area and its practical application.

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66 See Australian Public Service Commission 2007, APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and agency heads, APSC, Canberra.
Identity cards

Some of the legislation the Council examined does not require an officer to hold an identity card, but in other cases officers exercising an agency’s coercive information-gathering powers are required to hold a photographic identity card and produce it on request.68

The Council invited the six agencies to comment on whether officers exercising information-gathering powers should be required to carry either or both of the following:

- an identity card—with or without a current photograph
- additional written evidence of the scope of their authority.

The prevailing view was that officers should carry identity cards for production on request at all work-related times. There was less agreement on the need for an officer to carry additional written evidence of the scope of their authority. One agency said this would be useful, but others noted that the information is in any case available in the notice served or on the face of the identity card.

The Council’s view

Notwithstanding the relevant legislative provisions, a distinction can be drawn between situations in which agency officers are exercising their powers in a monitoring role and ones in which they are doing so as part of a formal investigative process. The Council considers that in the latter circumstance there are good reasons for officers to carry additional written evidence of the scope of their authority.

Photographic identification is also important as a fraud reduction measure.

Principle 13

If face-to-face contact is involved, at a minimum officers or external experts exercising coercive information-gathering powers should carry official photographic identification and produce it on request.

In a formal investigative procedure it is good administrative practice if officers and external experts are also able to produce written evidence of the extent of their authority.

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68 See, for example, s 8N of the Medicare Australia Act 1973 (Cth), ss 265 and 266 of the Superannuation Industry (Supervision) Act 1993 (Cth) and s 154C of the Trade Practices Act 1974 (Cth).
5 Notices, examinations and hearings

There is no obligation at common law to disclose to the proposed recipient of a notice connected with coercive information-gathering powers any information about the investigation. This means there is no requirement to explain why an investigation is started or continued, to provide evidence to support those reasons, or to give the name of any person making accusations about the recipient.69

Neither the starting of an investigation nor the investigation itself alters rights or imposes liabilities.70 The decision to start an investigation does not have to be in writing and is not subject to merits review by a tribunal. The investigator is not bound to justify their decision. It is for those subject to investigation to establish a lack of bona fides71 or the absence of good faith.

It has been held that notices for examination should be specific enough to allow the recipient to determine whether or not they are likely to need legal advice72, although the notices do not have to identify any person suspected of any contravention under investigation.73 Generally, notices should identify the possible statutory offence or, in the case of less targeted investigations, the statutory basis on which the information is sought. Depending on the nature of the offence, it might be necessary to be more specific.74

The content of agency notices

Most legislation requires that notices be in writing.75 For some agencies this is the only legislative requirement; for others, although the detail varies, legislation provides guidance on the content of notices.

Section 8Q of the Medicare Act requires that the notice specify how the person is to give the information or how the document is to be produced, the period within which the information is to be given or the document produced76, and the officer (if any) to whom the information is to be given or the document produced. Section 8Q(3) further provides that information can be given by appearing before a specified employee to answer questions. The notice must also state the provision of the Act under which it is issued.

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73 Stockbridge v Ogilvie (1993) 43 FCR 244.
75 As shown in Appendix A, written notice is not required under ss 13B, 61 and 62 of the Banking Act 1959 (Cth).
76 At present this is within 14 days for information and at least 14 days for an examination.
The ASIC Act and associated regulations require that notices for examination provide details of the nature of the matter to which the investigation relates, the time, date and place at which the examination is to take place, and the full name of the person conducting the examination.\(^77\) Section 68 of the Act also requires that the recipient of the notice be informed of their right to claim privilege against self-incrimination. Further, notice recipients are to be advised of their right to have a lawyer attend the examination.

The legislative treatment of time limits for compliance with notices varies. The ASIC Act requires the production of books ‘within a reasonable time and place’\(^78\), while s 155 of the Trade Practices Act requires that information, evidence or documents be provided ‘within the time and place specified in the notice’. In contrast, s 8Q of the Medicare Act requires that notice recipients be given at least 14 days’ compliance time. Where the compliance period is not specified the implication is that it must be a ‘reasonable time’.\(^79\)

In relation to personal information collected from the individual concerned, Information Privacy Principle 2 requires the collector of the information to ensure that the relevant individual is ‘generally aware of’ the ‘purpose for which the information is being collected’ and ‘if the information is authorised or required by or under law — the fact that the collection of the information is so authorised or so required’. Additionally, the collector should take steps to ensure that the individual is generally aware of:

- any person to whom, or any body or agency to which, it is the collector’s usual practice to disclose personal information of the kind so collected, and
- (if known by the collector) any person to whom, or any body to which, it is the usual practice of that first mentioned person, body or agency to pass on that information.

The application of Information Privacy Principle 2 extends therefore to both the intra-agency use and the inter-agency disclosure of information collected by an agency in the exercise of its coercive information-gathering powers.

**Agency practice in relation to notices**

In practice, notices are accompanied by a covering letter, and agency manuals provide guidance on the sort of information that should be set out in the notices. For example, the ATO Access and Information-gathering Manual provides comprehensive guidance on the content of notices and covering letters and the circumstances in which the various types of notices should be used. It also contains pro forma covering letters and pro forma notices requiring a taxpayer to furnish information,

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\(^77\) Regulation 2 of the Australian Securities and Investments Commission Regulations 2001 (Cth), Schedule 1, Form 1. It is of note that the Commonwealth Director of Public Prosecutions suggested inclusion of pro forma notices in regulations to limit the possibility of poorly drafted notices leaving agencies open to legal challenge.

\(^78\) Australian Securities and Investments Commission Act 2001 (Cth), s 87.

attend and give evidence, and/or produce documents.80 Chapter 6 of the manual tells officers they must inform notice recipients of the need to claim privilege against self-incrimination or client legal privilege before the fact. Privilege is also referred to in booklet 9 of the ATO’s Taxpayer’s Charter, which ATO officers are required to provide to people against whom the agency’s coercive information-gathering powers are being used.

Agency procedures manuals also state that, in practice, notices always include a time and place for the production of materials, even though this might not be a requirement in all the legislation the Council examined.

Consultation

Inclusion in notices of details such as the time, date and place of hearing and the officer to whom information should be provided received little attention in the submissions, despite the obvious need for these details.

The nature of the inquiry

There was much comment in relation to the extent to which the nature of the inquiry should be dealt with in notices. The submissions generally acknowledged that in some cases there are sound operational reasons for not identifying the specific subject matter on which evidence will be sought—for example, if to do so would unnecessarily restrict the scope of the examination or create a risk of evidence being destroyed.

It was suggested to the Council, for example, that providing considerable detail about the subject matter of an investigation could result in questions being anticipated and responses rehearsed, which might minimise involvement or liability. In addition, notice recipients might have grounds for objection if an examination strays beyond the ‘broad outline of the subject matter’. In this regard, one submitter drew a distinction between informing an examinee of the nature of the investigation and providing them with details of the examination.

Despite this, a number of submitters said that provision of a broad outline of the subject matter of the notice and its potential disclosure can maximise the efficiency of the information-gathering task and that, to achieve this, notices must outline in sufficient detail what information or documentation is required, stating, as far as is reasonably practicable, the general nature of the matter to be examined. It was also suggested that natural justice requires that notice recipients be given sufficient information to enable them to respond and to seek legal advice if necessary.

Response times

One view put forward was that it is not possible to legislate a time frame for responding and that what constitutes a ‘reasonable time frame’ will depend on the

circumstances of the case, the nature and extent of the material sought, and the nature of the notice.

A contrary view was that a minimum time frame is desirable to ensure that notice recipients are not required to produce documents ‘immediately’, ‘forthwith’ or ‘as soon as practicable’. No submission provided any guidance on what constitutes a reasonable time frame.

It was suggested that where it is operationally practicable an agency should discuss the time frame with a proposed notice recipient before issuing the notice. Another suggestion was that notices should state a minimum time frame for compliance but that subsequent negotiations between the notice recipient and the agency should be allowed.

Privilege

A further question raised concerns the desirability of informing notice recipients of their right to claim privilege against self-incrimination or self-exposure to penalty or client legal privilege.

The Council’s view

At a minimum, all notices should specify the legal authority relied on for exercise of the coercive decision-making power and the consequence of failure to comply.

The Council agrees that, to the extent that it is operationally possible, notices relating to specific investigations should outline the general nature of the matter under investigation. If an agency is unable to provide particular details or it is inappropriate to do so, the agency should outline the general nature of the matters under investigation and create a file record of the reason for withholding the information.

As noted, this is consistent with Information Privacy Principle 2, which requires a collector of personal information to ensure that the individual concerned is generally aware of the reason for collecting the information and, if applicable, the fact that the collection is authorised or required by law.

Consistent too with Information Privacy Principle 2, in the case of personal information it is essential to tell notice recipients which people, bodies or agencies the information is usually disclosed to. In the Council’s view, to the extent that it is operationally practicable, it represents good administrative practice to adopt this procedure in relation to all information—not simply personal information.

Either the notice to produce information or documents or the accompanying correspondence should also clarify the form in which the information or

81 This view is consistent with the approach recommended by the Commonwealth Minister for Justice and Customs (2004, A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, Commonwealth of Australia, Canberra, p. 81).
documentation is to be produced and how the information or documentation is to be provided.

Similarly, recipients of notices for examination or hearing should be told the time and place of questioning and whether they may be accompanied by a lawyer or another third party. Where possible, the identity of the officer conducting the examination or to whom materials are to be produced should be disclosed. This would seem of particular importance if an examination is to be conducted by counsel or a legal representative.

Additionally, if privilege against self-incrimination or self-exposure to penalty or client legal privilege needs to be claimed before the fact, it would seem important to alert notice recipients to this.

Legislation should specify a minimum period for the production of information or documents. The setting of a minimum period provides for notice recipients a safeguard that might be lacking in legislation that merely provides for a ‘reasonable’ time frame. To allay any concern that this might be detrimental to investigations in some circumstances, there should be provision for exceptions.

Principle 14

All coercive information-gathering notices should do the following:

- identify the legislative authority under which they are issued, the time, date and place for compliance, and any penalties for non-compliance
- in relation to specific investigations, set out the general nature of the matter in relation to which information is sought
- consistent with the requirements of the Privacy Act 1988 (Cth) in relation to personal information, clearly state whether it is the usual lawful practice of the agency to hand information collected in response to notices to another area of the same agency or to another agency
- provide details of a contact in the agency to whom inquiries about the notice can be addressed
- inform notice recipients of their rights in relation to privilege.

Notices to provide information or produce documents

It is good administrative practice to specify how the notice recipient should provide the information or how the document should be produced and to whom.

Notices to attend an examination or a hearing

Notice recipients should be told whether they may be accompanied by a lawyer or third party and, to the extent possible, the name of the person who will be conducting the examination.

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82 This is consistent with the approach recommended by the Minister for Justice and Customs—ibid.
The coercive information-gathering powers of government agencies

The time frame for compliance

Agency legislation should specify a minimum period for the production of information or materials or for attendance for examination or hearing. The legislation should also allow for exceptions to the rule in specified circumstances.

Materials covered by a notice

To facilitate compliance, a notice or its supporting correspondence should clearly identify the sorts of materials covered by the notice, including materials held on computer.

The nature of materials that may be collected

The agencies’ legislation also differs in relation to the materials that may be collected. For example, the materials can be:

- ‘documents’\(^{83}\)
- ‘information … books, accounts or documents’\(^{84}\)
- ‘information’\(^{85}\)
- ‘specified books’\(^{86}\)
- ‘books’\(^{87}\)
- ‘any records relating …’\(^{88}\)

Importantly in an electronic age, s 25 of the Acts Interpretation Act defines ‘document’ as including ‘any article or material from which sounds, images or writings are capable of being reproduced with or without aid of any other article or device’. The Act also defines ‘record’ as including computer-based information.

Section 25A of the Act further provides that a person who keeps a record of information by means of a device (such as a computer) and who is required to produce the information must do so by reducing it to a visible form. At least one agency drew attention to the effect of this provision on the letter it produces to accompany its notices. Section 11 of the Electronic Transactions Act 1999 (Cth) contains a complementary provision, which states, ‘where under a law of the Commonwealth, a person is required to produce a document that is in the form of paper, an article or other material, that requirement is taken to have been met if the person produces, by means of an electronic communication, an electronic form of the document’ that is reliable and readily accessible.

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83 Trade Practices Act 1974 (Cth), s 155.
84 Insurance Act 1973 (Cth), ss 49, 115.
85 Income Tax Assessment Act 1936 (Cth), s 264; Australian Securities and Investments Commission Act 2001 (Cth), s 19.
86 Australian Securities and Investments Commission Act 2001 (Cth), ss 30 to 33.
87 Retirement Savings Accounts Act 1997 (Cth), s 100; Superannuation Industry (Supervision) Act, s 255.
88 Life Insurance Act 1995 (Cth), ss 132, 141.
Several submissions noted the advantages of using pro forma notices to avoid practical errors in notices’ wording arising from different terminology in different legislation, particularly where that legislation is administered by a single agency. Compliance would be further encouraged if terms such as ‘information in the possession of’, ‘in the custody of’ and ‘under the control of’ the notice recipient were defined.

The Council’s view

The Council considers it important that notices advising of coercive information-gathering powers spell out as clearly as possible the nature of the information sought and the meaning of terms such as ‘in the possession of’ and ‘in the custody of’.

**Principle 15**

Compliance would be further encouraged if terms such as ‘information in the possession of’, ‘in the custody of’ or ‘under the control of’ the notice recipient were defined. Pro forma notices can be useful if differences in expression occur in the legislation of a single agency.

**Notice recipients**

Most of the legislation the Council examined provides that notices are to be given to ‘a person’, which includes a corporation, consistent with what is recommended in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. Such an approach is preferable to issuing notices to, for example, ‘an employer or agency’. It is important to be specific so that it is clear who bears the responsibility for compliance.

Agency legislation permits notices to be issued in relation to any person the agency considers can provide the requisite information. Although companies can be required to produce books and information, they cannot be compelled to attend for examination.

**Variation of notices**

Section 33(3) of the Acts Interpretation Act provides that, in the absence of a contrary intention, Acts conferring a power to make, grant or issue any instrument include a power exercisable in a like manner and subject to like conditions to repeal, rescind, revoke, amend or vary any such instrument.

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89 See, for example, the *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 33; the *Superannuation Industry (Supervision) Act*, s 270; the *Trade Practices Act 1974* (Cth), s 155; the *Banking Act 1959* (Cth), s 16B; the *Income Tax Assessment Act 1936* (Cth), s 264; and the *Social Security (Administration) Act 1999* (Cth), s 192.

