



**ASIC**

Australian Securities & Investments Commission

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# **ASIC Enforcement Review**

## **Positions and Consultation Paper 2—Harmonisation and enhancement of search warrant powers**

### **Submission by the Australian Securities and Investments Commission**

August 2017

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## Executive summary

- 1 ASIC welcomes the opportunity to make a submission to the ASIC Enforcement Review Taskforce (Taskforce) in response to its Positions and Consultation Paper 2 *Harmonisation and enhancement of search warrant powers*, issued on 28 June 2017 (Consultation Paper 2).
- 2 ASIC is Australia’s corporate, markets, financial services and consumer credit regulator. We have legislative responsibility for the enforcement of various laws including the *Australian Securities and Investments Commission Act 2001* (ASIC Act), *Corporations Act 2001* (Corporations Act), the *National Consumer Credit Protection Act 2009* (National Credit Act), the *Superannuation Industry (Supervision) Act 1993* (SIS Act), and the *Retirement Savings Accounts Act 1997* (RSA Act).
- 3 Search warrants are one of the most effective investigative tools available to ASIC to obtain and secure evidential material, and prevent the destruction and concealment of evidence.
- 4 We are currently able to utilise specific search warrant powers contained in the ASIC Act, National Credit Act, SIS Act and RSA Act, and also the search warrant powers contained in the *Crimes Act 1914* (Crimes Act). However, there are problems with the search warrant powers available to ASIC which limit the utility of these powers as an investigative tool, and lead to inconsistencies in the way that they operate.
- 5 The search warrant powers currently available to ASIC in the legislation that we administer are contained in:
  - (a) sections 35–37 of the ASIC Act;
  - (b) sections 269–271 of the National Credit Act;
  - (c) sections 271–273 of the SIS Act; and
  - (d) sections 102–104 of the RSA Act.
- 6 The primary difference between these search warrant powers is that ASIC can only apply for search warrants under the National Credit Act, SIS Act, and RSA Act if we have previously issued a notice requiring the relevant person to produce ‘particular books’ and the person has failed to do so. This failure enlivens ASIC’s ability to apply for a warrant in respect of those books. This ‘forewarning’ requirement was removed from the ASIC Act search warrant provisions in 2010.
- 7 Under the above provisions, ASIC can apply to a magistrate for a search warrant in respect of specific premises to search for and seize ‘particular books’. A magistrate may issue a search warrant in respect of those books if

they are satisfied that there are reasonable grounds for suspecting that the books are, or may be within the next 72 hours, on the specified premises.

- 8 Books seized under these provisions can be used for the full range of law enforcement functions carried out by ASIC, including contraventions that may result in criminal, civil or administrative proceedings. The books are admissible in civil and administrative proceedings.
- 9 These search warrant powers do not include any ancillary powers that support more effective execution of search warrants, as provided in the Crimes Act and discussed below.
- 10 ASIC can also apply to a magistrate for a search warrant under s3E of the Crimes Act. A magistrate is authorised to issue a warrant under s3E(1) of the Crimes Act if they are satisfied that there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, any ‘evidential material’ at the specified premises.
- 11 ‘Evidential material’ includes a thing relevant to an indictable or summary offence and is broader in scope than ‘particular books’. The indictable or summary offence that is the subject of the search warrant must be a Commonwealth offence, or a State offence that has a Federal aspect or connection.
- 12 The Crimes Act search warrant powers are supported by a range of ancillary provisions—including, for example, provisions under s3K(1) and (4) of the Crimes Act authorising the use of equipment to examine or process computers or other electronic devices during the execution of a search warrant.
- 13 Evidential material obtained under a Crimes Act search warrant can only be used by ASIC for investigating and prosecuting criminal offences. It cannot be used for investigating contraventions that are actionable only by civil or administrative proceedings undertaken by ASIC and is not admissible in civil or administrative proceedings.
- 14 We have identified problems with the search warrant powers available to us which limit the utility of these powers as an investigative tool. In summary, these problems include the following:
- (a) There are inconsistencies between the search warrant powers in the ASIC Act, National Credit Act, SIS Act and RSA Act—especially in relation to the ‘forewarning’ requirement (which is no longer part of the ASIC Act).
  - (b) Search warrants issued under the ASIC Act, National Credit Act, SIS Act and RSA Act only authorise the search for, and seizure of, ‘particular books’ that are specified in the warrant rather than the broader ‘evidential material’ that can be seized under the Crimes Act.

