



Australian
Competition &
Consumer
Commission

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31st July 2017

ASIC Enforcement Review
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Dear ASIC Enforcement Review Taskforce

ASIC Enforcement Review - Position and Consultation Papers 2, 4 and 5

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to comment on issues arising from the Position and Consultation Papers released by the Australian Securities and Investments Commission (ASIC) Enforcement Review Taskforce and to engage with the ASIC Taskforce as it conducts this review.

The ACCC makes this submission on the basis of our long history of using a similar suite of investigation tools and filling similar enforcement roles to ASIC. Like ASIC, we have a responsibility to investigate alleged serious criminal offences and refer briefs to the Commonwealth Director of Public Prosecutions and can take civil penalty proceedings. The ACCC and ASIC's ability to fulfil our obligations relies upon the ACCC and ASIC having a full suite of effective investigative and enforcement powers.

In summary, the ACCC submits the following:

- To increase ASIC's ability to enforce compliance with specialist criminal laws, it is crucial that ASIC has a broad suite of investigative tools including the capacity to obtain intercepted material for use in their own investigations. The investigation and enforcement of serious crimes is hampered by requiring ASIC (and the ACCC) to rely on investigations led by general law enforcement entities with interception powers.
- ASIC and the ACCC should have equivalent ancillary search and seizure powers to those in the *Crimes Act 1914* (Crimes Act), especially in relation to electronic material. There is no reason why the search warrant powers set out in the ASIC legislation (or the *Competition and Consumer Act 2010* (CCA)) should be less than what is provided under the Crimes Act in circumstances where the same conduct can amount to either a civil contravention or a criminal offence.
- In circumstances where the content of financial industry codes will not be prescribed as law but negotiated by business and potentially approved by ASIC, it is preferable that any proposed exemption from the competition law around formation and entry into such a code be as narrow as possible.

Paper 5 - ASIC's Access to Telecommunications Intercept Material

The ACCC strongly supports an amendment to the *Telecommunications Interceptions and Access Act 1979* (TIA Act) to enable interception agencies to share lawfully intercepted information with agencies responsible for investigating serious Commonwealth offences (such as insider trading and cartel offences) for which a warrant may be obtained under the TIA Act. This would enable the ACCC and ASIC to use intercepted material in their investigations and therefore increase their ability to enforce compliance with the laws they enforce.

The Taskforce's consultation paper notes that ASIC has experienced a number of practical problems that limit its capacity to obtain and use telephone interception evidence for legitimate purposes. The ACCC has experienced very similar, if not identical, problems.

The Taskforce notes different structures are in place in other jurisdictions which do not introduce such impediments to breaking down insider trading via telephone intercept product. The same analysis also applies to investigation of criminal cartel conduct by counterpart agencies to the ACCC overseas.

As the Taskforce notes in its paper, telephone intercept material can be critically important for investigation and prosecution of serious offences such as insider trading.

Telephone interception is available in Australia to investigate serious offences such as insider trading and cartel conduct, much as it is in other jurisdictions. However, the current structure of the law in Australia results in a situation where the agency which intercepted the telecommunication cannot refer the investigation to ASIC or the ACCC for potential investigation and prosecution. Rather, it requires the interception agency to investigate the specialist offence at which point it will seek the support of the subject specific expertise of ASIC or the ACCC in the intercepting agency's investigation.

As noted by the Taskforce in the Consultation and Position Paper, the current framework can cause significant management, resource and administrative problems especially where the interception agency may have competing law enforcement priorities and not be in a position to investigate the relevant Corporations Act (and in the ACCC's case, CCA) offence. In those circumstances, telephone intercept material already in the possession of the Commonwealth that assists in proving a breach of the law will not be available to establish insider trading and cartel conduct offences.

I note that the Parliamentary Joint Committee on Intelligence and Security supported the need for law enforcement and security agencies to be able to share telecommunication interception material to ensure that serious crimes and threats to national security can be investigated in a timely and thorough manner.¹

In light of all these matters, the ACCC strongly supports an amendment to the TIA Act which allows both ASIC and the ACCC the capacity to receive telecommunications intercept material that has been lawfully obtained by interception agencies and to use that material in its own investigations and prosecutions of serious offences under the Corporations Act and CCA.

¹ Parliamentary Joint Committee on Intelligence and Security Report of the Inquiry into Potential Reforms of Australia's National Security Legislation, May 2013, page 41.