Only some provisions of the legislation under consideration specifically provide for the variation of notices, although those provisions do not appear to provide for the recipient of the notice to seek a variation, something not covered by the Acts Interpretation Act. One submitter proposed that in the interest of efficiency all agencies should have the power to grant a variation. One agency noted, however, that, although variations to notices are possible, the result is a new notice with a new date. This change to the time frame can seriously affect any investigation.

The agencies’ guidelines deal with the question of variation in various ways. If the recipient of a notice from the ACCC seeks a variation, the ACCC officer asks the recipient to submit their request in writing. All variations agreed to by the commissioners must be signed by the relevant commissioner.

The Council’s view

Consultation before the issuing of a notice could reduce the need for subsequent variations. It is desirable that agency guidelines cover situations where notice recipients seek variations.

Service of notices

Service of notices is dealt with in ss 28A and 29 of the Acts Interpretation Act. If agency legislation remains silent on the manner of service, the provisions of the Acts Interpretation Act would apply. Some agency legislation makes provision for service, adopting an approach consistent with the Acts Interpretation Act.

One submission drew attention to the potentially dire consequences, from a prosecution perspective, of incorrectly addressing or serving a notice and suggested that consideration be given to ensuring that there are specific provisions dealing with addressing a notice to or serving one on an incorporated partnership. This could be done, it was said, in a manner similar to that described in s 109X of the Corporations Act 2001 (Cth), which deals with the service of documents on a corporation, but with reference to an incorporated legal partnership.

Examinations and hearings

All the agencies studied have legislative powers allowing them to require attendance for examination. As highlighted in the summary in Appendix A, however, the level of detail in the legislation varies considerably. The ASIC Act and the Superannuation Industry (Supervision) Act provide the greatest detail; the Income Tax Assessment Act provides the least.

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92 The ATO’s Access and Information-gathering Manual does, however, deal comprehensively with many aspects of these procedures.
In all instances notices are directed to natural persons. As noted, companies can be required to produce books and information, but they cannot be compelled to attend for examination.

Each of the agencies examined may require ‘any person’ they believe might be able to provide relevant information to attend an examination, not merely a person suspected of contravening the relevant legislation.

**Conducting an examination**

Examinations are generally conducted under oath or affirmation and in private. Sections 277 and 278 of the Superannuation Industry (Supervision) Act are illustrative: examinations occur under oath or affirmation; the inspector may require the examinee to answer questions put to them at the examination, provided the questions are relevant to the matter being investigated; the examination is to be conducted in private; and only authorised persons are permitted to attend.  

In cases where the legislation does not contain this degree of detail, agencies’ guidelines generally make similar provision. For example, the ACCC’s policies and guidelines say examinations should be conducted in private, with only those staff and people who are necessary for the examination present.

**Legal representation**

It has been held that in all but ‘quite extraordinary circumstances’ one would expect an examinee to have the opportunity to seek the assistance of a legal adviser. Process and procedural fairness—including the right to representation—are crucial to the use of coercive information-gathering powers.

The legislation of ASIC and APRA specifically permits the presence of legal representatives at examinations. The lawyer may address the inspector conducting the examination and may ask the examinee questions about matters raised by the inspector. The other agencies each have staff policies or guidelines that allow for the attendance of legal representatives and in some cases other representatives.

In relation to information obtained during a hearing, it has been held that s 155(1)(c) of the Trade Practices Act provides that, if so directed by the ACCC, a person must only divulge information they acquired from the examination or the evidence they gave during examination to a lawyer for the purpose of obtaining legal advice.

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93 Superannuation Industry (Supervision) Act, ss 277 and 278.
95 Australian Securities and Investments Commission Act, s 23.
96 Superannuation Industry (Supervision) Act, s 279.
**Transcripts**

For most of the agencies the Council considered the legislation or agency manuals or guidelines make provision for transcripts of proceedings. Because of the volume of decision making that occurs in agencies such as Centrelink, transcripts would be impracticable, but the Council understands that Centrelink does use transcripts when deploying its investigatory powers in the context of possible prosecution proceedings.

As well as providing transcripts to examinees, in some cases agencies are able to provide transcripts to other parties: APRA and ASIC both have provisions in their respective legislation enabling records to be given in certain instances to third parties. In accordance with Information Privacy Principle 11(3), however, an individual, body or agency to whom personal information is so disclosed shall not itself use or disclose that information for a purpose other than the purpose for which it was given to it. As a result, examinees should generally be made aware of the circumstances in which the transcript may be provided to third parties.

A number of submissions expressed support for the suggestion, put forward in the Council’s draft report, that examinees be obliged to accept the transcript of proceedings once they have verified its accuracy. Legislation does not at present provide for this.

**Subsequent use of information**

Several submitters agreed with the suggestion, raised in the draft report, that the position of evidence taken at an examination and used in a subsequent proceeding needs to be dealt with in legislation. They said this would ensure that basic rights are consistently available for people subject to compulsory examinations—particularly unrepresented people who unwittingly run the risk of breaching a penal provision. A number of submitters also referred to the situation of third parties, whose information may be disclosed without their knowledge or consent.

**The Council’s view**

Consistent with the decision of the majority of the High Court in the *Johns Case*, the Council considers that an agency should disclose compulsorily acquired information only after it has given the individual concerned an opportunity to object to such disclosure.

It is generally appropriate for examinations to be conducted under oath or affirmation, and this should be incorporated in the relevant legislation. The use to

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98 Section 281 of the Superannuation Industry (Supervision) Act provides that APRA may give a third person’s lawyer a copy of the written record of the examination if the person’s lawyer satisfies APRA that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related. The lawyer receiving this information may use it only in connection with preparing, beginning or carrying on or in the course of such proceedings. See also s 25 of the ASIC Act.

which evidence taken at examination may be put in subsequent proceedings should also be incorporated in the legislation.

Further, the Council considers that examinees are entitled to have hearings conducted in private and that, unless exceptional circumstances exist, a person should be entitled to legal (or, where appropriate, other) representation.

Finally, examinees should be required to read, to suggest amendment to if necessary, and to endorse the accuracy of transcripts of proceedings. They should also be told whether subsequent disclosure of information obtained during an examination or hearing is permissible.

**Principle 16**

Unless there are special reasons to the contrary, examinees should be entitled to:

- a private hearing—subject to the presence of authorised individuals

  in the absence of exceptional circumstances, the option of having legal (or, if appropriate, other) representation.

The reason for holding a public examination or for denying legal or other representation should be explained and a record of this kept.

Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.

Among other matters that may be dealt with without legislation are provision for viewing and correction by the examinee of a transcript of proceedings and, where relevant, the circumstances in which a third party may be given a copy of the transcript within the scope of agency privacy and secrecy provisions.

Examinees should be told if legislation precludes subsequent disclosure of information obtained during an examination or hearing. Agencies should clearly differentiate this situation from one in which there is no such legislative restriction.
6 Claims of privilege

At common law there are a number of circumstances in which a person called on by an agency exercising its coercive information-gathering powers to produce information or documents or to attend for examination might not be required to do so. Two of these limits on the agency’s power are the privilege against self-incrimination or self-exposure to penalty and legal professional privilege, now more commonly referred to as ‘client legal privilege’.

Privilege against self-incrimination or self-exposure to penalty

Description

Privilege against self-incrimination or self-exposure to penalty\(^\text{100}\) — which applies in civil and administrative proceedings in a court and where information may be obtained under compulsion by administrative agencies\(^\text{101}\) — entitles a person to refuse to answer questions or produce information or documents if answering the questions or producing the information or documents would tend to incriminate the person or expose them to penalty.\(^\text{102}\) This privilege generally does not extend to corporations.\(^\text{103}\)

For some time it was thought that the privilege did not protect individuals from orders requiring them to disclose information that might lead to disqualification for or removal of a licence or authority. This was said to be because such orders were made for the purpose of protecting the public and were therefore not punitive or penal in character. More recently, however, as a result of the majority decision of the High Court in *Rich v Australian Securities and Investments Commission*\(^\text{104}\), the scope of the privilege appears to have expanded to include situations where orders requiring the provision of information expose company directors to disqualification.

In *Rich* the High Court found that the orders can bear several characters. Although one of the objects of such an order is to protect the public, this does not preclude the order from being punitive in nature, penalising the person against whom it is granted. The two characterisations are not mutually exclusive. Kirby J (dissenting) regarded this approach with some concern. He considered that, if the established distinction between punitive and protective provisions were not taken into account,

\(^{100}\) Although referred to as ‘privilege against self-incrimination’, this privilege also encompasses the privileges against self-exposure to penalty and against self-exposure to the forfeiture of an existing right.


\(^{102}\) *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

\(^{103}\) *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 505–6, 556. See also *Trade Practices Commission v Abico Ice Works Pty Ltd* (1994) 52 FCR 96, 121–9. It should be noted, however, that s 155(7) of the *Trade Practices Act 1974* (Cth) actually extends to corporations an immunity to which they would not otherwise be entitled.

The coercive information-gathering powers of government agencies

privilege against exposure to penalty would be extended ‘to many undeserving beneficiaries contrary to the legislative design’. 105

The High Court held that the banning and disqualification orders under ss 206C and 206E of the Corporations Act were penalties, and this impinged on ASIC’s ability to disqualify a company director. The privilege against exposure to penalty applied in such a way as to prevent a defendant (in proceedings for the imposition and recovery of a penalty) from being compelled to produce documents or information that could ‘prove’ their liability.

In response to Rich, in 2005 the Australian Government announced an insolvency law reform package that included a proposal to abrogate privilege against exposure to a penalty in proceedings by which ASIC seeks a banning or disqualification order and no other penalty. The Corporations Amendment (Insolvency) Act 2007, introduced a package of reforms aimed at improving the operation of Australia’s insolvency laws. Item 12 of Schedule 2 to the Act inserted s 1349 in to the Corporations Act to remove penalty privilege for a range of proceedings under that Act or the ASIC Act or a proceeding in the Administrative Appeals Tribunal.

The rationales for the privilege

The privilege was originally seen as a curb on state power106, but the prevailing rationale for it in modern times has expanded to embrace the human rights principles of personal freedom, privacy, dignity and protecting individuals from the power of the state.107 Among other rationales are preventing abuse of power, maintaining the adversarial system, preventing conviction based on a false confession, protecting the quality of evidence, and avoiding self-accusation, perjury and contempt.108

Privileged materials

The privilege can be invoked both to protect people from supplying testimony about their own guilt and to protect documentary evidence. It is far stronger in the first instance than it is for documents already in existence that constitute evidence of guilt and are not testimonial in character.109 The privilege is not available to prevent the compulsory seizure of documents in administrative investigations.

105 ibid, 178.
109 See, for example, Trade Practices Commission v Abbco Ice Works Pty Ltd (1994) 52 FCR 96, 135 (Gummow J).
The coercive information-gathering powers of government agencies

Who may claim the privilege

At common law the privilege against self-incrimination is available only to individuals acting in their personal capacity. It does not protect company officers from providing information that might tend to incriminate or expose to penalty the company for which they work.\textsuperscript{110} The distinction between company officers and the corporate legal entity can, however, be problematic. Company officers can be compelled to incriminate the corporation they work for, but doing so could result in subsequent action being taken against them personally. In some cases legislation expressly protects officers from victimisation where they are fulfilling obligations imposed on them.\textsuperscript{111}

At common law the onus is on the claimant to establish that there are reasonable grounds for claiming the privilege, which must be claimed before a question is answered or a document is provided.\textsuperscript{112} If this is not done, the privilege is waived. The privilege must also be claimed in relation to a specific request, rather than being a ‘blanket’ claim.\textsuperscript{113} It might be inconvenient for an agency to make a specific request, but blanket claims, which are broader in scope, might require adjudication, adding time and expense to the process.

For a claim of privilege against self-incrimination there must be a ‘real and appreciable’ risk—as distinct from an ‘imaginary or insubstantial’ risk—of prosecution or exposure to penalty.\textsuperscript{114} Negative inferences cannot be drawn from a claim of privilege.\textsuperscript{115}

The privilege’s impact

The privilege has been criticised for its capacity to work against the effectiveness of legislative regulatory schemes and to frustrate the collection of valuable evidence from a primary source.\textsuperscript{116}

The privilege and agency legislation and practice

The privilege against self-incrimination or self-exposure to penalty is a substantive right and is thus available at common law unless removed expressly or implicitly by statute.\textsuperscript{117} Express statutory maintenance of the privilege is rare\textsuperscript{118}; none of the legislation under consideration expressly abrogates the privilege entirely.

\begin{enumerate}
\item See, for example, s 68 of the Superannuation Industry (Supervision) Act 1993 (Cth).
\item R v Owen [1951] VLR 393.
\item See, for example, Gamble v Jackson [1983] 2 VT 334.
\item See, for example, Trade Practices Commission v Arnotts (1990) 93 ALR 638.
\item See, for example, J Cotton 1998, ‘Self-incrimination in company legislation’, Company Lawyer, vol. 19, no. 6, p. 182.
\item Sorby v Commonwealth (1983) 152 CLR 281.
\item See, for example, Trade Practices Act 1974 (Cth), s 95ZK.
\end{enumerate}
In order to remove the privilege by implication, the implication must be strong.\textsuperscript{119} The courts will consider a variety of factors, the most important being the general purpose of the legislation. If the purpose of the legislation would be entirely defeated or largely frustrated by the existence of privilege, this is evidence that the legislature did not intend the privilege to be available.\textsuperscript{120}

Second, the privilege is likely to run counter to the reasons for conferring coercive information-gathering powers on agencies. As a consequence, courts have been willing to draw the implication that these privileges have been abrogated in relation to such powers. It has been held, for example, that the privilege against self-incrimination, including self-exposure to penalty, does not apply in the context of the ATO’s coercive information-gathering powers under s 264 of the Income Tax Assessment Act.\textsuperscript{121} Under s 155 of the Trade Practices Act there is no privilege against self-exposure to civil pecuniary penalties in relation to answers pursuant to s 155(1) for either corporations or individuals.

Legislation conferring coercive investigative powers sometimes provides that a person need not comply with a notice if they have a reasonable excuse. To ensure that such provisions do not lead to an assumption that the privilege does apply, some legislation provides that the privilege does not afford ‘a reasonable excuse’\textsuperscript{122}; other legislation remains silent on this.

**Use immunity**

In some cases when the privilege against self-incrimination does not apply, a degree of protection is afforded those compelled to provide information, so that the information they provide cannot be used against them. Depending on the extent of the protection, this is referred to as a ‘use immunity’ or a ‘derivative use immunity’. In the legislation there are many inconsistencies in connection with this protection.

Some of the agencies under discussion have legislative provisions that extend use immunity to corporations being investigated.\textsuperscript{123} APRA submitted, however, that extension of use immunity in this context would dramatically and adversely affect the outcome of any investigation it carried out and would impair, if not defeat, its ability to investigate corporate conduct.

A central policy concern in abrogating the privilege is balancing the need to protect individuals’ rights against the public interest in proper regulation.

