
FINANCIAL REGULATOR REFORM (NO.1) BILL 2019: ASIC SEARCH
WARRANT POWERS

EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bill	Financial Regulator Reform (No. 1) Bill 2019: ASIC search warrant powers

Chapter 1

Harmonising and enhancing ASIC's search warrant powers

Outline of chapter

1.1 Schedule 1 to this Bill strengthens ASIC's ability to carry out its enforcement functions by modernising and harmonising its search warrant powers, while ensuring appropriate safeguards are in place to balance the imposition on individuals' property and personal rights.

1.2 Schedule 1 to the Bill harmonises ASIC's search warrant powers across ASIC administered legislation into the ASIC Act. ASIC's search warrant powers are enhanced by applying by reference the search warrant powers in the *Crimes Act 1914*, modified as necessary.

Context of amendments

The establishment of the ASIC Enforcement Review Taskforce

1.3 On 19 October 2016, the Government established the ASIC Enforcement Review Taskforce in response to Recommendation 29 of the Financial System Inquiry.

1.4 The ASIC Enforcement Review Taskforce was established to review the enforcement regime available to ASIC and assess the suitability of the existing regulatory tools ASIC uses to perform its functions.

1.5 In reviewing the matters outlined in its terms of reference, the ASIC Enforcement Review Taskforce made a number of recommendations to:

- address gaps or deficiencies to allow more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- promote engagement and cooperation between ASIC and its regulated population without imposing undue regulatory burden on business; and
- promote a competitive and stable financial system that contributes to Australia's productivity and growth.

The Taskforce's findings

1.6 On 18 December 2017, the ASIC Enforcement Review Taskforce provided its final report to Government. The final report contained 50 recommendations in total.

1.7 The ASIC Enforcement Review Taskforce grouped its recommendations into eight broad themes. These include:

- enhancing the requirement for financial services and credit licensees to report significant breaches to ASIC;
- harmonising and enhancing search warrant powers;
- providing ASIC with access to telephone intercepts for the investigation and prosecution of corporate law offences;
- shifting to a co-regulatory model in appropriate cases where industry participants are required to subscribe to an ASIC approved code;
- strengthening ASIC's licencing powers;
- extending ASIC's banning powers to ban individuals from managing financial services businesses;
- strengthening penalties for corporate and financial sector misconduct; and
- providing ASIC with a directions power to complement ASIC's current powers to regulate an AFSL holder's or credit licensee's systems and conduct.

Harmonisation and enhancement of ASIC's search warrant powers

1.8 Search warrants are an important and effective regulatory tool for obtaining information. They are widely used by a range of enforcement agencies and regulatory authorities.

1.9 ASIC currently has a range of search warrant powers contained in the ASIC Act, the *National Consumer Credit Protection Act 2009*, the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993*. ASIC may also apply to a magistrate for a search warrant under the *Crimes Act 1914* for execution by the Australian Federal Police and/or state police.

1.10 Chapter 2 of the ASIC Enforcement Review Taskforce Report contained recommendations to harmonise and enhance ASIC's search warrant powers to eliminate inconsistencies and deficiencies that exist between the various powers.

- 1.11 These recommendations were that:
- ASIC-specific search warrant powers in various acts should be consolidated into the ASIC Act (Recommendation 11);
 - ASIC Act search warrants should provide for search and seizure of 'evidential material' (Recommendation 12);
 - ASIC Act search warrant powers should include ancillary powers that mirror the *Crimes Act 1914* provisions (Recommendation 13);
 - ASIC Act search warrants should only be issued when there is a reasonable suspicion of a contravention of an indictable offence (Recommendation 14);
 - material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings for as long as is reasonable and practicable (Recommendation 15); and
 - use of material seized under search warrants by private litigants should be subject to appropriate limits (Recommendation 16).

1.12 The recommendations address a number of inconsistencies and deficiencies identified in ASIC's existing search warrant powers, which limit the usefulness of warrants, and restrict ASIC's ability to use material it seized.

1.13 On 16 April 2018, the Government agreed to all of the recommendations as set out above at paragraph 1.11.

Summary of new law

1.14 Schedule 1 to this Bill harmonises and enhances ASIC's search warrant powers across various ASIC administered legislation. To do this, Schedule 1 to the Bill amends the ASIC Act and the *National Consumer Credit Protection Act 2009* to apply by reference the search warrant powers from the *Crimes Act 1914*, modified as necessary. Amendments to the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993* refer to the enhanced provisions in the ASIC Act.

