

ASIC Compelled Interviews

The Australian Securities and Investments Commission is a regulatory responsible for the oversight of corporate activity in Australia.

When ASIC officers decide to investigate an individual or a company, they have a number of powers at their disposal which they use to gather relevant information and documentation.

This guide will assist you to understand ASIC's compulsory investigation powers.

Section 19 Interviews

Pursuant to section 19 of the Australian Securities and Investment Commission Act 2001 ASIC can require a person to assist them in an investigation that they are conducting into corporate activity.

A requirement under a section 19 Notice is mandatory. If you fail to comply with the requirement, it is an offence and will lead to summary prosecution of company directors and company officers.

What does the legislation say?

Section 19 of the ASIC Act 2001 says that, 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, ASIC may do the following:

- By written notice require a person to give to ASIC all reasonable assistance in connection with the investigation; and
- Require that person to appear before a specified member or staff member for examination on oath and to answer questions.

A notice issued pursuant to section 19 must state the general nature of the matter that ASIC is investigating.

Section 19 compulsion versus the right not to self-incriminate

The section 19 investigative power is a power of compulsion. A person issued with a section 19 Notice must answer the questions that are asked of them. For the purpose of the section 19 investigative interview, it is not a reasonable excuse for a person to refuse or fail to give information, sign a record or produce a book on the basis that to do those actions might tend to incriminate the person or make the person liable to a penalty.

This represents an abrogation of the right to silence and the right not to incriminate oneself.

However, in circumstances where the person's answer may tend to incriminate them, the person is entitled to make a claim that the statement or signing of the record might tend to incriminate the person. If that privilege against self-incrimination is claimed before answering the question, the statement is not admissible in evidence against the person in:

- A criminal proceeding; or
- A proceeding for the imposition of a penalty.

The only exception to this is where the statement made or record signed is false. In the event that a false statement is made after claiming the privilege against self-incrimination, that false statement may be used for the purpose of evidencing a failure to comply with the requirements of the section 19 powers.

Can I have a lawyer present?

Yes; people who are required by section 19 to attend an investigative hearing are able to be represented by a lawyer. A lawyer may attend with the person and be present during the examination. In addition, the person's lawyer is able to, with the permission of the inspector, address the ASIC inspector and ask questions of their client about matters to which the inspector has examined the examinee.

It is important that in the case of company directors and other company officers, lawyers assist their clients during the course of an ASIC investigation. There may be information and answers that must be clarified through the use of questioning by the examinee's lawyer.

Can I have a support person?

Section 19 examinations take place in private. Pursuant to the legislation, the examination must take place in private and the inspector may give directions about who may be present during the examination or part of the examination.

The only people able to be present at the examination are:

- The inspector;
- The examinee or person being questioned;
- A staff member approved by ASIC;
- A lawyer for the examinee; or
- Any other person directed to be present by the inspector.

As a result, because examinations take place in private, a support person is not ordinarily permitted in a section 19 compulsory examination.

Non-compliance with a section 19 Notice

A person must not intentionally or recklessly fail to comply with a section 19 notice. If the person is found guilty of failing to comply with the notice, the maximum penalty is 2 years imprisonment. A person will have a defence to this offence if:

- The person has a reasonable excuse; or
- The person has stated the matter to the best of his or her knowledge or belief.

If as a result of a section 19 ASIC investigation, there is an allegation that you have intentionally or recklessly failed to comply with the notice, ASIC may cause a summary criminal prosecution to be commenced.

Where can I get more information?

If your company has been contacted by ASIC, you should immediately seek legal advice. Robertson O'Gorman Solicitors represents companies and company officers at all stages of the ASIC investigation process including through section 19 interviews.

To speak to one of our specialists please phone (07) 3034 0000 or email mail@robertsonogorman.com.au.



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