- (c) Search warrants under the ASIC Act, National Credit Act, SIS Act and RSA Act lack the range of critical supporting ancillary provisions such as those contained in the Crimes Act.
- (d) As a result of the limitations, outlined above, of search warrants issued under the ASIC Act, National Credit Act, SIS Act and RSA Act, ASIC predominantly relies on the Crimes Act search warrant power in our investigations. However, we are unable to use material lawfully obtained under a Crimes Act search warrant for investigating contraventions that are actionable through civil or administrative proceedings, or for conducting such proceedings.

## A ASIC’s comments on the Taskforce’s positions

### Key points

We generally support the Taskforce’s proposals in its Consultation Paper 2.

However, we make specific comments about Position 3— submitting that the appropriate threshold for the issue of a search warrant under an enhanced ASIC Act search warrant power is that of a reasonable suspicion of an indictable offence against the Corporations Act, ASIC Act, National Credit Act, SIS Act and RSA Act, or a reasonable suspicion of an indictable offence that otherwise falls within our general power of investigation under s13(1) of the ASIC Act.

We also make specific comments about Position 5—submitting that there should not be a time limit for holding and using evidential material. If a time limit is recommended, however, we consider it should be a period of not less than 12 months, with extensions to this period being available on application to the issuing court.

### Position 1: Consolidation of search warrant powers

#### Taskforce Position 1

ASIC-specific search warrant powers in various Acts should be consolidated into the ASIC Act.

- 15 We support the Taskforce’s Position 1.
- 16 The consolidation of search warrant powers presently in the ASIC Act, National Credit Act, SIS Act and RSA Act into a single search warrant power in the ASIC Act would address the current inconsistencies in the search warrant powers provided by these Acts and, in particular, would address the issue of the ‘forewarning’ requirement currently present in these Acts.
- 17 We note that a single consolidated search warrant power would also render the process of making any future amendments more efficient and consistent than it would be for amending search warrant powers in multiple Acts.

### Position 2: Authority to search for and seize ‘evidential material’

#### Taskforce Position 2

ASIC Act search warrants to provide authority to search for and seize ‘evidential material’.

- 18 We support the Taskforce’s Position 2.

- 19 We note that providing authority to search for and seize ‘evidential material’ would make the ASIC Act search warrant power consistent in this respect with the search warrant powers in the Crimes Act and in the *Competition and Consumer Act 2010* (Competition and Consumer Act).
- 20 We consider that adopting the broader ‘evidential material’ criterion for search and seizure under a search warrant is a crucial part of providing ASIC with an effective search warrant tool.
- 21 As noted in the Taskforce’s Consultation Paper 2, ASIC considers that the ‘particular books’ criterion in the ASIC Act, National Credit Act, SIS Act and RSA Act significantly limits the utility of the search warrant powers in these Acts because:
- (a) the particular books sought to be seized must be specified in the warrant application; and
  - (b) the material that ASIC is authorised to seize during the execution of the warrant is limited to those books—regardless of whether other books that are highly relevant to an investigation, but are not within the category of books specified in the warrant, are located during the execution of the search warrant.

### Position 3: Appropriate threshold for issuing a search warrant

#### Taskforce Position 3

ASIC Act search warrants to be issued when there is a reasonable suspicion of a contravention of an indictable offence.

- 22 We support the Taskforce’s position that a reasonable suspicion of a contravention of an indictable offence (as defined in s4G of the Crimes Act) is an appropriate threshold for the issue of a search warrant under an enhanced ASIC Act search warrant power.
- 23 If the other reforms proposed by the Taskforce are adopted, and ASIC is given the power under the ASIC Act to search for and seize a broader range of material—and we can use that material in criminal, civil and administrative proceedings—we consider that such a threshold would provide an appropriate balance between ASIC’s investigative requirements and the rights of individuals.
- 24 However, as ASIC’s investigative function goes beyond investigating contraventions of offences against the Corporations Act, ASIC Act, National Credit Act, SIS Act and RSA Act, we submit that an enhanced ASIC Act search warrant power should not be limited to suspected contraventions of indictable offences prescribed by those Acts.