If ASIC and the ACCC are made recipient agencies it would be necessary to ensure that privacy of telecommunications content is respected by imposing the same record keeping and reporting requirements placed on the interception agency on ASIC and the ACCC.

Paper 2 – Harmonisation and Enhancement of Search Warrant Powers

The ACCC supports the broad principle expressed by the Taskforce that harmonisation of and consistency between the search and seizure powers of ASIC, the ACCC and the Australian Federal Police (AFP) is desirable. As the Taskforce stated, the ACCC and ASIC are ‘analogous regulators’ and so their respective enforcement powers should be consistent, effective and fit for purpose.

To this end, the ACCC wishes to comment upon some of the Taskforce’s preliminary positions by drawing upon its own experience with its search and seizure powers so that ASIC may both avoid problems experienced by the ACCC as well as learn from positive elements of its enforcement provisions.

Forewarning of search warrants by ASIC

The ACCC supports removing the forewarning requirement.

Using a warrant is a substantial imposition on the property and personal rights of the recipient, requires meeting significant legal requirements and is time consuming and expensive. Therefore the ACCC and ASIC only use warrants as an investigative tool in serious investigations where it is unlikely that the evidential material can be obtained any other way and / or where the element of surprise is important. Forewarning provides the target of a future warrant with the opportunity to destroy, alter or conceal evidence which would undermine the ability of ASIC to progress the investigation.

ASIC Act search warrants to provide for search and seizure of ‘evidential material’

ASIC is required to specify the particular documents thought to exist (‘particular books’) before conducting a search, rather than describing a category of relevant documents. ASIC’s subsequent search and seizure is limited to those ‘particular books’. This means that if, in the course of an ASIC Act warrant, an ASIC officer identifies documents that constitute highly relevant evidence relating to offences to which the warrant relates but those documents do not form part of the ‘particular books’ specified in the warrant, the ASIC officer has no authority to seize those documents.

In contrast, when conducting a search warrant, the ACCC has a much greater ability to seize any document that may afford evidence of the contravention(s) set out in the warrant.²

The ACCC supports amending the ASIC Act to allow ASIC to search for and seize a broader range of evidential material and not limiting it to ‘particular books’. The current ‘particular books’ requirement is likely to severely limit the utility of ASIC’s search warrant power, as it may be unable to seize high quality evidence of a serious breach of the ASIC Act. It may also require ASIC to execute a second warrant at a later date to obtain that evidence.

² See section 154A of the *Competition and Consumer Act 2010*.

Further, allowing ASIC to search for and seize 'evidential material' would bring the ASIC Act in line with the CCA, which allows the ACCC to search for and seize 'evidential material'. This threshold allows the ACCC to seize a wide range of documents, and the ACCC has never executed a warrant in circumstances where we knew, before executing the warrant, all of the particular documents that were likely to evidence the alleged breaches we were investigating. It therefore addresses the problems ASIC faces due to the 'particular books' requirement.

ASIC Act search warrants to be issued when there is a reasonable suspicion of a contravention of an indictable offence and material seized under ASIC Act search warrants by ASIC should be available for use in criminal, civil and administrative proceedings

The ACCC considers that ASIC's ability to seek a search warrant should not be limited to indictable offences. The ACCC is able to seek a search warrant for both civil and criminal investigations. The ACCC has concurrent civil and criminal jurisdiction in a number of areas, for example cartel conduct (indictable offences) and certain provisions of the Australian Consumer Law (summary offences).

The ACCC's experience shows that it is important that the regulator of concurrent jurisdiction provisions have the ability to execute a warrant before deciding whether it will pursue a matter criminally or civilly. Currently, the ACCC begins a cartel conduct investigation on the assumption that a criminal charge may be laid, and then later decides whether the matter should proceed criminally or civilly. Having this flexibility is important because (as ASIC itself submitted to the Taskforce) it is almost always unclear at the beginning of an investigation whether the proceeding will be civil or criminal.

Like the ACCC, there are a number of provisions where ASIC has concurrent jurisdiction, for example insider trading, and so we believe it is appropriate that ASIC has the same ability to seek a search warrant as the ACCC currently does.