1.15 Under its harmonised and enhanced search warrant powers, ASIC can:

- apply for a search warrant in circumstances where the contravention would be an indictable offence under the ASIC Act, the *Corporations Act 2001*, the *National*

Consumer Credit Protection Act 2009, the Retirement Savings Accounts Act 1997 and the Superannuation Industry (Supervision) Act 1993;

- apply for a search warrant where a law of the Commonwealth, a State or Territory has been contravened and concerns the management of a body corporate or managed investment scheme or involves fraud or dishonesty and relates to a body corporate, managed investment scheme or financial product and the contravention would be an indictable offence;
- search and seize evidential material; and
- use the evidential material to perform its functions and duties and exercise its powers including preventing and investigating breaches of ASIC administered legislation, prosecuting such breaches and taking administrative action.

1.16 By applying the search warrant provisions from the *Crimes Act 1914*, ASIC has available to it the ancillary powers included in the *Crimes Act 1914*.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
ASIC’s search warrant powers are contained in the ASIC Act and <i>National Consumer Credit Protection Act 2009</i> . The ASIC Act provisions are applied to the <i>Corporations Act 2001</i> , the <i>Retirement Savings Accounts Act 1997</i> and the <i>Superannuation Industry (Supervision) Act 1993</i> .	ASIC’s search warrant powers are contained across various ASIC administered legislation: in the ASIC Act, <i>National Consumer Credit Protection Act 2009</i> , the <i>Retirement Savings Accounts Act 1997</i> and the <i>Superannuation Industry (Supervision) Act 1993</i> .
ASIC’s search warrant powers provide for search and seizure of evidential material.	ASIC’s search warrant powers provide for search and seizure of specified books.
Search warrants may be issued only when there is reasonable suspicion of a contravention of an indictable offence.	Search warrants may be issued when there are reasonable grounds to suspect books are on particular premises.
Evidential material seized under search warrants is available for use by ASIC in performing its functions	Material seized under the <i>Crimes Act 1914</i> search warrant provisions can only be used by ASIC for the

and duties and exercising ASIC's powers.	purpose of investigating and prosecuting criminal offences. Material seized under the ASIC Act search warrant powers can be used for a proceeding under a Commonwealth or state law.
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Detailed explanation of new law

1.17 Schedule 1 to the Bill harmonises ASIC's search warrant powers across various ASIC administered legislation to ensure that ASIC has consistent search warrant powers across legislation for which it has specific enforcement responsibility.

1.18 Schedule 1 to the Bill also makes amendments to ASIC's search warrant powers to modernise and make the powers more useful, recognising the integral part technology plays in the storage and communication of information.

1.19 To do this, Schedule 1 to the Bill incorporates by reference search warrant provisions from the *Crimes Act 1914* into the ASIC Act. The relevant search warrant provisions from the *Crimes Act 1914* are:

- Divisions 1, 2, 4C and 5 of Part IAA; and
- any other provisions of the *Crimes Act 1914*, to the extent that those other provisions relate to the operation of Divisions 1, 2, 4C and 5 of Part IAA.

[Schedule 1, item 1, section 39D of the ASIC Act]

1.20 Incorporating by reference the search warrant provisions from the *Crimes Act 1914* has the practical effect of keeping ASIC's search warrant powers up-to-date as changes are made to the *Crimes Act 1914*.

1.21 However, certain modifications are required to the *Crimes Act 1914* provisions to make the provisions 'fit for purpose' in the context of ASIC's regulatory and investigative remit. These modifications are contained in the ASIC Act.

1.22 Schedule 1 to the Bill also amends the *National Consumer Credit Protection Act 2009* to incorporate by reference the search warrant provisions from the *Crimes Act 1914*, which are also modified as necessary.

1.23 All references in this Explanatory Memorandum are to the ASIC Act unless otherwise stated.

How can ASIC apply for a search warrant?

1.24 To carry out its investigative and enforcement functions, ASIC can apply for a warrant.

1.25 Schedule 1 to the Bill adopts by reference a modified version of section 3E of the *Crimes Act 1914* to provide that a magistrate may issue a warrant, or authorise an ordinary search or frisk search, if the magistrate is satisfied by information given on oath or affirmation by an ASIC member, ASIC staff member or other person authorised by ASIC. [*Schedule 1, item 1, subsections 39F(1) and 39F(2) of the ASIC Act*]

1.26 Currently, when seeking a warrant under the *National Consumer Credit Protection Act 2009*, the *Retirement Savings Accounts Act 1997* or the *Superannuation Industry (Supervision) Act 1993*, ASIC must demonstrate to the court that it issued a notice to produce which has not been complied with.

