



ASIC

Australian Securities & Investments Commission

ASIC Enforcement Review

Positions and Consultation

Paper 5—ASIC's Access to

Telecommunications

Intercept Material

Submission by the Australian

Securities and Investments

Commission

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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 5 *ASIC's Access to Telecommunications Intercept Material*, issued on 20 July 2017 (Consultation Paper 5).
- 2 ASIC is Australia's corporate, markets, financial services and consumer credit regulator. We have the primary legislative responsibility to investigate, and support the Commonwealth Director of Public Prosecutions (**CDPP**) to prosecute, a range of serious criminal offences prescribed by the *Corporations Act 2001* (Corporations Act). In addition, ASIC also has responsibility for investigations that relate to conduct concerning or related to bodies corporate, managed investment schemes and/or financial products, where the conduct may constitute a serious contravention of an Australian State law, such as fraud or theft.
- 3 The *Telecommunications (Interception and Access) Act 1979* (**TIA Act**) regulates access by law enforcement agencies to the following:
 - (a) intercepted communications;
 - (b) stored communications, which includes records of historical communications such as voicemail, emails and sms messages; and
 - (c) telecommunications data (metadata) which includes subscriber details and details of telecommunications such as call time and location but not actual content.
- 4 An agency designated a "criminal law enforcement agency" under the TIA Act is able, in prescribed circumstances, to obtain access to telecommunications data and to apply for a warrant to obtain stored communications. ASIC is a designated criminal law enforcement agency under the TIA Act and may access stored communications and telecommunications in connection with and for the purposes of its investigations.
- 5 An agency designated as an "interception agency" can apply for a warrant to intercept telecommunications (**TI warrants**) for the purpose of offences prescribed as "serious offences", and material obtained pursuant to TI warrants (**TI material**) can be used by interception agencies for the purpose of investigating and prosecuting such offences.
- 6 Additionally, section 68 of the TIA Act permits interception agencies to disclose TI material to specified agencies (**Recipient Agencies**) if, among other things, the material relates to a matter that could be investigated by that agency, and the recipient agency may generally use the TI evidence for

(among other things) investigations and prosecutions for “relevant offences” within its jurisdiction.

7 Certain serious offences against the Corporations Act are prescribed as "serious offences" under the TIA Act and may be the subject of a TI warrant. Those offences are summarised in Consultation Paper 5 as follows:

- (a) insider trading (section 1043A of the Corporations Act);
- (b) market manipulation (sections 1041A – 1041D of the Corporations Act); and
- (c) financial services fraud (sections 1041E – s1041G of the Corporations Act).

8 In addition, other offences which are frequently investigated by ASIC such as serious fraud offences under State legislation, are prescribed as "serious offences" under the TIA Act and are offences for which a TI warrant may be obtained.

9 As noted in Consultation Paper 5, the investigation and prosecution of insider trading, market manipulation and financial services fraud offences are notoriously difficult, resource-intensive and time-consuming.

10 Further, as noted in in Consultation Paper 5, for the purpose of carrying out these investigations and prosecutions, ASIC has:

- (a) unique powers for gathering information and evidence and obtaining assistance that are not available to any other agency (and can only be exercised for the purpose of an investigation by ASIC); and
- (b) specialised staff, resources, experience and capabilities not possessed by any other Australian agency.

11 However, ASIC is not an interception agency and therefore cannot seek TI warrants for the purpose of investigating insider trading, market manipulation and financial services fraud offences. Also, ASIC is not a recipient agency, and is unable to receive TI material from other agencies that constitutes evidence relevant to such offences.

12 We have identified the following problems with ASIC being neither an interception agency nor a recipient agency under the TIA Act:

- (a) Parliament has recognised the importance TI material being available for insider trading, market manipulation and financial services fraud investigations. However, ASIC—the agency with the express statutory jurisdiction and specialisation for investigating and such offences—is unable to seek TI warrants and obtain TI material for the purpose of investigating these offences; and
- (b) ASIC is also unable to receive TI material that has been lawfully obtained by other agencies, even if:

- (i) ASIC is conducting an investigation that is related to the interception agency's investigation and the TI material obtained by the interception agency is highly relevant to the subject of ASIC's ASIC investigation; or
- (ii) the TI material obtained by the interception agency is evidence of the commission of offences that:
 - (A) fall within ASIC's express statutory jurisdiction;
 - (B) have come to light as a result of the telephone intercepts; and
 - (C) are not proposed to be investigated by the interception agency (or any other agency).

A ASIC's comments on the Taskforce's position

Key points

We generally support the Taskforce's proposal in its Consultation Paper 5. However in addition to being able to lawfully receive intercepted TI material from other agencies for the purposes of investigating and prosecuting serious offences within ASIC's jurisdiction, we submit that ASIC should be designated an interception agency under the TIA Act and be permitted to seek TI warrants for the purposes of its own investigations.