- 25 Pursuant to ASIC’s general powers of investigation under s13(1) of the ASIC Act, we may make such investigation as we think expedient for the due administration of the corporations legislation, where we have reason to suspect that one or more of the following may have been committed:
- (a) a contravention of the corporations legislation; or
  - (b) a contravention of a law of the Commonwealth or of an Australian state or territory—being a contravention that:
    - (i) concerns the management or affairs of a body corporate or managed investment scheme; or
    - (ii) involves fraud or dishonesty that is related to a body corporate or managed investment scheme, or to financial products.
- 26 We may exercise our information-gathering powers in relation to investigations commenced under the general power of investigation under s13(1) of the ASIC Act, including:
- (a) the examination power conferred by s19(1) of the Act; and
  - (b) pursuant to s28(d) of the Act, various powers to require the production of books conferred by Division 3 of the Act.
- 27 Our investigations frequently relate to conduct concerning or related to body corporates, managed investment schemes and/or financial products where this conduct constitutes a serious contravention of an Australian state law, such as fraud or theft.
- 28 We submit that it would be inconsistent with the extent of our legislatively mandated investigative remit to limit the availability of an enhanced ASIC search warrant power to a subset of the offences we regularly investigate.
- 29 Under the Crimes Act search warrant power, ASIC is able to apply for a search warrant in respect of a Commonwealth offence, or a State offence that has a Federal aspect or connection. Further, under s3F(1)(d)(ii) of the Crimes Act, when executing a Crimes Act warrant, an ASIC officer is entitled to seize material that is believed on reasonable grounds to be evidence of an offence other than the offence(s) specified in the warrant, provided that the offence constitutes an ‘indictable offence’ as defined in s4G of the Crimes Act.
- 30 If a re-cast ASIC Act search warrant power were to limit both the threshold for an application for a warrant, and the ability to seize material found during the course of the execution of a warrant, to material believed to be evidence of an offence against the Corporations Act, ASIC Act, National Credit Act, SIS Act or RSA Act, such a limitation may cause significant practical difficulties, summarised as follows:
- (a) In circumstances where ASIC has commenced an investigation under s13(1) of the ASIC Act in relation to suspected contraventions of



indictable offences against ASIC-administered legislation and also other indictable offences that fall within our legislative remit—such as state fraud or theft offences concerning or related to body corporates, managed investment schemes and/or financial products—ASIC would need to decide whether to:

- (i) obtain a search warrant under the Crimes Act (and forego many of the benefits of an enhanced ASIC Act search warrant power); or
  - (ii) obtain a search warrant under the enhanced ASIC Act search warrant power and risk that we would be unable to seize evidence of a serious indictable offence that is within our legislative remit, but not within the ambit of the search warrant power.
- (b) If such evidence of an indictable offence that is within ASIC’s investigative remit, but is not an indictable offence against an ASIC-administered Act, is identified during the execution of the warrant, we may be required to either obtain a separate warrant under the Crimes Act on an urgent basis (which creates uncertainty as to which search warrant power has been used to seize the evidence), or leave the evidence on the site to be obtained at a later time under ASIC’s other information-gathering powers (which creates a significant risk of concealment, destruction or movement of that evidence).

31 For these reasons, we submit that the appropriate threshold for the issue of a search warrant should be that of a reasonable suspicion of an indictable offence against the Corporations Act, ASIC Act, National Credit Act, SIS Act and RSA Act, or a reasonable suspicion of an indictable offence that otherwise falls within our general power of investigation under s13(1) of the ASIC Act.

## Position 4: Ancillary provisions for search warrant powers

### **Taskforce Position 4**

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

32 We support the Taskforce’s Position 4.

33 The absence of ancillary provisions for the search warrant powers under the ASIC Act, National Credit Act, SIS Act and RSA Act (of the type available under the Crimes Act) operates as a significant limitation on the utility and effectiveness of the search warrant powers under these Acts.

34 As noted by the Taskforce, business practices have evolved in recent years to the point that core documentary evidence relevant to ASIC investigations is held predominantly in electronic form. Consequently, searching electronic

devices for relevant evidence, and the seizure of electronic evidence, have now become critical tasks performed in the execution of search warrants.

- 35 Under the ASIC Act, National Credit Act, SIS Act and RSA Act, there are no clear powers authorising the use of electronic equipment, and the copying or seizure of data from electronic devices, during the execution of these search warrants. Without these types of supportive ancillary provisions, the search warrant powers contained in these Acts are unclear and of limited utility.
- 36 Furthermore, there is no capacity under the ASIC Act, National Credit Act, SIS Act and RSA Act to apply for search warrants by telephone or electronic means in urgent cases. In situations where a search warrant must be sought urgently—due to an identified risk of movement, concealment or destruction of evidence—the search warrant powers in these Acts are effectively otiose.
- 37 We consider that supportive ancillary provisions that mirror the ancillary powers in the Crimes Act search warrant provisions are essential to ensuring the relevance and utility of an ASIC-specific search warrant power.

## Position 5: Availability of seized material for use in court proceedings

### Taskforce Position 5

Material seized under ASIC Act search warrants should be available for use by ASIC in criminal, civil and administrative proceedings.