1.27 Consistent with the process under the *Crimes Act 1914*, ASIC is no longer required to demonstrate when seeking a search warrant that it has previously issued a notice to a person requiring the production of books which the person has failed to produce.

1.28 This means ASIC is no longer required to forewarn a person under investigation that it may apply for a search warrant. These changes will decrease the risk of destruction, concealment and alteration of evidence by such persons, and enhance ASIC's ability to progress an investigation.

1.29 The existing search warrant provisions require ASIC to specify particular books thought to exist. ASIC's subsequent search and seizure is limited to those particular books.

1.30 This means that if, in the course of executing a search warrant under any of these Acts, an ASIC officer identifies documents that are highly relevant to the offences to which the warrant relates, but those documents do not form part of the particular books specified in the warrant, there is no authority to seize those documents.

1.31 Under its harmonised provisions ASIC is no longer required to specify the exact books or evidential material that can be searched and seized. Instead, the magistrate, in issuing the warrant must state the offence to which the warrant relates and the kinds of evidential material that can be searched for under the warrant.

1.32 The magistrate must also state that the warrant authorises the seizure of evidential material about the offence to which the warrant relates or another offence that is an indictable offence.

1.33 This means that under its harmonised search warrant powers ASIC is able to seize other material relevant to the particular offence if

ASIC uncovers the material in the process of exercising the warrant or material relevant to another indictable offence.

1.34 This approach gives the Australian Federal Police and/or state police, and ASIC more flexibility in executing a search warrant, particularly if evidential material that was previously unknown to ASIC is discovered at the premises. As a consequence, ASIC will be able to search and seize a wider range of material relevant to its investigation.

1.35 The explanation in paragraphs 1.27 and 1.31 to 1.34 is the result of applying by reference Division 2 of Part IAA of the *Crimes Act 1914*. Modifications are not required.

1.36 As search warrants are often sought and issued in circumstances where there is a reasonable concern that relevant evidence will be destroyed, tampered with or not produced under a notice, there may be situations where swift action is required to ensure that the effective execution of the warrant is not frustrated.

1.37 Schedule 1 to the Bill also adopts a modified version of subsection 3R(1) of the *Crimes Act 1914* to enable an ASIC member, ASIC staff member or other person authorised by ASIC to apply for a search warrant by telephone, telex, fax or other electronic means in urgent cases. [*Schedule 1, item 1, subsection 39F(4) of the ASIC Act*]

When can a search warrant be issued?

1.38 Using a search warrant is a substantial imposition on individuals' property and personal rights. It is also a significant logistical undertaking that involves substantial costs, planning and coordination with the Australian Federal Police and/or state police.

1.39 In light of these concerns, Schedule 1 to the Bill adopts a modified version of the definition of evidential material which is limited to material relevant to an indictable offence. The definition of evidential material in the *Crimes Act 1914* would normally also include a thing relevant to a summary offence. [*Schedule 1, item 1, subsection 39E of the ASIC Act*]

1.40 This means that when a magistrate is considering issuing a search warrant under the harmonised ASIC search warrant provisions, the magistrate must suspect that material relevant to an indictable offence is, or will be in the next 72 hours, present on those premises.

1.41 The definition of indictable offence applied by reference, is an offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears.

1.42 This threshold ensures that ASIC's harmonised search warrant powers are only used by ASIC to investigate serious offences. It also seeks to achieve an appropriate balance between the need for ASIC to

have access to effective investigative tools, the relevant harm or risk resulting from the purported contravention, and the rights of individuals.

How can seized evidential material be used and disclosed?

1.43 Under the existing search warrant provisions in the ASIC Act, the *National Consumer Credit Protection Act 2009*, the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993*, ASIC may use books seized by ASIC under those provisions for the purposes of a proceeding under a law of the Commonwealth or of a State or Territory.

1.44 In contrast, material seized under the existing search warrant provisions in the *Crimes Act 1914* which is subsequently shared with ASIC can only be used by ASIC for the purpose of investigating or prosecuting criminal offences. Seized material cannot be used to investigate contraventions that may give rise to civil proceedings or administrative action, and the material is not admissible in any such proceedings or action undertaken by ASIC.

1.45 The ASIC Enforcement Review Taskforce found that the restrictions on the permissible use of evidence obtained under the existing *Crimes Act 1914* search warrant provisions create various practical difficulties for ASIC.

1.46 Schedule 1 to the Bill substitutes section 3ZQU of the *Crimes Act 1914* to set out the purposes for which material seized under ASIC's new search warrant powers can be used by ASIC. [*Schedule 1, item 1, section 39G of the ASIC Act*]

1.47 Under the substituted provision, a constable or Commonwealth officer may use or make available to an ASIC staff member to use, seized evidential material for the purpose of the performance of ASIC's functions or duties or the exercise of ASIC's powers.