For example, it might be appropriate to retain use immunity if oral statements in compulsory examinations could render a person liable to criminal prosecution, although there is less justification for retaining it for civil penalties. Different regimes could also be applied to corporations and individuals.

\textsuperscript{119} Sorby v Commonwealth (1983) 152 CLR 281, 311.
\textsuperscript{120} Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328, 341 (Mason AC, Wilson and Dawson JJ).
\textsuperscript{122} See, for example, Australian Securities and Investments Commission Act 2001 (Cth), s 68.
\textsuperscript{123} See, for example, Trade Practices Act 1974 (Cth), s 155(7).
A person can claim use immunity before answering questions that would tend to incriminate them; such immunity means the answers given cannot be admitted in evidence in subsequent proceedings against the person. Use immunity does not usually cover proceedings for perjury or for making false or misleading statements to an inquiry or investigation.

Variations in use immunity provisions

The variations in the threshold tests for claiming use immunity range from ‘tend[ing] to incriminate’, ‘would tend to incriminate the individual or make the individual liable to a penalty’ and ‘may tend to incriminate’ to ‘might tend to incriminate’. Under s 104(6)(a) of the Health Insurance Act 1973 (Cth) the threshold is the ‘belief’ that the answer might tend to incriminate. In all these instances there is a subjective element, which is the person’s claim for immunity, and an objective one, which is the agency’s decision whether or not to accede to the request. The legislation does not specify who is to make the latter determination.

There are also differences in terms of the proceedings for which use immunity is afforded and the materials covered. For example, immunity is afforded in relation to the following:

- criminal proceedings but not civil penalty proceedings—s 155(7) of the Trade Practices Act and ss 56 and 82 of the Insurance Act
- criminal and civil proceedings—s 68(3) of the ASIC Act, s 117(2) of the Retirement Savings Accounts Act, s 156F of the Life Insurance Act and s 287(3) of the Superannuation Industry (Supervision) Act.

Further, there are variations in the scope of the materials protected:

- furnishing information or permitting the inspection of or producing documents—s 155(7) of the Trade Practices Act, s 8S of the Medicare Australia Act
- information furnished, evidence given and documents produced—s 65Q(11) of the Trade Practices Act and s 43 of the Product Grants and Benefits Administration Act 2000 (Cth)
- information—s 16B of the Banking Act and s 156F of the Life Insurance Act
- questions, answers and any information, document or thing obtained as a direct consequence of an answer—ss 82 of the Insurance Act
- a record, answer or statement—s 117 of the Retirement Savings Accounts Act

124 Banking Act 1959 (Cth), ss 14A; Insurance Act 1973 (Cth), ss 38F, 56 and 82.
125 Trade Practices Act 1974 (Cth), s 155(7); Medicare Australia Act 1973 (Cth), s 8S.
126 Trade Practices Act 1974 (Cth), ss 95U and 95ZK; Insurance Act 1973 (Cth), ss 56 and 82; Banking Act 1959 (Cth), s52F; Retirement Savings Accounts Act 1997 (Cth), s 117; Superannuation Industry (Supervision) Act 1993 (Cth), s 287.
• an oral statement giving information or signing a record—s 68 of the ASIC Act and s 287(3) of the Superannuation Industry (Supervision) Act.

There is no immunity in relation to the production of books for the purposes of ss 30, 31(1), 32A and 33 of the ASIC Act and s 255 of the Superannuation Industry (Supervision) Act.

Enactment of more limited immunities for ASIC and APRA followed extensive research into the difficulties associated with corporate regulation. Such an approach had been recommended in reports by the Joint Standing Committee on Corporations and Securities127 and by John Kluver.128 The two reports found that derivative use immunities and, in some instances, use immunities would constitute an unacceptable fetter on the investigation and prosecution of corporate misconduct offences.

**Claiming use immunity**

Some of the legislation examined does not specify whether privilege must be claimed before incriminating disclosures are made.129 Other legislation, however, requires that privilege be claimed before the fact.130 The common law requires that privilege be claimed before the fact, so there could be uncertainty about whether or not privilege applies in such circumstances.

**Derivative use immunity**

Legislation removing privileges can go one step further than use immunity, protecting against the use of the information disclosed as a result of the removal of the privilege to uncover other information against the person who made the disclosure; an example is s 148 of the Life Insurance Act.

Inclusion of a use immunity or a derivative use immunity in legislation is a strong indication of an intention to abrogate the privilege against self-incrimination, even when that is not expressly stated.

It was submitted to the Council that derivative use immunity should not be available to people being examined because it provides a ‘shield’ against the proper investigation and prosecution of criminal offences; that is, a person being examined could cooperatively disclose information and then claim the immunity in relation to evidential material that might be acquired later as part of the investigation.

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129 See, for example, *Trade Practices Act 1974* (Cth), s 155(7).
130 See, for example, *Retirement Savings Accounts Act 1997* (Cth), s 117(2); Superannuation Industry (Supervision) Act, s 287(2); *Australian Securities and Investments Commission Act 2001* (Cth), s 68(2).
Client legal privilege

Client legal privilege is a substantive right that reflects an important common law immunity.\(^{131}\) It is an evolving and often contentious area of the law, as demonstrated by the introduction of legislation to deal with the investigation of the conduct of James Hardie directors and executives in connection with their Australian asbestos-related liabilities.\(^{132}\) It is beyond the scope of this report to make detailed comment in this regard, although the Council does consider it useful to make some observations about practical aspects of client legal privilege.

Description

Client legal privilege relates to all forms of confidential communication:

- between a client and their lawyer for the dominant purpose of giving or obtaining legal advice

  or

- between a lawyer or client and a third party at the request of the lawyer or client for the dominant purpose of current or anticipated legal proceedings.\(^{133}\)

In relation to the second point, in *Pratt Holdings v Commissioner of Taxation*\(^{134}\) the Full Federal Court held that a third party’s communication with a client, even in the absence of pending litigation, could in some circumstances be protected by client legal privilege. Previously, it was thought this was possible only if the third party was acting as the client’s agent in making the communication.

Client legal privilege belongs to the client, not the legal adviser, so it is up to the client to make decisions in relation to waiver.

As is the case with other common law rights, the privilege cannot be abrogated by statute in the absence of ‘clear words or a necessary implication to that effect’.\(^{135}\) Being a substantive rule of law, the privilege is not confined to the process of discovery or inspection and the giving of evidence in judicial proceedings: absent legislative provision to the contrary, individuals and corporations may rely on the

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\(^{132}\) *The James Hardie (Investigations and Proceedings) Act 2004* (Cth) was introduced to deal with the separation of subsidiary companies in James Hardie by means of a group restructure, the transfer of assets offshore in that restructure, and the subsequent underfunding of obligations to compensate people with a legitimate claim against James Hardie for asbestos-related diseases.

\(^{133}\) *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

\(^{134}\) *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217.

privilege to resist giving or producing to Commonwealth agencies information or documents sought in the exercise of coercive information-gathering powers.¹³⁶

Documents are not privileged simply because they were used in some way while advice was being provided: a document must have been created for the purpose of giving or receiving advice or for conducting litigation. Provided they otherwise satisfy the test, communications by way of computer or other electronic means fall within the privilege.

The limits of the privilege

Client legal privilege is not available for communications made for an improper purpose or made in furtherance of an offence or an action capable of rendering a person liable for a civil penalty.¹³⁷

For the exception to apply, the courts require specific allegations supported by evidence, and this can be a time-consuming and costly exercise. Agencies that have experience with the exception said it has little practical impact on their powers because the circumstances to which the exception applies rarely arise. When they do, the evidentiary burden is so great it is difficult to establish whether the exception ought to apply.

As a general rule, communication of a client’s identity attracts client legal privilege only in exceptional circumstances.¹³⁸

The rationales for the privilege

The public interest in encouraging the obtaining of legal advice and the promotion of compliance with the law are central rationales for client legal privilege.¹³⁹ The privilege forms the basis of the rights and protections available to an individual in relation to the exercise of executive power. To the extent that it is accorded, the privilege reflects the predominance of this form of public interest over the more general public interest that all relevant documentary material should be available to regulatory agencies in the conduct of a case.

This policy approach received endorsement following the Dawson review¹⁴⁰, which recommended that s 155 of the Trade Practices Act be amended to ensure that the Act does not require the production of documents to which client legal privilege attaches.¹⁴¹ The government accepted the recommendation on the ground that

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¹³⁷ See, for example, Attorney-General (NT) v Kearney (1958) 158 CLR 500. See in particular the recent discussion by Young J in AWB Limited v Cole and Another (No. 5) [2006] 155 FCR 87 at paras 210–219.
¹³⁹ An extended discussion of the rationales for the privilege may be found in Australian Law Reform Commission 2007, Client Legal Privilege and Federal Investigatory Bodies, Discussion paper no. 73, ALRC, Sydney, ch. 2.
¹⁴⁰ Recommendation 13.5 of the Dawson report.
¹⁴¹ The Trade Practices Legislation Amendment Act (No. 1) 2006 amended s 155 to make it clear that privilege applies in relation to s 155 notices. Most of the provisions of the Act commenced on 1 January 2007.
preserving client professional privilege ‘is in the public interest, as it facilitates the obtaining of legal advice and promotes the observance of the law’.  

Exceptions to the general rule can be appropriate in particular circumstances. For example, the James Hardie (Investigations and Proceedings) Act 2004 (Cth) expressly abrogates legal professional privilege in relation to certain materials, allowing their use in the investigation of James Hardie and any related proceedings. The Act also allows authorised persons, among them ASIC and the Commonwealth Director of Public Prosecutions, to obtain materials that would otherwise be subject to client legal privilege and use them for the purposes of specific investigations and proceedings. Given the nature of the claims that were being made, it was imperative that agencies could proceed as quickly as possible with their investigations.

During the Cole inquiry into AWB’s sales of wheat to Iraq the Royal Commissions Act 1902 (Cth) was amended in response to the decision of Justice Young in AWB Limited v Honourable Terence Rhoderic Hudson Cole. The Royal Commissions Amendment Act 2006 (Cth) specifies that a commissioner may require the production of a document in respect of which privilege is claimed for the limited purpose of making a finding about that claim. Notwithstanding that provision, the court retains discretion to determine claims of privilege in the first instance.

Suggestions for reform

In its 2002 discussion paper entitled Securing Compliance: civil and administrative penalties in Australian federal regulation and its report entitled Principled Regulation: federal civil and administrative penalties in Australia the Australian Law Reform Commission canvassed the proposal that client legal privilege be legislated as a default provision. In its 2005 report Uniform Evidence Law the commission recommended an extension of privilege under the legislation to pre-trial and non-curial contexts, including the compulsory production of documents (Recommendation 14.1).

The commission’s most recent inquiry into client legal privilege considered the impact of such privilege on all Commonwealth bodies that have coercive information-gathering or associated powers—including ASIC, APRA, Centrelink, Medicare, the ATO and the ACCC. In its report on the subject the commission proposes the enactment of legislation of general application to cover various aspects

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144 [2006] FCA 571.
145 AWB Limited v Honourable Terence Rhoderic Hudson Cole (No. 2) [2006] FCA 913.
of the law and procedure governing client legal privilege in federal investigations.\textsuperscript{150} It also proposes that the legislation provide that, in the absence of any clear, express statutory statement to the contrary, client legal privilege should apply to the exercise of coercive information-gathering powers of Commonwealth agencies.\textsuperscript{151} Further, the commission proposes that, where it is sought to abrogate privilege, an express reference should be made to the sections or divisions within a scheme that abrogate or modify the privilege.\textsuperscript{152}

The commission recommends that, where the Australian Parliament believes that exceptional circumstances exist\textsuperscript{153} to warrant a departure from the standard position, the parliament can legislate to abrogate client legal privilege in relation to a particular investigation undertaken by a federal investigatory body or a particular power of a federal investigatory body.\textsuperscript{154} It further provides that any such legislative provision should take into account the following factors in determining whether client legal privilege may be abrogated:

- the subject of the investigation, including whether the inquiry concerns a matter (or matters) of major public importance that has (or have) a significant impact on the community in general or on a section of the community or whether the inquiry is a covert investigation
- whether the information sought can be obtained in a timely and complete way by using alternative means that do not require abrogation of client legal privilege, and especially
- the degree to which a lack of access to the privileged information would hamper or frustrate the operation of the investigation and, in particular, whether the legal advice itself is central to the issues being considered.\textsuperscript{155}

Any proposed modification or abrogation would obviously need to involve a balancing of competing values, interests and rationales in the context of the law’s overall commitment to serving the administration of justice.

**The privilege and agency legislation and practice**

The legislation relating to client legal privilege varies markedly, and for most of the agencies the Council examined it remains silent. In the absence of specific legislative provision, the general purpose or object of the legislation is important. Following the decision of the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*\textsuperscript{156}, it is unlikely that the privilege will be deemed incompatible with an agency’s investigative powers.

\textsuperscript{150} ibid, Recommendation 5-1.
\textsuperscript{151} ibid, Recommendation 5-2.
\textsuperscript{152} ibid, Recommendation 5-3.
\textsuperscript{153} This has been strengthened from ‘special circumstances’ proposed in the discussion paper [6.152].
\textsuperscript{155} ibid.
\textsuperscript{156} (2002) 213 CLR 543.
Under s 155(7)(B) of the Trade Practices Act client legal privilege does not have to be actively claimed: it exists as a default position. This provision was included in the Act by the Trade Practices Legislation Amendment Act (No 1) 2006; it was a result of the Dawson review’s recommendation that s 155 be amended to ensure that the Act does not require the production of documents to which the privilege attaches. As noted, the government endorsed the recommendation on the ground that preserving client legal privilege ‘is in the public interest, as it facilitates the obtaining of legal advice and promotes the observance of the law’.

In contrast with the privilege against self-incrimination, the existence of client legal privilege does not pose a direct challenge to the purposes for which investigative powers are conferred. The ATO advised that since Daniels it has operated on the basis that client legal privilege is available. ASIC, relying on the earlier decision in Corporate Affairs Commission (NSW) v Yuill, continues to act on the basis that the production of books is not excused on the ground of client legal privilege, although it does encourage claims for client legal privilege to be made so they can be formally recorded.

Under s 69 of the ASIC Act, s 288 of the Superannuation Industry (Supervision) Act and s 118 of the Retirement Savings Accounts Act, if a client does not consent to disclose lawyers can refuse to disclose information that contains privileged communication. If privilege is claimed, the lawyers are required to reveal their client’s name and address and to identify any documents containing the communication. Agencies said, however, this limitation has failed to provide an effective investigatory tool.