- 38 We support the Taskforce’s Position 5. However, in the following paragraphs, we make specific comments on the Taskforce’s proposal in relation to imposing an appropriate time limit for holding and using seized evidential material.
- 39 We note the Taskforce’s recommendation that it may be appropriate to impose a limit on the length of time that ASIC can hold or use seized material before it must be returned. This may contribute to:
- (a) investigations that have the benefit of seized material being conducted more efficiently and with greater priority; and
  - (b) the period during which seized material is available to be released to third parties by ASIC being potentially limited.
- 40 The Taskforce advises that it draws no conclusion on what may be an appropriate timeframe and invites comment on this. We note, however, that the Taskforce acknowledges that the 120-day time limit provided for the retention of material seized under a warrant issued under the Competition and Consumer Act may not be a sufficient timeframe due to the complexity

of ASIC investigations and delays commonly experienced in instituting and progressing court proceedings—and, in particular, criminal proceedings.

41 In addition to the factors giving rise to delay in ASIC investigations noted by the Taskforce, as outlined above, there are a number of other factors that routinely cause significant delay to the processing and review of material seized by ASIC under a search warrant. As a consequence, these can delay or prolong our investigations or the institution of court proceedings. Other delaying factors include the following:

- (a) Delays are routinely caused by the time required to process and review significant volumes of electronic material. With advances in digital storage technology, commonly seized electronic devices such as mobile phones can contain enormous amounts of electronic information. For example, modern mobile phones can potentially contain millions of separate data files, including emails, social media chat messages, and SMS communications. The execution of Crimes Act search warrants often results in the seizure of multiple electronic devices at multiple premises. Handling and processing this seized electronic material requires the assistance of specialist computer forensic staff, who use specialist forensic software to enable the review of this material. The high volume of material generated by seized electronic material takes ASIC staff considerable time to review.
- (b) The delays noted above are compounded when seized electronic evidential material contains files that are partly or wholly in a foreign language—and, in particular, in a script other than a Latin alphabetic script, which in ASIC's experience is becoming increasingly common given the globalisation of Australian business. Considerable further time is necessary to engage native speakers of the particular foreign language to review seized material, and to translate relevant material into English for further review by ASIC investigators.
- (c) Significant delays can occur as a result of claims of legal professional privilege (LPP) over seized material, particularly when seized electronic material contains a large volume of files. Typically, when material has been seized under a search warrant from a person or organisation, and that person or organisation seeks to make an LPP claim over the seized material, ASIC facilitates the resolution of these claims by enabling the claimant or their legal representative to review the seized material for the purpose of identifying any material over which claims of LPP are to be made. ASIC is required to provide a reasonable period of time to resolve such claims before we can properly examine or use the seized material. The delays caused by this process are compounded if a claimant's LPP claims are not substantiated, or if ASIC disputes the validity of any LPP claims made during this process, in which case the dispute could result in mediation or litigation with the claimant.

(d) We also submit that, if appropriate limits are placed on the ability of third-party private litigants to access material seized by ASIC under a search warrant—as proposed in the Taskforce’s Position 6 in Consultation Paper 2—this would reduce the need to limit the period that seized material is held, during which the material could potentially be released by ASIC to third parties.

42 In light of the above, rather than imposing a specific time limit, we submit that it is appropriate that the current retention requirements under s37(5) of the ASIC Act be maintained (which is similar to the obligation under s3ZQX of the Crimes Act in relation to s3E Crimes Act warrants). ASIC should be required to return material seized under a search warrant when it is not required for an investigation or proceedings.

43 However, if a retention period is considered appropriate, we do not consider that 120 days would provide sufficient time in most cases to hold and effectively use seized material before it must be returned, or an application made to a magistrate to retain the material for a further specified time period. If a time limit is to be recommended, we strongly submit that a time limit of not less than 12 months would be a more appropriate retention period.

## Position 6: Appropriate use of seized material by third parties

### **Taskforce Position 6**

Use of material seized under search warrants by private litigants should be subject to appropriate limits.

44 We support the Taskforce’s Position 6 as stated above.

45 We acknowledge that, as identified in the Taskforce’s Consultation Paper 2, the use of search warrant powers involves the exercise of a significant state power that is invasive, and potentially impacts on a person’s rights, dignity and privacy.

46 In these circumstances, it would be appropriate to limit the ability of private third parties to derive benefit from access to search warrant material.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Competition and Consumer Act	<i>Competition and Consumer Act 2010</i>
Consultation Paper 2	Positions and Consultation Paper 2 <i>Harmonisation and enhancement of search warrant powers</i> , issued on 28 June 2017 by the Taskforce
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Crimes Act	<i>Crimes Act 1914</i>
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
RSA Act	<i>Retirement Savings Accounts Act 1997</i>
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
Taskforce	ASIC Enforcement Review Taskforce