



Law Council
OF AUSTRALIA

Office of the President

31 July 2017

Ms Kate Mills
Principal Adviser
ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ASICenforcementreview@treasury.gov.au

Dear Ms Mills

HARMONISATION AND ENHANCEMENT OF SEARCH WARRANT POWERS

1. The Law Council of Australia is grateful for the opportunity to provide feedback on the Australian Securities and Investments Commission (**ASIC**) Enforcement Review Taskforce's (**the Taskforce**) *Positions and Consultation Paper 2: Harmonisation and Enhancement of Search Warrant Powers (Consultation Paper)*.
2. The Law Council acknowledges the assistance of its National Criminal Law Committee, the Privileges and Immunities of its Federal Litigation and Dispute Resolution Section, its Business Law Section, the Queensland Law Society, the Law Society of New South Wales, the Law Society of South Australia in the preparation of this submission.

Taskforce Positions

3. The following addresses each of the Taskforce Positions outlined in the Consultation Paper.

Consolidation of ASIC-specific search warrant powers

4. The Law Council supports the position that all search warrant powers, specific to ASIC, currently legislated in various Acts, be consolidated into the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). This will provide for greater consistency in the way search warrant powers available to ASIC operate.

Search and seizure of 'evidential material'

5. The Law Council supports the position that ASIC Act search warrant powers be made more consistent with those in the *Crimes Act 1914* (Cth) (**Crimes Act**) and the *Competition and Consumer Act 2010* (Cth), by allowing ASIC to search for and seize 'evidential material'. Under the Crimes Act, 'evidential material' has a specific meaning and includes material in electronic form. Under the Crimes Act, a search warrant may be issued if there are reasonable grounds for suspecting that there is, or

will be within the next 72 hours, any evidential material at the premises. Provision for the search and seizure of evidential material under ASIC Act search warrants will assist in improving consistency across various search warrant powers.

Threshold for applying for an ASIC Act search warrant

6. The Law Council supports the position that a search warrant only be issued under the ASIC Act where there is a reasonable suspicion of contravention of an indictable offence. This is an appropriate threshold for the issuing of a search warrant and ensures that search warrants are only issued in the course of investigating serious offences.

Ancillary powers

7. The Law Council supports ancillary powers being included in the search warrant powers under the ASIC Act. The Law Council suggests that these ancillary powers mirror the provision of the Crimes Act.

Material seized under ASIC Act search warrants

8. The Law Council supports the position that material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings. However, in relation to civil and administrative proceedings, material seized under ASIC Act search warrants should only be available for use where the proceedings were commenced by ASIC.

Third party access to seized material

9. The Law Council does not support the position that private litigants should be able to use material seized under search warrant. Search warrants powers must carefully balance the need to investigate indictable crimes against maintaining protections for individual rights and freedoms. Allowing third party access to seized material is significantly broader than powers provided under section 3ZQU of the Crimes Act and falls beyond the scope of the intention of the search warrant. Further, once material is provided to private litigants, ASIC no longer retains control over that material.
10. Private litigants may seek relevant material through existing Uniform Civil Procedure Rule processes and, for example, through *Anton Pillar* orders.

Additional Comments

Preservation of Client Legal Privilege

11. The Law Council notes that section 69 of the ASIC Act preserves legal professional privilege. It specifies that lawyers are entitled to refuse to comply with a requirement under certain provisions of the ASIC Act to provide information or produce a book where to do so would involve disclosing, or the book contains, a privileged communication. The Law Council submits that section 69 of the ASIC Act must extend to the proposed consolidation of search warrant powers into the ASIC Act.
12. Legal professional privilege, or client legal privilege as it is more accurately known, is the right of a client of a lawyer to have certain communications with their lawyer protected from disclosure. These communications must be made for the dominant purpose of giving or obtaining legal advice or the provision of legal services (*Esso*

Australia Resources Limited v The Commissioner of Taxation (1999) 201 CLR 49). This right serves the administration of justice by encouraging full and frank disclosures by clients to their lawyers. Any amendments to the ASIC Act relating to search warrant powers should make it clear that legal professional privilege cannot be compromised by the execution of these search warrants.

13. Thank you for the opportunity to provide these observations.
14. Please contact Dr Natasha Molt, Senior Legal Advisor, Policy Division ((02) 6246 3754 or natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona McLeod'.

Fiona McLeod SC
President