The ‘reasonable excuse’ provisions the Council identified do not expressly state whether or not client legal privilege is available. In AWB Ltd v Honourable Terence Roderick Hudson Cole Young J said the term ‘reasonable excuse’ in the context of s 3(5) of the Royal Commissions Act 1902 ‘bears its ordinary meaning, and that meaning is wide enough to include the non-production of a document on the grounds that it is subject to legal professional privilege’. In the absence of express words to the contrary, a reasonable excuse provision is likely to encompass client legal privilege, and the result is that, unless privilege is abrogated (as discussed), a successful claim of client legal privilege can give an absolute right to refuse to answer questions or to provide information to an agency.

### Adjudicating a dispute about the privilege

None of the legislation the Council examined provides for adjudication of claims of client legal privilege, even though such claims almost invariably involve legal advice and judicial consideration.

The guidelines for client legal privilege agreed by the Law Council of Australia and the Australian Taxation Office in relation to access to lawyer’s premises are relevant.
in this regard.\textsuperscript{160} They are reproduced in the ATO’s \textit{Access and Information-gathering Manual} and are prefaced with an explanation of client legal privilege; they also provide details of the documents that would usually be privileged or would not be covered by privilege.

The guidelines are designed to ensure ‘that a taxation officer will not inspect any document to which access is being sought and which is being held by a lawyer, until the lawyer has been given the opportunity to claim client legal privilege on behalf of the client in respect of any of those documents’.\textsuperscript{161} If such a claim is disputed by an ATO officer, the guidelines direct that the officer

not inspect any document the subject of the claim until either:

(i) the claim is abandoned or waived; or

(ii) the claim is dismissed by a court.’\textsuperscript{162}

There are also general guidelines agreed by the Australian Federal Police and the Law Council of Australia for the execution of search warrants on lawyers’ premises where a claim of client legal privilege is made. In its 2008 report on client legal privilege the Australian Law Reform Commission recommends that these guidelines be revised in a number of respects.\textsuperscript{163}

The Council notes the commission’s recommendation for the establishment of a model procedure for resolving disputed privilege claims in federal investigations.\textsuperscript{164}

\textbf{Matters raised in consultation}

The agencies the Council studied considered broad consistency in the area of client legal privilege neither desirable nor achievable. It was, however, suggested that within a single agency or where agencies work together closely the threshold test and scope of the privilege or immunity could be made consistent across these agencies and the relevant legislation. The agencies also thought guidance on how, when and by whom privilege may be claimed would be useful, either in the form of guidelines or in legislation.

As with the privilege against self-incrimination or self-exposure to penalty at common law, it is up to the claimant to establish that there are reasonable grounds for claiming privilege. The privilege will be waived if it is not claimed before answering a question or providing a document. It must also be claimed in relation to each specific request, rather than generally for a range of information. This can be very time-consuming if, for example, questions are being asked about a general topic in the course of an examination or hearing. The agencies that mentioned this


\textsuperscript{162} ibid.


\textsuperscript{164} ibid, Recommendation 8–19.
difficulty said that in claiming privilege people should be confined to specific and identifiable evidence, and there should be no blanket entitlement to privilege.

The legislation under consideration offered little assistance in relation to how privilege should be dealt with in a practical sense. The need for guidance is especially acute in the context of hearings and examinations where ‘on-the-spot’ responses might be required both from examiners and from those being examined.

The Council’s view

In the law and practice relating to client legal privilege and the information-gathering powers of federal bodies there are inconsistencies and uncertainties that require clarification. The Australian Law Reform Commission’s recent review was very helpful in elucidating this area of the law.

The Council notes the commission’s recommendation that the Australian Government legislate in relation to client legal privilege and its interaction with coercive information-gathering powers.165 In the Council’s view, abrogation of the privilege should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope—for example, for limited purposes associated with the conduct of a royal commission.

The Council considers there is a link between any abrogation of client legal privilege and the threshold specified for the exercise of a particular coercive information-gathering power and suggests that consideration will need to be given to the threshold if privilege is to be abrogated.

In the Council’s view, agencies should keep written records of the situations where the privilege applies and, in particular, where the privilege is waived. This requirement should be part of agency guidelines on coercive information-gathering powers.

Principle 17

Client legal privilege and the privilege against self-incrimination—including the privilege against self-exposure to penalty—are fundamental principles that should be upheld through legislation. Abrogation of the privileges should occur only rarely, in circumstances that are clearly defined, compelling and limited in scope. Legislation should clearly state whether or not the privileges are abrogated and when, how and from whom the privileges (including a use immunity) may be claimed.

Agencies should keep written records of the situations in which the privileges apply, and especially when they are waived. Agency guidelines to supplement legislative directions should also be developed in relation to privilege; among the topics covered should be the procedures to be adopted by agencies in responding to a claim of privilege and the nature and effect of a waiver of privilege.

165 ibid, Recommendations 8–1 to 8–22.
Privilege and other professionals

Although client legal privilege has unique status, legally enforceable obligations to maintain confidentiality can arise in many relationships. Doctors, accountants, bankers and social workers are well-known examples of professionals who are required to keep their clients’ information secret.

The obligations are subject to the overriding duty to comply with the law, so an agency’s lawful use of its investigative powers cannot be resisted on the ground of contractual confidentiality—as distinct from client legal privilege. Some legislation makes specific provision in this regard; for example, s 92 of the ASIC Act provides that a person responding to ASIC’s use of its coercive information-gathering powers is not liable for a proceeding for breach of confidence.

Most of the legislation the Council examined does not extend protection to other professionals. Section 8R of the Medicare Australia Act does, however, provide limited protection in specifying that it is a reasonable excuse for refusing to comply with a request for information if compliance would disclose a patient’s clinical details.

The Australian Law Reform Commission recommended the creation of a ‘confidential relationships’ privilege in its 1987 report on evidence. The proposal was not adopted in the Evidence Act 1995 (Cth), but the Evidence Act 1995 (NSW) provides for such a privilege. It requires a court to balance a range of considerations, among them the probative value and importance of the evidence in the proceeding, the nature and gravity of the offence in question, and the availability of other evidence. The commission’s 2008 report on client legal privilege recommends that federal client legal privilege legislation provide that a person who is required to disclose information under a coercive information-gathering power of the Commissioner of Taxation not be required to disclose a document that is a tax advice document prepared for that person.

In 2005 the Australian, New South Wales and Victorian Law Reform Commissions were asked to inquire into the operation of the uniform evidence law regime and to propose updates and amendments. The commissions released the report Uniform Evidence Law in December 2005 and recommended legislative amendment to provide for a professional confidential relationship privilege similar to that provided for under the New South Wales legislation. It recommended that the privilege extend to pre-trial processes, including investigation notices. This approach was approved by the Standing Committee of Attorneys-General when it endorsed the model uniform evidence Bill. The committee agreed that implementation of the uniform Bill is a matter for each jurisdiction. These issues are also related to the Australian Law Reform Commission’s report on client legal privilege. The government is currently considering these recommendations.

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7 Limits on the disclosure and use of information: secrecy and privacy provisions

Information gathering can be more effective and efficient if the information is shared both within and between agencies, especially when investigations involve numerous agencies. There can be benefits for agencies in the execution of their statutory objects and for individuals faced with multiple requests for the same information from different agencies or from different areas within a single agency.

These benefits must, however, be balanced against the need to ensure that sufficient protection is afforded individual rights. Among the policy considerations relevant to inter-agency information sharing is the purpose of the exchange; for example, an investigation of actions breaching two different regulatory regimes represents an obvious circumstance in which exchange of information between agencies is warranted.

The nature of the information to be exchanged can also be highly pertinent. Among the relevant considerations here are community attitudes to the sharing of information such as medical information. Situations in which there is an immediate and serious threat to public health and safety are also compelling considerations. Amendments to the Privacy Act effected by the Privacy Legislation Amendment (Emergencies and Disasters) Act 2006 (Cth) are illustrative: the new legislation creates a clear and certain legal basis for managing the collection, use and disclosure of personal information about dead, injured and missing individuals in an emergency or disaster in Australia or abroad.

The general position at law

The repository of a statutory power to compel the provision of information owes to the provider of such information a general, but not absolute, duty of confidence. In the absence of express statutory provision, any use other than the one for which the information was obtained is unauthorised.\(^{169}\)

The High Court dealt with agencies’ ability to exchange information in *Johns v Australian Securities Commission*.\(^{170}\) The court decided that a statute conferring a power to obtain information by compulsion limits, expressly or implicitly, the purposes for which the information obtained can be used or disclosed. The information can then be used ‘for no other purpose’.\(^{171}\) The majority also found that the rules of natural justice require that disclosure of information occur only after the


\(^{171}\) ibid, 425.
subject of the information has been afforded an opportunity to formally object to disclosure or to put forward caveats on the manner in which the information may be used.

**Disclosure of information**

Agency secrecy provisions—also referred to as ‘confidentiality provisions’—are relevant to both inter- and intra-agency disclosure and use of information. The provisions recognise that in some circumstances it might be appropriate for agencies to disclose information obtained through, among other things, the use of coercive information-gathering powers. The secrecy provisions the Council examined are complex and vary in scope, but they all cover at least some confidential information provided to an agency under compulsion.172

In some areas there is overlap between secrecy provisions and the Privacy Act. The secrecy provisions cover and seek to limit the use and disclosure of information, whereas the Information Privacy Principles also cover the collection, storage and subsequent use of information. To the extent that they relate to the use and disclosure of ‘personal information’173, the secrecy provisions prevail over the more general requirements of the Privacy Act. Moreover, in the Privacy Act itself there are exceptions relevant to information an agency acquires through the exercise of its coercive information-gathering powers.

Information Privacy Principle 11 prohibits disclosure of personal information in other than specified circumstances.174 Since IPP 11(1)(d) provides, however, for an exception where the disclosure is ‘required or authorised under law’, any disclosure authorised by a secrecy provision is permitted by IPP 11. Conversely, if disclosure is prohibited by a secrecy provision, IPP 11 cannot authorise or legitimise the information’s disclosure. Another exception to the prohibition is provided by IPP 11(1)(a), which, as noted, permits the disclosure of personal information if ‘the individual concerned is reasonably likely to have been aware, or made aware under IPP 2, that information of that kind is usually passed to that person, body or agency’.

The impact of agency secrecy provisions is potentially much wider than the requirements of the Privacy Act because the information covered in the former case is not limited to personal information.

Most of the agency secrecy provisions the Council examined cover information connected in some way to a particular person (which may include a corporation). Commonly used formulations protect information ‘relating to the affairs of’ or ‘with respect to the affairs of’ a person, ‘information about a person (including a corporation) acquired by an officer in the performance of his or her functions or duties’, or simply ‘protected information’.175 The APRA Act lists the persons and

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172 The exception is Medicare Australia.
173 As noted, ‘personal information’ is defined in s 6 of the *Privacy Act 1988* (Cth) as ‘information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’.
174 *Privacy Act 1988* (Cth), s 14.
175 See, for example, *Australian Securities and Investments Commission Act 2001* (Cth), s 127.
bodies whose information is protected but in sufficiently wide terms to cover most entities about which APRA might hold sensitive information.\footnote{Australian Prudential Regulation Authority Act 1998 (Cth), s 56(1).}

All the secrecy provisions the Council examined permit disclosure of information by an officer who is performing duties or exercising functions under the relevant legislation. The provisions are couched in terms wide enough to cover disclosure within and beyond the confines of the agency concerned. Section 127(3) of the ASIC Act, for example, provides that disclosure of information by specified persons in the performance or exercise of a function or power of ASIC is ‘taken to be an authorised use and disclosure of the information’.

In relation to disclosure to external entities and the protections provided against further disclosure, the scale and complexity of the provisions vary. For example, the Trade Practices Act simply permits information to be disclosed when an officer is required by law to do so, thus placing elsewhere the responsibility for determining the precise information that will, in practical terms, be disclosed. The Act itself provides examples of an obligation to disclose being placed on the ACCC.\footnote{See, for example, Trade Practices Act 1974 (Cth), s 157.}

Subject to a number of exceptions\footnote{Under s 127(4) information can be disclosed to APRA, to the Reserve Bank, to a royal commission and to a range of other specified bodies, including the Australian Financial Institutions Commission and the Superannuation Complaints Tribunal. Information can be disclosed to any agency with conditions if the chairman is ‘satisfied that particular information’ can assist an agency in the performance of its functions and powers. Under s 127(4B) information can be released to a body corporate if certain requirements are satisfied. See, for example, Social Security (Administration) Act 1999 (Cth), ss 202(3), 209.}, s 127 of the ASIC Act requires that ASIC take all reasonable measures to protect from unauthorised use or disclosure information given to it in confidence in or in connection with the performance of its functions or the exercise of its powers under the corporations legislation. This provision seems to give ASIC considerable flexibility in determining the appropriate use and disclosure of information. Some legislation provides for additional information uses to be permitted by the relevant Minister\footnote{See, for example, Social Security (Administration) Act 1999 (Cth), ss 202(3), 209.}; this, too, offers some degree of flexibility.

In contrast, s 56 of the APRA Act provides that it is not an offence if the disclosure of protected information or the production of a protected document occurs when the person disclosing the information or producing the document ‘is satisfied’ that this ‘will assist a financial sector agency, or any other agency … specified in the regulations, to perform its functions or exercise its powers and the disclosure is to that agency’ or is to ‘another person and is approved by APRA by instrument in writing’.

The most detailed approach is described in s 16 of the Income Tax Assessment Act, which contains lists of persons to whom information may be disclosed and the purposes for which it may be disclosed. A wide range of agencies are listed. Some recipients of information are themselves subject to detailed secrecy requirements, and the process is repeated up to three persons removed from the ATO.
Use of information

Many agencies have a variety of statutory functions and investigative powers that may be used by different parts of the organisation for different purposes. The question therefore arises of whether information can be internally distributed once it has been acquired by any part of the agency.

Information Privacy Principle 10 says that personal information collected for a particular purpose can be used for another purpose only in the following circumstances:

- Consent is given by the individual concerned.
- The record keeper has reasonable grounds to believe that use of the information for that other purpose is necessary in order to prevent or mitigate a serious and imminent threat to someone’s life or health.
- The use is required or authorised by or under law.
- The use is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty or for the protection of public revenue.
- The purpose for which the information is used is directly related to the purpose for which it was collected. 180

‘Authorised by or under law’

As noted, all agencies’ secrecy provisions provide that disclosure of information in the performance or exercise of an agency’s powers is an authorised use of that information.

Several of the agencies the Council examined pointed out that, when information is gathered for a particular purpose in reliance on the secrecy provisions, they do not consider themselves restricted to using the information for that purpose only: if the information is also relevant to another function of the agency it will be used for that purpose too.