1.48 This would include ASIC preventing or investigating a breach of an offence provision, a breach of a civil penalty provision, investigating such a breach or a breach that could result in other civil or administrative action.

1.49 It would also include ASIC using material seized through a search warrant to:

- disqualify a person from managing a corporation or ban a person from providing financial services or engaging in credit activities;
- seek a declaration of a contravention from a court;
- revoke, suspend or vary conditions of a licence;
- issue an infringement notice;
- seek an injunction to stop future misconduct; or
- seek an order from a court to wind up a company.

1.50 ASIC is also able to share information with a person engaged by ASIC to, for example, assist in the preparation of a legal case or undertake forensic accounting. It is important that ASIC can share the information broadly with people that it engages.

1.51 A constable or Commonwealth officer may also make available to a constable or a Commonwealth officer the seized evidential material for:

- preventing or investigating a breach of an offence provision, a breach of a civil penalty provision, or a breach of an obligation (other than an obligation of a private nature);
- prosecuting a breach of an offence provision;
- prosecuting a breach of a civil penalty provision; or
- taking administrative action in response to a breach of an obligation.

1.52 A constable or Commonwealth officer is able to use the material in preventing, investigating or prosecuting a breach of any offence provision. This is not limited to indictable offences.

1.53 Constable and Commonwealth officer are defined in section 3 of the *Crimes Act 1914* and are adopted for the purposes of ASIC's harmonised search warrant provisions without modification.

1.54 The information may also be shared and used by an agency that has responsibility for law enforcement in a foreign country, intelligence gathering in a foreign country or the security of a foreign country for the purpose of enforcement action in that foreign jurisdiction.

1.55 The substituted provision inserted by Schedule 1 to this Bill also replicates parts of section 3ZQU in the *Crimes Act 1914*.

1.56 This includes using or making available for others to use the seized material for proceedings under the *Proceeds of Crimes Act 1987*,

investigating or resolving a complaint under the *Ombudsman Act 1976* or the performance or functions of the Australian Federal Police.

How are ASIC's search warrant powers enhanced?

1.57 The existing search warrant powers in the ASIC Act, the *National Consumer Credit Protection Act 2009*, the *Retirement Savings Accounts Act 1997* and the *Superannuation Industry (Supervision) Act 1993* do not adequately address the issues that arise from the operation of modern businesses. The ASIC Enforcement Review Taskforce found that as a result, these search warrant powers are not as practical or effective as they could be.

1.58 The search warrant provisions in the *Crimes Act 1914* were recently amended by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* to address these concerns to allow the Australian Federal Police to carry out its functions more effectively.

1.59 Schedule 1 to this Bill incorporates by reference many of the 'ancillary powers' for search warrants from the *Crimes Act 1914* into the ASIC Act for the purposes of ASIC's new search warrant powers, with minor modifications as necessary.

1.60 For example, these give ASIC the ability to:

- take photographs and make video recordings of the search (section 3J of the *Crimes Act 1914*);
- operate electronic equipment on the premises to access data (section 3L of the *Crimes Act 1914*);
- move devices to another place for processing to determine if the devices contain evidential material (section 3K of the *Crimes Act 1914*); and
- operate seized devices to access data (section 3ZQV of the *Crimes Act 1914*).

1.61 The minor modifications applied to the provisions are:

- reading references in the *Crimes Act 1914* to the 'Commissioner' as being references to the 'Chairperson of ASIC' [*Schedule 1, item 1, subsections 39H(5) of the ASIC Act*];
- omitting references to specific sections in the *Crimes Act 1914* where those sections are not applied by reference to ASIC's harmonised search warrant powers [*Schedule 1, item 1, subsection 39H(3) and 39H(4) of the ASIC Act*];
- allowing the Chairperson of ASIC to delegate powers, functions or duties under the harmonised search warrant

provisions to a senior ASIC staff member [*Schedule 1, item 1, subsection 39H(8) of the ASIC Act*]; and

- providing for decisions to be taken about the removal or destruction of data by either the Commissioner of the Australian Federal Police or Chairperson of ASIC depending on who has control of the data [*Schedule 1, item 1, subsections 39H(6) and 39H(7) of the ASIC Act*].

