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So you've been ordered to an interview or to hand over documents?

Most specialist regulators have broad powers to compel attendance at interviews and the production of documents. But there are limits to when and how such orders can be issued.

A recent judgment from Australia sheds some light on this issue, while also confirming how difficult it is to mount a legal challenge against the exercise of these powers by a regulator.

The case

The facts of *A v Independent Commission Against Corruption [2014] NSWCA 414* are a little unclear as the judgment is subject to broad suppression orders. It appears that the ICAC issued a summons to A Co to appear and produce documents. The request related to the content of an email account and electronic calendar operated by or on behalf of a political journalist who had some connection with A Co. The notice made no reference to the nature of the allegation or complaint which was being investigated by ICAC, or the purpose for which the documents were sought.

A Co mounted a broad ranging attack on the notice, arguing that it was invalid because it was unrelated to an existing allegation or complaint. Various administrative law challenges were also brought against the decision to issue the notice.

Key findings

A Co succeeded in establishing that, although the ICAC Act did not specifically require that a notice must relate to the purposes of an investigation, this requirement should be read into the Act because the power to compel the production of documents was incidental to the power to investigate.

However the Court found that investigative relevance was an extended concept and that it was not "self-evident" that the very broad request which ICAC had issued was not for the purposes of an investigation. It therefore ruled that the notice was valid. It also rejected the administrative law arguments.

Take-outs for the New Zealand context

So what does this decision mean for the person facing an onerous request for documentation from a New Zealand regulator?

Firstly, legal challenges will be hard to maintain. This is reinforced in the case of the FMA because, under section 57 of the Financial Markets Authority Act 2011, a notice must be complied with pending legal challenge to its validity unless the applicant succeeds in getting interim orders. Section 57 supplements the High Court's normal grounds for interim orders with some additional requirements of which applicants will need to satisfy the court.

Secondly, the courts will be loath to second guess a claim by a regulator that documents are needed for the purposes of an investigation:

"[T]he evaluation of probabilities concerning the usefulness of the information is, within limits, for the investigator, and certainly not for the persons from whom disclosure is sought".

It is a broader test of relevance than applies in court proceedings.

Thirdly, and more helpfully, the Court has confirmed that the "reasonable grounds" for the non-compliance defence can be based not only on legal constraints (such as legal privilege and the privilege against self-incrimination), but can also include physical and practical difficulties in complying with the requirement.

Finally, ICAC came in for some criticism for failing to engage. The Court noted that litigation might not have been necessary had ICAC taken advantage of the "ample opportunity" it had to acknowledge and accommodate the legitimate concerns of the applicant but that it had instead "preferred the course of avoiding practical engagement".

That accords with our view, that sensible engagement with the regulator is usually the best way to resolve unduly onerous document requests.

For further information, please contact the lawyers featured.

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