This use would seem to fall within the third exception to Information Privacy Principle 10—‘use authorised by or under law’. The Office of the Privacy Commissioner drew the Council’s attention, however, to the Privacy Commissioner’s Guideline 34, which discusses the meaning of the term ‘authorised by or under law’ in Information Privacy Principles 10 and 11. The guideline states that a law authorises an agency to use information for another purpose if it ‘clearly and specifically gives [the agency] a discretion to use the personal information for that purpose. The agency must be able to point to a specific relevant discretion in the legislation governing it’. 181 The guideline also notes that information is not authorised to be used for another purpose by a section in an Act that confers on an...

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180 Privacy Act 1988 (Cth), s 14.
office holder a general discretion ‘to do anything necessary or convenient to be done for or in conjunction with’ their functions.

**Consent**

Consent is an exception to the general prohibition against the use and disclosure of personal information under Information Privacy Principles 10 and 11.

The question of consent by an individual as a basis for the exchange of information warrants careful consideration. Consent of itself might not be sufficient to permit disclosure. A higher threshold of express, voluntary and informed consent might be appropriate if the disclosure of personal information could have more serious consequences. If there is a question about whether the consent is fully informed it could be that use and disclosure of information should be authorised by law.

**Agency practice**

The Council’s review showed that agencies are prudent in their control of the ways in which information is released. For example, authorisations to disclose information might be limited to officers above a particular level or to a specialist unit of the agency. One agency said it had developed precedents and guidelines for its officers in this regard.

Some agencies have entered into memorandums of understanding in order to regulate the exchange of information with other agencies. Although generally not having the force of law, MoUs formalise the terms of a relationship or framework for cooperation between the parties. APRA has an MoU with ASIC, for example, the purpose of which is to ensure the ‘effective and efficient performance of their respective financial obligations’.

Several agencies said they were developing or revising their own guidelines dealing with the internal distribution and use of information. This was in response to an increasing number of staff inquiries about whether exchange of information was authorised or appropriate.

**Consultation and reforms**

**Inter-agency information exchange**

A number of agencies expressed dissatisfaction with the current arrangements for inter-agency information exchange. They pointed to the complexity of the legislation and to inconsistencies in the breadth of provisions that can lead to disclosure being prohibited under some but not other legislation. In some areas a number of secrecy provisions apply; for example, 10 different secrecy provisions were said to apply to

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human services–related agencies. Inconsistencies between secrecy provisions in the legislation of a single agency can also result in inefficiencies within the agency.

Government has taken measures in some areas to resolve this difficulty. In June 2006 a review of information and intelligence sharing in the aviation sector, carried out for the Attorney-General’s Department, identified over 130 secrecy provisions in Commonwealth legislation. The report concluded that specific legislative amendments can remove impediments to information sharing created, for example, by secrecy provisions or privacy legislation.

In August 2006 the Federal Treasurer announced legislative amendments to facilitate information sharing between the agencies involved in Project Wickenby, the work of a multi-agency taskforce established in 2004 to combat internationally promoted tax avoidance arrangements. The Tax Laws Amendment (2007 Measures No 1) Act 2007 (Cth) was passed to facilitate ‘enhanced sharing of information between certain agencies in the pursuit of tax avoidance or evasion’. It broadened the scope for information gathering and sharing for agencies involved in the project.

Submissions also highlighted difficulties encountered when notices are issued requiring the provision of information relating to matters or transactions conducted in overseas jurisdictions. In some cases, providing this information in accordance with the notice requirements would constitute a breach of privacy and disclosure laws in those jurisdictions.

The suggestion was made that agencies themselves should approach their counterpart agency in the foreign jurisdiction and arrange for an information request from that agency, in accordance with local legal requirements. It was also suggested that agencies consult with industry in order to establish clear guidelines on how and when information is to be exchanged with foreign agencies.

**Intra-agency information exchange**

As noted, inconsistencies between secrecy provisions can also result in inefficiencies within an agency. This was highlighted in a discussion paper outlining an approach to standardising the various secrecy and disclosure provisions in the tax laws and developing a new framework in a single piece of legislation. The proposed standardisation would reinforce the high level of protection given to taxpayer

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183 Centrelink, Medicare, the Child Support Agency, Health Services Australia, CRS Australia and Australian Hearing.
184 See, for example, Department of the Treasury 2006, Review of Taxation Secrecy and Disclosure Provisions, Department of the Treasury, Canberra.
185 Peter Ford 2006, ‘Review of Information and Intelligence Sharing in the Aviation Sector’, Report to the Attorney-General’s Department, Canberra. The report recommended that a schedule be developed and included in the Privacy Act, setting out a list of authorisations contained in sectoral legislation. The report was not publicly released.
186 The ATO, ASIC, the Commonwealth Director of Public Prosecutions, the Australian Crime Commission, the Australian Federal Police supported by AUSTRA, the Attorney-General’s Department and the Australian Government Solicitor.
187 An August 2007 Treasury media release providing an update on Project Wickenby stated, ‘Amendments to tax secrecy provisions that were enacted in April 2007 allow the Commissioner of Taxation to share information more effectively with other government agencies to facilitate law enforcement activities for Project Wickenby …’
information by providing a framework for identifying appropriate disclosure and use of protected information.\textsuperscript{188} At the time of writing, the Council understands that Treasury is drafting legislation to implement the review’s recommendations.

The Council’s view

The law relating to the disclosure and use of information an agency obtains by means of its coercive information-gathering power is complex and difficult for agency officers to apply. The secrecy provisions are unnecessarily complex; their rationalisation would increase agencies’ effectiveness, efficiency and accountability in the exchange of information.

In relation to inter-agency exchange of information, the Council’s consultations suggest that there are areas additional to those already identified by government that would benefit from review and possible reform. One such area is human services. It can be expected that further reforms in the area of inter-agency information exchange will ensue from the Australian Law Reform Commission’s current review of privacy laws.

In relation to intra-agency exchange of information, there is also a lack of clarity about the use to which information may be put. In the Council’s view, this uncertainty could be largely overcome through careful explanation at the point of collection of information of the usual intra-agency uses and disclosures of information.

As noted, the Council considers it good administrative practice if agencies tell the recipients of notices associated with coercive information-gathering powers when information— including information that is not ‘personal’ information for the purposes of the Privacy Act—is normally exchanged with other agencies or is passed to other areas within an agency. Additionally, when unforeseen uses or disclosures do occur, agency officers should be encouraged to advise the people from whom the information was collected. The development of agency guidelines on this is desirable.

Although it was not discussed during the consultation process, the Council also considers it important that, consistent with Information Privacy Principle 8, all agency officers be encouraged to check the accuracy of the information they receive by means of their coercive information-gathering powers or through disclosure pursuant to agency secrecy provisions.

Memorandums of understanding also provide an important means of ensuring consistent and lawful inter-agency disclosure of information obtained through the use of coercive information-gathering powers.\textsuperscript{189}

The coercive information-gathering powers of government agencies

Principle 18

The complexity and inconsistency of agencies’ secrecy provisions mean that special care is needed when dealing with inter-agency disclosure of information.

In notices and requests it is necessary to carefully describe the information agency officers require in the exercise of their coercive information-gathering powers and the probable uses of that information.

Agencies should provide to their officers guidance about situations in which the use of information for purposes not reasonably foreseen at the time of collecting the information might be contemplated.

Guidelines and training for agency officers in both these areas and in relation to the effect of and interaction between the Privacy Act 1988 (Cth) and agencies’ secrecy provisions are essential.

It is good administrative practice to develop memorandums of understanding between agencies, clarifying the responsibilities of agency officers in disclosing information obtained through, among other things, the use of coercive information-gathering powers.

The threshold for information exchange

The Council’s draft report sought comments on the idea of subjecting the exchange of information to a threshold trigger similar to that governing the initial issuing of a notice.

Several submitters agreed with this proposal. A contrasting view was that such an approach could give rise to inflexibility and be inappropriate in some situations. For example, in circumstances of serious and imminent threats to public health and safety, different and less restrictive considerations might apply to inter-agency information exchange. It was suggested that it would be preferable to leave it to the legislature to determine, for each information-gathering regime, when the transfer of information may occur.

The Council’s view

The trigger threshold for the exchange of information by an agency relying on its secrecy provisions should, in most instances, be the same as that for the initial collection of the information by that agency. Some circumstances, such as when there are threats to public health and safety, should be exempt.

The Commonwealth Ombudsman recently supported the use of MoUs in relation to information exchange in appropriate circumstances. See Commonwealth Ombudsman 2007, Lessons for Public Administration: Ombudsman investigation of referred immigration cases, Report no. 11, Lesson 7, ‘Remove unnecessary obstacles to prudent information exchange with other agencies and bodies’, Commonwealth Ombudsman, Canberra, p. 16.
This is consistent with the approach to the disclosure of personal information advocated in Information Privacy Principle 11(1)(c), which provides an exception for disclosures made in situations where there is a reasonable and imminent threat to life or health. There might also be other policy considerations—for example, those identified at the beginning of this chapter—that would have a strong influence on determination of the suitable threshold for inter-agency exchange of information.

Additionally, the Council considers that initial limitations on the collection and use of information arising in connection with privilege and use immunity remain pertinent and should be taken into account in contemplating the forwarding of information.

It is vital that the decision to release information to another agency reside with an officer of adequate seniority and experience.

**Principle 19**

Subject to limited exceptions, it is desirable that inter-agency disclosure of information obtained in the exercise of coercive information-gathering powers be subject to a threshold trigger of the same calibre as that governing the initial issuing of a notice (see principle 1). Additionally, privilege and use immunity should be taken into account when the release of information to another agency is being considered.

Examples of situations in which exceptions to the threshold trigger would be apposite are when there is an immediate and serious risk to health or safety and when limited information is required for a royal commission.

As noted, the discretion to disclose information obtained through the use of coercive information-gathering powers should rest with senior, experienced agency officers.

**Physical security and record management**

This discussion would be incomplete in the absence of reference to the security and management of information. Information Privacy Principle 4 requires that an agency take reasonable security measures to prevent loss, unauthorised access, use, modification or disclosure or any other misuse of records. Large volumes of documents and data can be acquired through the use of coercive information-gathering powers, so it is important that agencies have adequate techniques for maintaining the integrity of the information.

The retention and destruction of information agencies collect in the exercise of their coercive information-gathering powers are governed by the *Archives Act 1983* (Cth).

**Agency practice**

Most agencies have agency-specific physical and electronic safeguards and protocols for storage and retrieval of information; for example, the ACCC uses the TRIM document management system to receipt and track information. Nevertheless, care is
essential when storing and managing received information—including ensuring that a record has the right security classification and restricting access where relevant.

ASIC has adopted a formal system for recording and managing documents it receives under its information-gathering powers. Medicare also reported detailed procedures for handling all evidence acquired through the use of its investigative powers: a record is made of the origin of a document, the officer taking possession of it, and all of the document’s subsequent movements.

Some of the larger agencies have registers for incoming documents, so that the documents are catalogued under fields such as date, from whom they were obtained, and who in the agency received them.

It was suggested that all agencies should adopt strategies for ensuring the integrity of information received by virtue of using coercive information-gathering powers. It was further suggested that guidelines include direction that the information be provided to the smallest possible number of agency employees and kept on a secure server.

The Council’s view

Agencies should adopt strategies and guidelines aimed at ensuring the integrity, proper management and accurate recording of information received in the exercise of coercive information-gathering powers. This could include direction on matters such as maintaining records of documents received; the provision, where practicable, of receipts for materials held; and, in the case of documents sighted and returned, the need to keep an adequate record of the date of sighting the document and who sighted it.

The Council also considers it important that agencies keep someone who has provided information in response to a notice associated with coercive information-gathering powers informed, as appropriate, of whether an investigation is still current and when documents can be returned. In some circumstances it might be desirable to make arrangements to give interim access to documents or to provide copies of documents to notice respondents.

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<th>Principle 20</th>
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Agency strategies and guidelines should operate to ensure the integrity, proper management and accurate recording of information received in the exercise of an agency’s coercive information-gathering powers. Wherever possible, receipts should be given for documents and materials furnished to the agency.

An agency that has used its information-gathering powers to obtain information or documents from someone should keep under continuing review the need to keep the person informed, as appropriate, about whether an investigation is still current, when documents can be returned to the person, or whether other arrangements can be made for the person to be given interim access to the documents or a copy of the documents.
Appendix A  The legislation: a summary