1.62 Schedule 1 to the Bill also adopts a modified version of subsection 3LA(1) of the *Crimes Act 1914* to enable an ASIC member, ASIC staff member or other person authorised by ASIC to apply to a magistrate for an order requiring a person to provide reasonable assistance or information to assist with a computer or other electronic device. [*Schedule 1, item 1, subsection 39F(3) of the ASIC Act*]

1.63 Existing subsection 65(2) of the ASIC Act which provides that a person must not intentionally or recklessly fail to provide reasonable assistance to a person who is exercising his or her powers under a search warrant is repealed. The provisions applied by reference from the *Crimes Act 1914* provide avenues for ASIC to seek assistance when executing a warrant. [*Schedule 3, item 9, subsection 65(2) of the ASIC Act*]

How long can ASIC retain seized material?

1.64 Schedule 1 to the Bill applies by reference section 3ZQX of the *Crimes Act 1914*. This provision sets out when material seized under ASIC's harmonised search warrant powers must be returned.

1.65 This applied provision requires the Chairperson of ASIC to take reasonable steps to return seized material if it is not required or no longer required for one of the reasons described by paragraphs 1.47 or another judicial or administrative review proceedings. There are exceptions to the requirement as per the exceptions in the *Crimes Act 1914*.

How can a person access seized material?

1.66 The ASIC Enforcement Review Taskforce specifically considered the circumstances in which a private litigant should be able to access information seized by ASIC under its harmonised search warrant provisions. The ASIC Enforcement Review Taskforce concluded that it was appropriate to provide additional protections to material seized under a search warrant to limit the ability of private litigants to access that material.

1.67 Schedule 1 to the Bill amends the ASIC Act to provide that another law of the Commonwealth is not able to permit access to material seized under ASIC's harmonised search warrant powers to a private person. [*Schedule 1, item 1, section 3ZQUA of the ASIC Act*]

1.68 This rule is intended to prevail, for example, over the Bill's provision for the purposes for which seized material can be used by ASIC and shared, explained above at paragraph 1.47. It is also intended to prevail over those parts of section 3ZQU that seek to preserve uses that are required or authorised by other Commonwealth, State or Territory laws.

1.69 A private person can only obtain the seized material through a court order. [*Schedule 1, item 1, subsection 3ZQUA(4) of the ASIC Act*]

1.70 Consequential amendments are also required to section 37 of the ASIC Act. Section 37 allows for the sharing and use of seized books. However, section 37 is amended to exclude material obtained under ASIC's harmonised search warrant powers. [*Schedule 3, items 3, 4 and 5, paragraph 37(1)(b), subsections 37(1) and 37(9) of the ASIC Act*]

Consequential amendments

ASIC Act

1.71 Schedule 3 to this Bill also makes consequential amendments to the ASIC Act to support the updated approach to search warrants.

1.72 The existing search warrant provisions in the ASIC Act are repealed as are redundant references. [*Schedule 3, items 1, 2 and 8, sections 28 and 35 to 36A, and subsection 65(1) of the ASIC Act*]

1.73 References to the existing search warrant provisions in the ASIC Act are updated to refer to the adopted and modified provisions from the *Crimes Act 1914*. [*Schedule 3, items 3, 6, 7, paragraphs 37(1)(b), 39B(1)(b) and 39B(1)(d) of the ASIC Act*]

National Consumer Credit Protection Act 2009

1.74 Schedules 2 and 3 to the Bill amend the *National Consumer Credit Protection Act 2009* to similarly apply, with modifications, the search warrant provisions from the *Crimes Act 1914*. [*Schedule 2, item 1, Part 6-3A and Schedule 3, items 10, 11, 12, 13, 14, 15 and 16, sections 262, 263, 269 and 270, paragraph 271(1)(b), subsections 271(1) and 271(9) and section 292 of the National Consumer Credit Protection Act 2009*]

Superannuation Industry (Supervision) Act 1993

1.75 Schedule 3 to the Bill amends the *Superannuation Industry (Supervision) Act 1993* to remove the search warrant provisions contained in the *Superannuation Industry (Supervision) Act 1993* and refer to the new provisions included in the ASIC Act. [*Schedule 3, items 21, 22, 23 and 24, section 271, paragraph 273(1)(b), subsections 273(1) and 273(9) of the Superannuation Industry (Supervision) Act 1993*]

Retirement Savings Accounts Act 1997

1.76 Schedule 3 to the Bill amends the *Retirement Savings Accounts Act 1997* to remove the search warrant provisions contained in the *Retirement Savings Accounts Act 1997* and refer to the new provisions included in the ASIC Act. [*Schedule 3, items 17, 18, 19 and 20, section 102, paragraph 104(1)(b) and subsections 104(1) and 104(9) of the Retirement Savings Accounts Act 1997*]