ASIC Act search warrant powers to include ancillary powers that mirror the Crimes Act provisions

The ACCC supports amending the ASIC Act to include ancillary powers that mirror the Crimes Act provisions. For regulators like ASIC and the ACCC to effectively perform their enforcement functions, it is crucial that their search and seizure powers keep up to date with technological changes in the way evidential material is stored, communicated and transported. As noted in the Consultation Paper, the ACCC and ASIC face significant difficulties in relation to electronic material. These issues have increased the resource burdens on the ACCC and businesses subject to search warrants.

It appears that ASIC experiences some similar problems as its provisions are also not the most up to date. The provisions in the *Crimes Act* are "the most up to date" and they have been effective at addressing the practical issues that the AFP formerly faced and that ASIC and the ACCC currently still face. To ensure consistency and harmonisation between all the regulators, the ACCC supports amending both ASIC and the ACCC's ancillary search warrant powers to match those of the Crimes Act.

Time limit for retention of evidence obtained via a search warrant

It is essential that enforcement agencies be able to retain evidential material obtained from conducting a search warrant for sufficient time to ensure that it is able to use that material in its enforcement actions.

Adopting the ancillary powers set out in the Crimes Act should also include adopting an equivalent provision to section 3ZQX of the Crimes Act. Under section 3ZQX of the Crimes Act, the Commissioner must take reasonable steps to return the thing to the person from whom it was seized if they are satisfied that the thing seized is not required, or is no longer required.

Section 154U of the CCA, in contrast, requires the ACCC to return seized things at the end of 120 days after the things were seized, unless proceedings have been instituted before the end of the 120 days which have not been completed, or an extension order is made under section 154V. Section 154V provides for a magistrate to make an extension order allowing the inspector to retain the thing for a period not exceeding 3 years. An order extending the period can only be sought if proceedings have not commenced.

The 120 day time limit, even where an extension is provided for, has been problematic for the ACCC for example, in relation to protracted proceedings. If the ACCC commences proceedings after the initial 120 days (likely in most investigations) and within a period covered by an extension order obtained under section 154V, then it is required to return the seized things at the conclusion of the extension period (whatever granted, up to three years), notwithstanding that proceedings may still be ongoing.

This is because, firstly, the exemption for court proceedings in subsection 154U(2)(a) applies only to proceedings commenced within the original 120 days, and not within any extension period granted under section 154V. Secondly, the ACCC would not be able to seek a further extension under section 154V as an inspector can only apply for an order if proceedings have not commenced, and a magistrate can only make an order if they are satisfied that the thing can be used for the purposes of an *investigation* (which would arguably have already been completed if proceedings had commenced).

Paper 4 – Industry Codes in the Financial Sector

Industry Codes in the Financial Sector

The ACCC is generally supportive of the co-regulatory model put forward in the Position and Consultation Paper 4 Industry Codes in the Financial Sector. The ACCC supports an industry codes model which improves the content, enforceability and consistency of codes.

The paper discusses whether there is a need for the need for an express exemption to Part IV of the CCA if an industry code scheme is introduced in circumstances where the content of financial industry codes will not be prescribed as law but negotiated by business and potentially approved by ASIC. The paper relevantly states:

‘...in some cases conduct associated with the formation of and subscription to codes may potentially enliven the provisions of Part IV of the CCA. Consideration will need to be given to whether these matters should be expressly taken to be authorised as an exception to Part IV.’

The ACCC is concerned by the prospect of a broad legislative exemption being created to the competition provisions of the CCA for any conduct ‘associated with the formation of and subscription to’ every financial industry code. While there are benefits from industry members seeking to improve practices via an industry code, it is doubtful that an industry code can only be arrived at by firms engaging in conduct that is likely to breach the competition provisions in Part IV of the CCA.

If this assessment is incorrect and the panel considers that an exemption is needed, the ACCC believes the wording of any new exemption that is created by statute or regulation should be as narrow as possible.

However, the CCA already provides scope for a tailored approach to exceptions to the competition provisions in Part IV, without requiring a change in the law. The "authorisation" process would allow industry participants to give notice of the type of conduct that they propose to engage in and for that conduct to be authorised, that is effectively exempted from the competition provisions of the CCA by the ACCC where the public benefits of that particular proposed conduct outweigh the detriments. Authorisation applications are assessed via a transparent, public process.

The ACCC is very willing to further elaborate on these issues. Should you wish to discuss further, please contact Marcus Bezzi, Executive General Manger, Competition Enforcement, 02 9230 9130.

Yours sincerely



Rod Sims
Chairman