Table A.1 summarises the legislation dealing with the coercive information-gathering powers of the six Commonwealth agencies the Council reviewed— the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the Australian Taxation Office, Centrelink and Medicare Australia.
<table>
<thead>
<tr>
<th>Type of power</th>
<th>Reasons for use</th>
<th>Power used against</th>
<th>Limitations</th>
<th>Who has the power</th>
<th>Contents of notice</th>
<th>Notice period</th>
<th>Privilege against self-incrimination</th>
<th>Legal professional privilege</th>
<th>Review rights</th>
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<tbody>
<tr>
<td><strong>Australian Competition and Consumer Commission</strong></td>
<td><strong>Trade Practices Act 1974, s 155(1)</strong></td>
<td>Provide information, produce documents, give evidence</td>
<td>Reason to believe a person has information, documents or evidence relating to contravention of Act, designated telecommunications matter, decision under ss 91B(4), 91C(4) (authorisations), s 93 decision (exclusive dealings), s 93AC, s 93AC, s 95AS or s 95AZM (merger clearance)</td>
<td>A person</td>
<td>Notice may not be given merely because privilege against self-incrimination has been invoked in other contexts (ss 155(2A)). Cabinet documents excluded (ss 155(7A))</td>
<td>ACCC, chairperson, deputy chairperson (to hear evidence only subject to statutory trigger); member of commission can issue notice; SES or acting SES can hear evidence</td>
<td>Specify time and manner for giving information, time and place for giving evidence</td>
<td>Not specified</td>
<td>Available under s 155(7B); Daniels v ACCC (2002) 213 CLR 543</td>
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<tr>
<td><strong>Trade Practices Act 1974, s 65Q(1)</strong></td>
<td>Provide information, produce documents, give evidence</td>
<td>Reason to believe that a corporation is capable of providing information relating to goods it supplies that are intended to be used or of a kind likely to be used by a consumer and that will or may cause injury to a person</td>
<td>Corporation supplying the goods (information must be signed by an officer of the corporation)</td>
<td>Requirements in relation to documents must be ‘reasonable’; information must be provided in a ‘reasonable time’; and appearance for examination must be at a ‘reasonable time’</td>
<td>Minister or officer authorised by the Minister</td>
<td>Specify manner and a reasonable time for giving information, reasonable requirements for producing documents, reasonable time and place for giving evidence</td>
<td>Reasonable time for giving information</td>
<td>Use immunity available for any other proceedings (s 65Q(11)); No specific abrogation of privilege against self-incrimination</td>
<td>Not specified. Section 65Q(9) states failure to comply with notice is a strict liability offence</td>
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<tr>
<td><strong>Trade Practices Act 1974, s 95ZK</strong></td>
<td>Provide information, produce documents</td>
<td>Reason to believe a person is capable of providing information</td>
<td>A person</td>
<td>Information must be relevant to an inquiry about the person, the supply of goods or services by the person being investigated/or monitored, a locality notice (proposition to fix prices at a particular location)</td>
<td>Chairperson or inquiry chair</td>
<td>Specify time and manner for giving information, documents to be provided</td>
<td>At least 14 days</td>
<td>Available (s 95ZK(6))</td>
<td>Reasonable excuse defence (s 95ZK(5))</td>
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<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
<td>Notice period</td>
<td>Privilege against self-incrimination</td>
<td>Legal professional privilege</td>
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<tr>
<td>Trade Practices Act 1974, s 95S</td>
<td>Give evidence, produce documents</td>
<td>Not specified: provision under Part VIIA (Price surveillance)</td>
<td>A person</td>
<td>Inquiry chair. The chair may exercise the power on another person's application</td>
<td>Specify documents to be provided</td>
<td>Not specified</td>
<td>Available (s 95U(3)-(4))</td>
<td>Reasonable excuse defence (s 95U(5))</td>
<td>Not specified</td>
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<td>Trade Practices Act 1974, s 151BK</td>
<td>Provide information</td>
<td>Satisfied that a carrier or carriage provider has a substantial degree of power in a telecommunications market</td>
<td>A carrier or carriage provider who has a substantial degree of power in a telecommunications market</td>
<td>Information must relate to charges for goods or services. ACCC can require person to notify about changes or additions to charges</td>
<td>Specify time period, form and information required. Must specify reason and be a written notice (s 151BM)</td>
<td>Either within 7 days before altering a charge (ss 151BK(4) and (6)) or within period specified in direction of imposing, varying or ceasing a charge (ss 151BK(5))</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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<td>Australian Prudential Regulation Authority</td>
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<tr>
<td>Banking Act 1959, s 13</td>
<td>Provide information, including books, accounts and documents</td>
<td>APRA to protect depositors of authorised deposit institutions (s 12); provision under Division 2 (Protection of depositors)</td>
<td>Authorised deposit institution</td>
<td>Information must relate to financial stability</td>
<td>Specify information required and time for providing it</td>
<td>Not specified. ADI to provide information 'immediately' if considered likely to be unable to meet its obligations (ss 13(5))</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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<td>Banking Act 1959, s 13B</td>
<td>Produce books, accounts or documents, provide information, provide facilities</td>
<td>Investigation of affairs of ADI under ss 13 or 13A (Protect depositors of ADIs).</td>
<td>Authorised deposit institution</td>
<td>Can require ADI to give information. Access to records is by force of section. APRA can determine this provision does not apply to an ADI (s 11)</td>
<td>Investigator appointed by APRA under ss 13, 13A</td>
<td>Need not be in writing</td>
<td>Not specified, but each day of failure to comply gives rise to a continuing offence (ss 13B(18))</td>
<td>Not specified</td>
<td>Not specified</td>
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<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
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<td><strong>Banking Act 1959, s 16B</strong></td>
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<tr>
<td>Provide information, produce books, accounts or documents</td>
<td>APRA considers information will help it carry out its functions under the Act</td>
<td>Auditor or former auditor of ADI or non-operating holding company. If ADI is a subsidiary of a foreign company, another subsidiary of the foreign company</td>
<td>APRA can determine this provision does not apply to an ADI (s 11)</td>
<td>APRA</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before the fact (s 52F)</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part VI</td>
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<tr>
<td><strong>Banking Act 1959, s 61</strong></td>
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<tr>
<td>Produce books, accounts or documents, provide information, provide facilities</td>
<td>If satisfied that a report is necessary</td>
<td>ADI, non-operating holding company or a subsidiary of either</td>
<td>In relation to investigation of specified prudential matters. Access to records and information is by force of section. APRA can make s 11 exemption</td>
<td>Investigator</td>
<td>Need not be in writing. Appointment is in writing and specifies prudential matters under investigation</td>
<td>Not specified, but each day of failure to comply gives rise to a continuing offence (s 61(5))</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part VI</td>
</tr>
<tr>
<td><strong>Banking Act 1959, s 62</strong></td>
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<tr>
<td>Provide information, including books, accounts and documents</td>
<td>Not specified: this is a general provision allowing APRA to conduct investigations</td>
<td>Various: ADI, non-operating holding company, subsidiary of either, any other person who carries on a banking business in Australia</td>
<td>Must not require information concerning individual customers of an ADI unless it relates to the prudential matters of an ADI. APRA can make s 11 exemption</td>
<td>APRA</td>
<td>Need not be in writing</td>
<td>Not specified, but each day of failure to comply gives rise to a continuing offence (s 62(1C))</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before the fact (s 52F)</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part VI</td>
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<tr>
<td><strong>Insurance Act 1973, s 115</strong></td>
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<tr>
<td>Provide information, produce books, accounts or documents</td>
<td>Purposes of Act or Part 2 of Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 and to consider an application to carry on insurance business</td>
<td>An officer of general insurer, holding company, subsidiaries, corporation applying for authorisation</td>
<td>Not specified</td>
<td>APRA or a person authorised by APRA</td>
<td>Not specified; need not be in writing</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part IV</td>
</tr>
<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
<td>Notice period</td>
<td>Privilege against self-incrimination</td>
<td>Legal professional privilege</td>
<td>Review rights</td>
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<td><strong>Insurance Act 1973, s 49</strong></td>
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<tr>
<td>Provide information, produce books, accounts or documents</td>
<td>APRA considers information will help it carry out its functions under the Act</td>
<td>An auditor, actuary, former auditor or former actuary of general insurer, holding company or subsidiary</td>
<td>Not specified</td>
<td>APRA</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before the fact (s 38F)</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part IV</td>
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<tr>
<td><strong>Insurance Act 1973, s 55</strong></td>
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<tr>
<td>Produce books, provide assistance, answer questions</td>
<td>Investigating affairs of a general insurer, holding company or subsidiary, or exercising monitoring functions under s 38</td>
<td>A prescribed person in relation to the general insurer, holding company or subsidiary (defined in s 50)</td>
<td>If APRA or inspector is investigating the affairs of the body corporate or its associate or for purposes of APRA’s monitoring functions under s 38</td>
<td>APRA or inspector</td>
<td>For giving of assistance, only ‘all reasonable assistance’ is required</td>
<td>Not specified</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before answering question in examination (ss 56(2))</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part IV</td>
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<tr>
<td><strong>Insurance Act 1973, s 81</strong></td>
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<tr>
<td>Produce books, provide assistance, answer questions</td>
<td>Investigating a designated security trust fund (set up by Lloyd’s—see ss 68 and 69)</td>
<td>A prescribed person in relation to a designated security trust fund (refers to s 50, with an additional category)</td>
<td>Only if APRA is investigating affairs of a designated security trust fund</td>
<td>APRA or inspector</td>
<td>For giving of assistance, only ‘all reasonable assistance’ is required</td>
<td>Not specified</td>
<td>Not available. Use immunity available for criminal proceedings (s 82)</td>
<td>Not specified</td>
<td>Not reviewable decisions for the purposes of Part IV</td>
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<tr>
<td><strong>Australian Prudential Regulation Authority and Australian Securities and Investments Commission</strong></td>
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<td><strong>Life Insurance Act 1995, s 131</strong></td>
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<tr>
<td>Provide information, produce documents</td>
<td>Purposes of the Act, monitor compliance (s 130)</td>
<td>A life company</td>
<td>Only any matter relating to the business of the company or its subsidiary</td>
<td>Regulator</td>
<td>Specify time for providing information</td>
<td>7 days to 1 month</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Internal review by regulator and merits review by AAT (s 236)</td>
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<tr>
<td><strong>Life Insurance Act 1995, s 132</strong></td>
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<tr>
<td>Produce records</td>
<td>Purposes of the Act, monitor compliance (s 130)</td>
<td>A life company</td>
<td>Only any records relating to the affairs of the company</td>
<td>Regulator</td>
<td>Specify reasonable time and place for producing records, authorised officer (if any)</td>
<td>Reasonable time for producing records</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Internal review by regulator and merits review by AAT (s 236)</td>
</tr>
<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
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<td>Legal professional privilege</td>
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<tr>
<td><strong>Life Insurance Act 1995, s 141</strong></td>
<td>Produce records</td>
<td>Investigation of business of a company</td>
<td>A 'relevant person' in relation to a company (director, secretary, employee, actuary, auditor, shareholder or agent)</td>
<td>Regulator</td>
<td>Specify reasonable time and place for producing records, authorised officer (if any)</td>
<td>Reasonable time for producing records</td>
<td>Not available. Use immunity available for criminal proceedings (s 156F)</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>Life Insurance Act 1995, s 142</strong></td>
<td>Provide assistance, answer questions</td>
<td>When investigating the business of a company</td>
<td>A 'relevant person' in relation to a company (director, secretary, employee, actuary, auditor, shareholder or agent)</td>
<td>Regulator</td>
<td>Specify authorised person for asking questions</td>
<td>Not specified</td>
<td>Not available. Use immunity available for criminal proceedings (s 156F)</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>Retirement Savings Accounts Act 1997, s 100</strong></td>
<td>Produce books</td>
<td>Investigation of the affairs of a retirement savings account provider</td>
<td>A 'relevant person' in relation to RSA provider. Others if reasonable grounds to believe they have books relating to affairs</td>
<td>Inspector</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before the fact (s 117)</td>
<td>Available for lawyers unless client consents or the communication is with a body corporate under administration or winding up (s 118)</td>
<td>Not provided (not a reviewable decision: s 16)</td>
</tr>
<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
<td>Notice period</td>
<td>Privilege against self-incrimination</td>
<td>Legal professional privilege</td>
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<tr>
<td><strong>Retirement Savings Accounts Act 1997, s 101</strong></td>
<td>Provide assistance, answer questions</td>
<td>Investigation of the affairs of an RSA provider? Not explicitly mentioned</td>
<td>A ‘relevant person’ in relation to the RSA provider. Others if reasonable grounds to suspect or believe they have information relevant to investigation</td>
<td>Only needs to give ‘all reasonable assistance’</td>
<td>Inspector</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Available for statements for criminal proceedings if claimed before making the statement (s 120(2)). Use immunity available for statements and information for criminal proceedings if claimed before the fact (s 117(3))</td>
<td>Available for statements if person objects to statement’s admission (s 120(5)). Also available for lawyers in relation to information unless the communication is with a body corporate under administration or winding up (s 118)</td>
</tr>
<tr>
<td><strong>Retirement Savings Accounts Act 1997, s 92</strong></td>
<td>Provide information</td>
<td>For the purposes of the Act, to monitor the RSA provider (s 91)</td>
<td>An RSA provider</td>
<td>Only information in relation to the provision of RSAs</td>
<td>Regulator or authorised person</td>
<td>Specify period in which to provide information, the year and the matters that need to be reported on</td>
<td>‘Within a specified period’</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before the fact (s 117)</td>
<td>Available for lawyers unless client consents or the communication is with a body corporate under administration or winding up (s 118)</td>
</tr>
<tr>
<td><strong>Retirement Savings Accounts Act 1997, s 93</strong></td>
<td>Produce books. Can require books produced in English</td>
<td>For the purposes of the Act, to monitor the RSA provider (s 91)</td>
<td>A ‘relevant person’ in relation to the RSA provider (including a responsible officer of the RSA provider and an auditor of RSA)</td>
<td>Only books relating to the affairs of the RSA provider to the extent that they relate to the provision of RSAs</td>
<td>Regulator or authorised person</td>
<td>Notice to specify reasonable time and reasonable place</td>
<td>Reasonable time for producing books</td>
<td>Not available. Use immunity available for criminal proceedings if claimed before the fact (s 117)</td>
<td>Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 118)</td>
</tr>
<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
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<td><strong>Superannuation Industry (Supervision) Act 1993, s 254(2)</strong></td>
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<tr>
<td>Provide information</td>
<td>For the purposes of the Act</td>
<td>Trustee of a superannuation entity</td>
<td>Must specify an income year of the entity</td>
<td>Regulator or authorised person</td>
<td>Specify period in which to provide information, the year and the matters that need to be reported on</td>
<td>'Within a specified period'</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)</td>
<td>Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)</td>
<td>Not provided (not a reviewable decision: s 10)</td>
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<tr>
<td><strong>Superannuation Industry (Supervision) Act 1993, s 255</strong></td>
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<td>Produce books.</td>
<td>For the purposes of the Act</td>
<td>A 'relevant person' in relation to the superannuation entity</td>
<td>Only any books relating to the affairs of the superannuation entity</td>
<td>Regulator or authorised person</td>
<td>Specify reasonable time and reasonable place</td>
<td>Reasonable time for producing books</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)</td>
<td>Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)</td>
<td>Not provided (not a reviewable decision: s 10)</td>
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<td>Can require books produced in English</td>
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<td><strong>Superannuation Industry (Supervision) Act 1993, s 264(2)</strong></td>
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<tr>
<td>Provide information</td>
<td>Appears that conduct by trustee or investment manager is likely to adversely affect the values or the interests of beneficiaries</td>
<td>A 'relevant person' in relation to the superannuation entity</td>
<td>Only any information or matters relating to the affairs of the entity</td>
<td>Regulator</td>
<td>Specify information required or matters to be reported on and time for providing same. Must be written notice</td>
<td>'Within a stated period'</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)</td>
<td>Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)</td>
<td>Not provided (not a reviewable decision: s 10)</td>
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<td><strong>Superannuation Industry (Supervision) Act 1993, s 269</strong></td>
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<tr>
<td>Produce books</td>
<td>For purposes of an investigation of the affairs of a superannuation entity</td>
<td>A 'relevant person' in relation to the superannuation entity</td>
<td>Not specified</td>
<td>Inspector</td>
<td>Must be written notice</td>
<td>Not specified</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)</td>
<td>Available for lawyers unless client consents or communication is with a body corporate under administration or winding up (s 288)</td>
<td>Not provided (not a reviewable decision: s 10)</td>
</tr>
<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
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<tr>
<td>Superannuation Industry (Supervision) Act 1993, s 270</td>
<td>Provide assistance, answer questions</td>
<td>Investigation of the affairs of a superannuation entity</td>
<td>A ‘relevant person’ in relation to the superannuation entity or others where there are reasonable grounds to suspect or believe they have information relevant to the investigation</td>
<td>Only needs to give ‘all reasonable assistance’</td>
<td>Inspector</td>
<td>Must be written notice</td>
<td>Not specified</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 287)</td>
<td>For statements if person objects to their admission (s 290(5)); for information unless client consents or communication is with a body corporate under administration or winding up (s 298)</td>
</tr>
<tr>
<td>Australian Securities and Investments Commission</td>
<td>ASIC Act 2001, s 19</td>
<td>Provide assistance, answer questions</td>
<td>Suspects or believes on reasonable grounds a person can give information relevant to an investigation under Division 1</td>
<td>A person</td>
<td>Only needs to give ‘all reasonable assistance’. Can be used only for purposes outlined in s 28</td>
<td>ASIC</td>
<td>Must state the general nature of the matter being investigated and set out right to lawyer and privilege against self-incrimination. Requires written notice</td>
<td>Not specified</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
</tr>
<tr>
<td>ASIC Act 2001, s 30</td>
<td>Produce books</td>
<td>Exercise of powers under corporations law, compliance, contraventions, investigations (s 28)</td>
<td>A body corporate that is not an exempt public authority, the responsible entity of a registered scheme, or an ‘eligible person’ in respect of these</td>
<td>Only for the production of books relating to the affairs of the body. Can be used only for purposes outlined in s 28</td>
<td>ASIC member or staff member authorised under s 34</td>
<td>Specify member or staff member, place, time and books to be produced. Requires written notice</td>
<td>At a ‘specified time’</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
<td>For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Case law uncertain regarding clients. Reasonable excuse (s 63)</td>
</tr>
<tr>
<td>Type of power</td>
<td>Reasons for use</td>
<td>Power used against</td>
<td>Limitations</td>
<td>Who has the power</td>
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<td><strong>ASIC Act 2001, s 31</strong></td>
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<tr>
<td>Produce books</td>
<td>Exercise of powers under corporations law, compliance, contraventions, investigations (s 28)</td>
<td>Operators of financial markets and clearing and settlement facilities, board members of operators, people who carry on financial services businesses, and any other person who, in ASIC's opinion, deals with financial products</td>
<td>Only for the production of specified types of books concerning financial products (business affairs, dealings, audits, etc). Can be used only for purposes outlined in s 28</td>
<td>ASIC member or staff member authorised under s 34</td>
<td>Specify member or staff member, place, time and books to be produced. Requires written notice</td>
<td>At a 'specified time'</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
<td>For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients</td>
<td>Not specified</td>
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<td><strong>ASIC Act 2001, s 32A</strong></td>
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<tr>
<td>Produce books</td>
<td>Exercise of powers under corporations law, compliance, contraventions, investigations (s 28). Under Division 2, Part 2 (Unconscionable conduct and consumer protection—financial services)</td>
<td>A person who supplies or supplied financial services or an 'eligible person' in relation to that person</td>
<td>Only for the production of specified books relating to the supply of financial services or the financial service</td>
<td>ASIC member or staff member authorised under s 34</td>
<td>Specify member or staff member, place, time and books to be produced</td>
<td>At a 'specified time'</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
<td>For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients</td>
<td>Not specified</td>
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<tr>
<td><strong>ASIC Act 2001, s 33</strong></td>
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<tr>
<td>Produce books</td>
<td>Exercise of powers under corporations law, compliance, contraventions, investigations (s 28)</td>
<td>A person</td>
<td>Only for the production of specified books in relation to the affairs of a body corporate or registered scheme or by matters covered by ss 31 and 32A</td>
<td>ASIC member or staff member authorised under s 34</td>
<td>Specify member or staff member, place, time and books to be produced</td>
<td>At a 'specified time'</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
<td>For information unless client consents or the communication is with a body corporate under administration or winding up (s 69). Reasonable excuse (s 63). Case law uncertain regarding clients</td>
<td>Not specified</td>
</tr>
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<td>Type of power</td>
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<td>Limitations</td>
<td>Who has the power</td>
<td>Contents of notice</td>
<td>Notice period</td>
<td>Privilege against self-incrimination</td>
<td>Legal professional privilege</td>
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<td><strong>ASIC Act 2001, s 41</strong></td>
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<tr>
<td>Provide information</td>
<td>Exercise of powers under corporations law, compliance, contraventions, investigations (s 40)</td>
<td>Operators of financial markets and clearing and settlement facilities and any person who carries on a financial services business</td>
<td>Only for information in relation to an acquisition or disposal of financial products</td>
<td>ASIC</td>
<td>Need not be in writing</td>
<td>Not specified</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
<td></td>
<td>Not specified</td>
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<tr>
<td><strong>ASIC Act 2001, s 43</strong></td>
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<tr>
<td>Provide information</td>
<td>For a range of circumstances relating to possible contraventions of corporations law</td>
<td>Any person if ASIC believes on reasonable grounds they can give information</td>
<td>Only for determining whether to exercise a power, investigating possible contravention, applying for (civil) declarations and orders</td>
<td>ASIC</td>
<td>Need not be in writing</td>
<td>Not specified</td>
<td>Not available. Use immunity for oral statements is available for criminal proceedings if claimed before the fact (s 68)</td>
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<td>Not specified</td>
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<tr>
<td><strong>Corporations Act 2001, s 912C</strong></td>
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<tr>
<td>Provide information</td>
<td>Not specified. Part 7.6 concerns licensing of financial services</td>
<td>A financial services licensee. If several licensees, one or all licensees</td>
<td>Information must be about the licensee’s financial services</td>
<td>ASIC</td>
<td>Require written notice. Can ask for periodic statements or on specific events</td>
<td>Within time specified if reasonable period</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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<tr>
<td><strong>Corporations Act 2001, s 672A</strong></td>
<td>Provide information</td>
<td>Obtain information about ownership or beneficial ownership of listed companies and managed investment schemes</td>
<td>A member of the company or scheme or a person having a relevant interest in voting shares in the company or scheme</td>
<td>ASIC, listed company or responsible entity for a listed managed investment scheme</td>
<td>Require written notice</td>
<td>Disclosure must be made within 2 days of notice being given</td>
<td>Not specified. Not available to companies in relation to 'proceedings' (s 1316A)</td>
<td>Not specified</td>
<td>Can apply for exemption (s 673)</td>
</tr>
</tbody>
</table>