Position 1: Access to TI material

Taskforce Position 1

ASIC should be able to receive TI material to investigate and prosecute serious offences.

- 13 We support the Taskforce's Position 1.
- 14 We agree with the range of factors outlined by the Taskforce in support of the position that ASIC should be able to receive TI material to investigate and prosecute serious offences, summarised as follows:
- (a) the investigation and prosecution of insider trading, market manipulation and financial services fraud offences are notoriously difficult, resource-intensive and time-consuming;
 - (b) in light of the difficulties associated with investigating these offences, Parliament has recognised the utility of TI material being given to ASIC for the purpose of investigations of serious Corporations Act offences (and in particular insider trading and market manipulation offences);
 - (c) ASIC is the agency with the specific statutory responsibility for investigating and prosecuting offences such as insider trading, market manipulation and financial services fraud;
 - (d) ASIC is the most appropriate agency to carry out such investigations and prosecutions – it has unique information and evidence gathering powers, specialised staff, resources and experience, and can directly obtain information and assistance from other international regulators;
 - (e) under the current TIA Act regime, ASIC—the agency with specific expertise and an express and primary statutory mandate for investigating insider trading, market manipulation and financial services fraud offences—cannot obtain or receive TI material. This is the case even though the TIA Act permits that such material can be obtained for the purposes of investigating and prosecuting such offences; and

(f) internationally, the availability of TI material for the investigation of the equivalent of the serious Corporations Act offences has been recognised as important. In the US, the availability of TI material has led to convictions being secured.

15 However, in addition to being able to lawfully receive intercepted TI material from other agencies for the purposes of investigating and prosecuting serious offences within ASIC's jurisdiction, we submit that ASIC should be designated an interception agency under the TIA Act. ASIC should be permitted to seek TI warrants for the purposes of its investigations.

16 As noted in Consultation Paper 5, designating ASIC with "recipient agency" status under the TIA Act would address the following issues caused by the current TIA Act regime:

- (a) an interception agency such as the Australian Federal Police (**AFP**) being unable to share TI material with ASIC in circumstances where it and ASIC have separate or related investigations, and ASIC is best placed to deal with the conduct identified in the investigations which may constitute offences that are within ASIC's express statutory jurisdiction; and
- (b) an interception agency obtaining TI material during the course of an investigation that is identified as evidence of misconduct that falls within ASIC's express statutory jurisdiction being unable to share that information with ASIC, in circumstances where the interception agency itself does not propose to investigate the misconduct, with the consequence that no action is taken in relation to the misconduct.

17 For TI material to be available to ASIC for the purpose of investigating and prosecuting insider trading, market manipulation and financial services fraud offences, an interception agency such as the AFP must either:

- (a) have commenced an investigation into the offending (either of its own initiative or following a referral from ASIC) in the course of which TI material is obtained; or
- (b) have otherwise obtained TI material which may constitute evidence of the commission of such offences during the course of an investigation into separate or unrelated misconduct.

18 As a consequence, ASIC would be limited to accessing TI material to circumstances where another agency either has an existing investigation or is willing and has the capacity to commence its own investigation into the relevant conduct.

19 By way of example, ASIC may have commenced an investigation into serious organised, systematic and ongoing insider trading such as that detailed in Case Study 1 in which access to TI material may be critical to a successful outcome. However, the availability of TI material for the

purposes of the investigation may be determined not by the seriousness of the suspected offending and the likelihood of critical evidence being obtained through telephone intercepts but by the AFP's own resource commitments and priorities.

20 As noted by the Taskforce in Consultation Paper 5, while it is open to the AFP to investigate Corporations Act offences, it rarely does so due to competing law enforcement priorities and ASIC's express jurisdiction in this area.

21 For the above reasons, we submit that it is appropriate that ASIC be granted interception agency status under the TIA Act.

22 Should interception agency status be granted to ASIC, we submit that the most practical mechanism for ASIC to execute TI warrants would be for ASIC to use the interception infrastructure and capabilities of an interception agency such as the AFP on a user-pays basis, rather than ASIC developing its own infrastructure and capabilities in house. This would:

- (a) minimise the capital costs of ASIC, and would offset to a large extent the cost related resource implications for the AFP of providing assistance to ASIC in TI operations; and
- (b) alleviate concerns in relation to a significant increase in the use of TI warrants in connection with ASIC investigations, as the impact on ASIC's enforcement budget of costly TI warrant operations would ensure that such operations are only conducted in compelling circumstances for the investigation of very serious ongoing offending.

Key terms

Term	Meaning in this document
AFP	Australian Federal Police
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Consultation Paper 5	Consultation Paper 5 <i>ASIC's Access to Telecommunications Intercept Material</i> , issued on 20 July 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>
TI material	Material obtained under a TI warrant
TI warrant	A warrant issued under the TIA Act to intercept telecommunications
Taskforce	ASIC Enforcement Review Taskforce