| **Insurance Contracts Act 1984, s 11C** | Provide documents | For any purpose connected with general administration of 'relevant legislation' | Insurer | Only documents relating to insurance cover provided, not documents relating to particular person | ASIC | Require written notice. Specify documents required | At least 30 days | Reasonable excuse defence (s 11C(2)) | Not specified |

| **Insurance Contracts Act 1984, s 11D** | Provide information | For any purpose connected with general administration of 'relevant legislation' | Insurer | Only information relating to insurer’s organisational structure and administrative arrangements, statistics about the nature and volume of insurance business, copies of training guides and manuals. Not documents dealing with a particular person | ASIC | Require written notice | At least 30 days | Reasonable excuse defence (s 11D(3)) | Not specified |

**Australian Taxation Office**

**Fringe Benefits Tax Assessment Act 1986, s 128**

<p>| Provide information, answer questions, produce documents | For the purposes of the Act | A person (including an employee of a Commonwealth, state or territory government department or any public authority) | None specified. Commissioner has power to require production of ‘any’ document and ask ‘questions’ | Commissioner | Require written notice. Specify time and place for giving evidence | Not specified | Not specified | Not specified | Case law says Administrative Decisions (Judicial Review) Act review is not excluded |</p>
<table>
<thead>
<tr>
<th>Type of power</th>
<th>Reasons for use</th>
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</thead>
<tbody>
<tr>
<td>Income Tax Assessment Act 1936, s 264</td>
<td>Provide information, answer questions, produce books, documents and other papers</td>
<td>Not specified. Commissioner has general administration of the Act (s 8)</td>
<td>A person (including any officer employed by any department of a government or by any public authority) Can only require a person to give evidence concerning their or any other person's income or assessment. No such limit on giving 'information'</td>
<td>Commissioner</td>
<td>Require written notice. Specify time and place for giving evidence</td>
<td>Not specified</td>
<td>Old case law implies no privilege</td>
<td>Not specified</td>
<td>Case law says ADJR Act review is not excluded</td>
</tr>
<tr>
<td>Petroleum Resource Rent Tax Assessment Act 1987, s 108</td>
<td>Provide information, answer questions, produce documents</td>
<td>For the purposes of the Act</td>
<td>A person</td>
<td>Not specified</td>
<td>Commissioner or certifying Minister</td>
<td>Require written notice</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Product Grants and Benefits Administration Act 2000, s 42</td>
<td>Provide information, answer questions, produce documents</td>
<td>Reason to believe a person has information or is capable of giving evidence relevant to the operation of the Act or an 'entitlement Act'</td>
<td>A person</td>
<td>Not specified. Act concerns grants and benefits administered by the Commissioner (s 3)</td>
<td>Commissioner</td>
<td>Require written notice. Specify manner and form of providing information or time and place for giving evidence</td>
<td>Not specified</td>
<td>Not available. Use immunity for any evidence or information is available for other criminal proceedings (s 43)</td>
<td>Not specified</td>
</tr>
<tr>
<td>Superannuation Contributions Tax (Assessment and Collection) Act 1997, s 39</td>
<td>Provide information, answer questions, produce documents</td>
<td>For the purposes of the Act</td>
<td>A person</td>
<td>Not specified. Commissioner has power to require production of 'any' document and ask 'questions'</td>
<td>Commissioner</td>
<td>Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information</td>
<td>A reasonable period to provide information</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Superannuation Contributions Tax (Members of Constitutionally Protected Funds) Assessment and Collection Act 1997, s 33</td>
<td>Provide information, answer questions, produce documents</td>
<td>For the purposes of the Act</td>
<td>A person</td>
<td>Not specified. Commissioner has power to require production of 'any' document and ask 'questions'</td>
<td>Commissioner</td>
<td>Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information</td>
<td>A reasonable period to provide information</td>
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<td>Not specified</td>
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<tr>
<td>Superannuation Guarantee (Administration) Act 1992, s 77</td>
<td>Provide information, answer questions, produce documents</td>
<td>For the purposes of the Act</td>
<td>A person</td>
<td>Not specified. Commissioner has power to require production of ‘any’ document and ask ‘questions’</td>
<td>Commissioner</td>
<td>Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information</td>
<td>A reasonable period to provide information</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Superannuation Industry (Supervision) Act 1993</td>
<td>Any books relating to the affairs of the entity</td>
<td>For the purposes of the parts of the Act administered by the ATO</td>
<td>A person</td>
<td>Only for provisions administered by the Commissioner of Taxation</td>
<td>Commissioner</td>
<td>Written notice to specify reasonable time and place for producing books</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Taxation Administration Act 1953, s 14I</td>
<td>Provide information, answer questions, produce documents</td>
<td>For the purposes of Part IV of the Act (Exchange control: taxation certificates)</td>
<td>A person</td>
<td>Not specified</td>
<td>Commissioner</td>
<td>Written notice. For examinations notice to specify time and place</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Taxation Administration Act 1953, s 353–10 (Schedule 1)</td>
<td>Provide information, answer questions, produce documents</td>
<td>For matters relevant to administration and operation of Schedule 1 (Collection and recovery of income tax and other liabilities) other than Division 340 (Release from liabilities)</td>
<td>A person</td>
<td>Only information relating to the application of indirect tax laws to person or any other entity or for purposes of Schedule 1</td>
<td>Commissioner</td>
<td>Written notice</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>Termination Payments Tax (Assessment and Collection) Act 1997, s 27</td>
<td>Provide information, answer questions, produce documents</td>
<td>For the purposes of the Act</td>
<td>A person</td>
<td>Not specified. Commissioner has power to require production of ‘any’ document and ask ‘questions’</td>
<td>Commissioner</td>
<td>Written notice to specify reasonable time and place for giving evidence or reasonable manner for providing information</td>
<td>A reasonable period to provide information</td>
<td>Not specified</td>
<td>Not specified</td>
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<td>Centrelink</td>
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<td>Provide information, produce documents</td>
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<td>Secretary considers information or document may be relevant to determining whether a person is entitled to be paid family assistance</td>
<td>A person</td>
<td>Only information or document relevant to determine the person or other person's eligibility for family assistance and/or child care benefit and the amount of entitlement</td>
<td>Secretary</td>
<td>Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)</td>
<td>At least 14 days (s 158)</td>
<td>Reasonable excuse defence (s 159).</td>
<td>No specific abrogation of the privilege</td>
<td>Not reviewable by Social Security Appeals Tribunal (ss 111). Secretary may review decision on own initiative, other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)</td>
</tr>
<tr>
<td>A New Tax System (Family Assistance) (Administration) Act 1999, s 155</td>
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<td>Provide information, produce documents</td>
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<td></td>
<td>Determine financial situation of a debtor to Commonwealth under Act and be informed of debtor's change of address</td>
<td>A person who owes a debt under or as a result of the Act</td>
<td>Information must be relevant to the person's financial situation or change of address</td>
<td>Secretary</td>
<td>Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)</td>
<td>At least 14 days (s 158)</td>
<td>Reasonable excuse defence (s 159).</td>
<td>No specific abrogation of the privilege</td>
<td>Not reviewable by SSAT (ss 111). Secretary may review decision on own initiative other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)</td>
</tr>
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<tr>
<td>Privilege against self-incrimination</td>
<td>A person believes person may have information or document that would help locate a debtor to the Commonwealth under Act or is relevant to debtor's financial situation</td>
<td>Information must be relevant to the financial situation or location of a debtor</td>
<td>Secretary</td>
<td>Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)</td>
<td>At least 14 days (s 158)</td>
<td>Reasonable excuse defence (s 159). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 159). No specific abrogation of the privilege</td>
<td>Not reviewable by SSAT (s 111). Secretary may review decision on own initiative other than in exceptional cases where the Secretary exercised those powers himself or herself (ss 104, 105)</td>
<td></td>
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</tbody>
</table>

| A New Tax System (Family Assistance) (Administration) Act 1999, s 156 |

<table>
<thead>
<tr>
<th>Power used against</th>
<th>Limitations</th>
<th>Who has the power</th>
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</thead>
<tbody>
<tr>
<td>Provide information</td>
<td>For the purposes of determining eligibility for family assistance, including when assistance wrongfully given</td>
<td>Information must be about a class of persons and must include only specified types of data (e.g. name, address, marital status, education, employment). All information determined to be not relevant must be destroyed after 13 weeks</td>
<td>Secretary</td>
<td>Written notice to specify time, manner and officer (to provide information or document) or time and place (for giving evidence) (s 158)</td>
<td>At least 14 days (s 158)</td>
<td>Reasonable excuse defence (s 159). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 159). No specific abrogation of the privilege</td>
</tr>
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</table>

<p>| A New Tax System (Family Assistance) (Administration) Act 1999, s 157 |</p>
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<tbody>
<tr>
<td>A New Tax System (Family Assistance) (Administration) Act 1999, s 25</td>
<td>Provide information</td>
<td>Where anything happens, or a claimant becomes aware that anything is likely to happen, that causes the claimant to cease to be eligible for a family tax benefit or becomes eligible for a lesser rate</td>
<td>A person</td>
<td>Information must relate to an event or change of circumstances</td>
<td>Secretary</td>
<td>Secretary must approve a manner of notification that a claimant is to use and must notify the claimant of the approved manner of notification</td>
<td>As soon as practicable after the claimant becomes aware that the event or change has happened or is likely to happen</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>A New Tax System (Family Assistance) (Administration) Act 1999, s 56C</td>
<td>Provide information</td>
<td>Where anything happens, or a claimant becomes aware that anything is likely to happen, that causes the claimant to cease to be conditionally entitled to a child care benefit</td>
<td>A person</td>
<td>Information must relate to an event or change of circumstances</td>
<td>Secretary</td>
<td>Secretary must approve a manner of notification that a claimant is to use and must notify the claimant of the approved manner of notification</td>
<td>As soon as practicable after the claimant becomes aware that the event or change has happened or is likely to happen</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td>A New Tax System (Family Assistance) (Administration) Act 1999, s 219K</td>
<td>Enter premises</td>
<td>To inspect records</td>
<td>An approved child care service or former operator of an approved child care provider</td>
<td>Authorised officer is not authorised to enter premises or remain on premises without consent and must produce an identity card if requested</td>
<td>An authorised officer</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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<tr>
<td>A New Tax System (Family Assistance) (Administration) Act 1999, s 219L</td>
<td>Produce records</td>
<td>An approved child care service must keep records outlined in s 219F(1)</td>
<td>An approved child care service or former operator of an approved child care provider</td>
<td>The occupier, or another person who apparently represents the occupier, must assist the officer with all reasonable facilities and assistance</td>
<td>An authorised officer</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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<td>Type of power</td>
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<tr>
<td><strong>A New Tax System (Family Assistance) (Administration) Act 1999, s 219N</strong></td>
<td>Provide report</td>
<td>Where the child care service provides care to a child the service must provide to the Secretary a report</td>
<td>An approved child care service</td>
<td>Report is to be in the form and manner approved by the Secretary</td>
<td>Secretary</td>
<td>Not specified</td>
<td>Report must be provided to the Secretary some time during the next reporting period</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>A New Tax System (Family Assistance) (Administration) Act 1999, ss 26A and 57A</strong></td>
<td>Provide information</td>
<td>Claimant determined to be entitled to a payment but has not nominated a bank account</td>
<td>A person</td>
<td>Information must be the person's bank account details</td>
<td>Secretary</td>
<td>Need not be in writing</td>
<td>28 days</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>A New Tax System (Family Assistance) (Administration) Act 1999, s 57F</strong></td>
<td>Provide information</td>
<td>Claimant determined to be conditionally eligible for child care benefit by fee reduction</td>
<td>A person</td>
<td>Information must be specified in a data verification form accompanying notice</td>
<td>Secretary</td>
<td>Require written notice. Specify time required for form to be returned</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>A New Tax System (Family Assistance) (Administration) Act 1999, s 219TJ</strong></td>
<td>Provide information</td>
<td>Where an event or change of circumstances is likely to affect the ability of the nominee to act as a nominee</td>
<td>A nominee of a person</td>
<td>Information must relate to an event or change of circumstances</td>
<td>Secretary</td>
<td>Require written notice. Specify manner and time for providing information</td>
<td>At least 14 days except for any proposal by nominee to leave Australia</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>A New Tax System (Family Assistance) (Administration) Act 1999, s 219TK</strong></td>
<td>Provide statement</td>
<td>For matter relating to nominee's disposal of money paid to nominee on behalf of a person</td>
<td>A payment nominee</td>
<td>Statement must be about a matter relating to disposal of money paid to nominee on behalf of a person</td>
<td>Secretary</td>
<td>Require written notice. Specify manner and time for giving statement</td>
<td>At least 14 days</td>
<td>Reasonable excuse defence (s 219TK(8)). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 219TK(8)). No specific abrogation of the privilege</td>
</tr>
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<td>Type of power</td>
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<td><strong>Farm Household Support Act 1992, s 54</strong></td>
<td>Provide information, produce documents</td>
<td>Secretary considers information may be relevant to questions relating to entitlement and rates of payment for farm household support</td>
<td>A person</td>
<td>Information must be relevant to entitlement and rates of payment for farm household support, exceptional circumstances support, dairy exit payments</td>
<td>Secretary</td>
<td>Specify time, manner and officer for providing information and specify notice given under this section</td>
<td>At least 14 days</td>
<td>Reasonable excuse defence (s 54(7A)). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 54(7A)). No specific abrogation of the privilege</td>
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<tr>
<td><strong>Social Security (Administration) Act 1999, s 192</strong></td>
<td>Provide information, produce documents</td>
<td>Secretary considers information may be relevant to question relating to entitlement and rates of payment for social security</td>
<td>A person</td>
<td>Information must be relevant to questions relating to entitlement and rates of payment for social security, including allowances</td>
<td>Secretary</td>
<td>Specify time, manner and officer for providing information and specify that notice is given under s 196. The notice may require the person to provide the information by appearing before a specified officer to answer questions</td>
<td>At least 14 days (s 196)</td>
<td>Reasonable excuse defence (s 197). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 197). No specific abrogation of the privilege</td>
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<tr>
<td><strong>Social Security (Administration) Act 1999, s 193</strong></td>
<td>Provide information, produce documents</td>
<td>To determine financial circumstances of debtor to Commonwealth and be informed of debtor’s change of address</td>
<td>A person who owes a debt under social security law or the Farm Household Support Act 1992</td>
<td>Information relevant to financial situation or change of address</td>
<td>Secretary</td>
<td>Specify time, manner and officer for providing information and specify that notice is given under s 196. The notice may require the person to provide the information by appearing before a specified officer to answer questions</td>
<td>At least 14 days (s 196)</td>
<td>Reasonable excuse defence (s 197). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 197). No specific abrogation of the privilege</td>
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<td>Privilege</td>
<td>against self-incrimination</td>
<td>A person</td>
<td>Information must be relevant to the location or financial situation of the person</td>
<td>Secretary</td>
<td>Specify time, manner and officer for giving information and specify that notice is given under s 196. The notice may require the person to give the information by appearing before a specified officer to answer questions</td>
<td>At least 14 days (s 196)</td>
<td>Reasonable excuse defence (s 197). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 197). No specific abrogation of the privilege</td>
<td>Not reviewable by SSAT (s 144). Secretary may review decision on own initiative if satisfied of sufficient reason (s 126)</td>
</tr>
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</table>
| Social Security (Administration) Act 1999, s 194
 Provide information, produce documents | Secretary believes person may have information or document that would help locate debtor to the Commonwealth or is relevant to the debtor’s financial situation | A person           | Information must be relevant to the location or financial situation of the person | Secretary         | Specify time, manner and officer for giving information and specify that notice is given under s 196. The notice may require the person to give the information by appearing before a specified officer to answer questions | At least 14 days (s 196) | Reasonable excuse defence (s 197). No specific abrogation of the privilege | Reasonable excuse defence (s 197). No specific abrogation of the privilege | Not reviewable by SSAT (s 144). Secretary may review decision on own initiative if satisfied of sufficient reason (s 126) |
| Social Security (Administration) Act 1999, ss 63 and 64
 Provide information, answer questions, attend for examination | Secretary is of the opinion that a person should provide various types of information | A person           | Information must relate to certain types of information. Section 64 allows for medical examinations | Secretary         | Must inform person of the effect of the section                                      | Not specified | Reasonable excuse defence (s 74) | Only required to take reasonable steps to comply | Merits review available: Secretary (s 126), SSAT (s 142), AAT (s 179) |
| Social Security (Administration) Act 1999, s 70
 Provide information | To be informed of care receiver’s change of circumstances | A care receiver or a parent of a care receiver | Information must be about a specified event or change in circumstances | Secretary         | Notice to specify time and manner for giving information                              | At least 14 days after the event or change in circumstances (s 72) | Reasonable excuse defence (s 74). No specific abrogation of the privilege | Reasonable excuse defence (s 74). No specific abrogation of the privilege | Secretary (s 126), SSAT and AAT review not available (s 144(k)) |
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<thead>
<tr>
<th>Type of power</th>
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<tr>
<td>Provide information</td>
<td>Where an event, change of circumstances or matter might affect or have affected payment or qualification for a concession card</td>
<td>A person who is a claimant, recipient or former recipient of a social security payment or concession card</td>
<td>For events and circumstances (but not matters): must be one that might affect or has affected payment or eligibility for payment. For a former recipient, not required to comply if event or change occurred more than 13 weeks before the giving of notice (s 69)</td>
<td>Secretary</td>
<td>Specify time and manner of providing information</td>
<td>At least 7 days for some types of information and at least 14 days for other types (s 72)</td>
<td>Reasonable excuse defence (s 74). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 74). No specific abrogation of the privilege</td>
<td>Secretary (s 126), SSAT and AAT review not available (s 144(k))</td>
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<td>Social Security Act 1991, s 92F</td>
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<td>Provide information</td>
<td>In the course of an application for registration as member of the pension bonus scheme</td>
<td>A person who has applied for registration</td>
<td>Section defines what information can be sought but the definition is not exhaustive</td>
<td>Secretary</td>
<td>Specify period for providing information</td>
<td>At least 14 days</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)</td>
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<td>Social Security Act 1991, s 1061ZJ</td>
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<td>Provide a copy of tax assessment</td>
<td>Not specified. Division 2 of Part 2A concerns qualification for senior health card</td>
<td>A person who holds a seniors health card</td>
<td>Applies only to notice of assessment or amended assessment</td>
<td>Secretary</td>
<td>Not specified</td>
<td>Within 13 weeks of receipt of tax assessment notice</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)</td>
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<td><strong>Social Security Act 1991, s 1061ZZBR</strong></td>
<td>Provide information</td>
<td>Where an event or change of circumstance might affect the payment of financial supplement. (s 1061ZZBS)</td>
<td>A person who is a 'category 2' student receiving financial supplement</td>
<td>Only information relating to event or change that may affect the payment of financial supplement (s 1061ZZBS)</td>
<td>Requires written notice. Specify time and manner of providing information and specify it is a 'recipient notification notice' (s 1061ZZBT)</td>
<td>14 days or 15 to 28 days in special circumstances (s 1061ZZBV)</td>
<td>Reasonable excuse defence (s 1061ZZBW), No specific abrogation of the privilege</td>
<td>Merits review available: Secretary (s 126 SS (Admin) Act 1999), SSAT (s 142 SS (Admin) Act 1999), AAT (s 179 SS (Admin) Act 1999)</td>
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**Social Security Act 1991, s 1061ZZBY**

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<tr>
<td><strong>Social Security Act 1991, s 1209H</strong></td>
<td>Provide information</td>
<td>Reason to believe Commissioner of Taxation has information relevant to Part 3.18 or relationship between an individual and a trust is relevant to Part 3.18</td>
<td>Issued to the Commissioner of Taxation</td>
<td>Information must be relevant to Part 3.18 of the Act (Means test treatment of private companies and trusts), Use of information is limited by s 1209H(5)</td>
<td>Notice must be in writing</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
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<td>Provide information, produce documents</td>
<td>Secretary considers information may be relevant to student assistance entitlement and rate of payment</td>
<td>A person</td>
<td>Not specified</td>
<td>Secretary</td>
<td>Specify time, manner and officer for providing information or time and place for giving evidence (s 347)</td>
<td>At least 14 days (s 347)</td>
<td>Reasonable excuse defence (s 347). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 347). No specific abrogation of the privilege</td>
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<td>Provide information, produce documents</td>
<td>Determine financial circumstances of debtor to the Commonwealth, be informed of debtor’s change of address</td>
<td>A person who owes a debt in relation to a student assistance benefit</td>
<td>Information must be relevant to financial situation or change of address</td>
<td>Secretary</td>
<td>Specify time, manner and officer for providing information or time and place for giving evidence (s 347)</td>
<td>At least 14 days (s 347)</td>
<td>Reasonable excuse defence (s 347). No specific abrogation of the privilege</td>
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<td>Provide information, produce documents</td>
<td>Secretary believes person may have information or document relating to debtor to the Commonwealth</td>
<td>A person</td>
<td>Information must be relevant to financial situation or location of a debtor</td>
<td>Secretary</td>
<td>Specify time, manner and officer for providing information or time and place for giving evidence (s 347)</td>
<td>At least 14 days (s 347)</td>
<td>Reasonable excuse defence (s 347). No specific abrogation of the privilege</td>
<td>Reasonable excuse defence (s 347). No specific abrogation of the privilege</td>
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<td><strong>Medicare</strong></td>
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<td><strong>Medicare Australia Act 1973, s 8P</strong></td>
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<td>Provide information, produce documents</td>
<td>Reasonable grounds for believing an offence has been or is being committed and that information or document is relevant</td>
<td>A person</td>
<td>Not required to produce records containing a patient’s clinical details (s 8P(3)) subject to exceptions (s 8P(4))</td>
<td>An authorised officer</td>
<td>Specify time, manner and officer for providing information or time and place for giving evidence (s 8Q)</td>
<td>At least 14 days (s 8Q)</td>
<td>Not available. Use immunity for evidence or information in criminal proceedings (s 8S)</td>
<td>Reasonable excuse defence (s 8P). No specific abrogation of the privilege</td>
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Appendix B  Section 51 of the Administrative Appeals Tribunal Act

Section 51 of the Administrative Appeals Tribunal Act 1975 describes the functions and powers of the Administrative Review Council:

(1) The functions of the Council are:

(aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and

(ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

(i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

(ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;

and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be
made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

(2) The Council may do all things necessary or convenient to be done for or in connexion with the performance of its functions.

(3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.
Appendix C  Submissions received

The Council reviewed submissions in response to its draft report from the following organisations:

- Association of Superannuation Funds of Australia
- Australian Competition and Consumer Commission
- Australian Customs Service
- Australian Friendly Societies Association
- Australian Government Solicitor
- Australian Institute of Company Directors
- Australian Privacy Foundation
- Australian Prudential Regulation Authority
- Australian Securities and Investments Commission
- Australian Taxation Office
- Centrelink
- Child Support Agency
- Civil Aviation Safety Authority
- Comcare
- Commonwealth Director of Public Prosecutions
- Department of Agriculture, Fisheries and Forestry
- Department of Defence
- Department of Education, Science and Training
- Department of Employment and Workplace Relations
- Department of Families, Housing, Community Services and Indigenous Affairs
- Department of Health and Ageing
- Department of Immigration and Citizenship
• Department of the Treasury
• Department of Transport and Regional Services
• Freehills
• Law Council of Australia
• Medicare Australia
• National Australia Bank
• National Legal Aid
• Office of Evaluation and Audit (Indigenous Programs), Department of Finance and Administration
• Office of the Inspector of Transport Security, Department of Transport and Regional Services
• Office of the Parliamentary Council
• Office of the Privacy Commissioner
• Productivity Commission
• Telstra
• Westpac Banking Corporation