



15 October 2019

Manager
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Dear Sir/Madam

**Exposure Draft Consultation on Search Warrants, Access to Telecommunications Intercept
Material, Licensing and Banning Orders**

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the Treasury ASIC Enforcement Review Taskforce's Exposure Draft on Search Warrants, Access to Telecommunications Intercept Material, Licensing and Banning Orders.

We have a number of concerns in relation to the search warrant powers, penalties and overall need to ensure that the regulatory system delivers fair outcomes. We outline the specific concerns below.

Search Warrant Powers

In relation to the proposed enhancement of ASIC's search warrant powers, AFMA holds concerns around the extent of the extra application of those powers.

The proposed amendments to the ASIC Act and the National Consumer Credit Protection Act (NCCPA) extend the application of Crimes Act search warrant provisions to indictable offences under the corporations legislation, Commonwealth, State and Territory laws concerning:

- the management or affairs of a body corporate or managed investment scheme;
- laws involving fraud or dishonesty which related to a body corporate or management investment scheme or to financial products;
- the Retirement Savings Account Act; and
- the Superannuation Industry (Supervision) Act 1993.

The working definition of proposed in the Exposure Draft of “indictable offence” that is 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.

Following the significant increases in penalties and prison terms for certain offences in the Corporations Act, the ASIC Act, the NCCPA and Insurance Contracts Act that resulted from the passing of the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018, the use of this definition of “indictable offence” will mean that the search warrant powers can apply to the investigation of a significantly broader range of offences.

During the consultation phase regarding such amendments to criminal penalties, industry participants, including AFMA and the Law Council of Australia, raised concerns that proportionality principles for penalties were being not adequately applied, and that new penalties for certain offences are now disproportionately high and are not an appropriate reflection of the seriousness of the offence.

As a result, under the current proposals, the search warrant powers would now apply to offences that are considered “ordinary criminal offences” under the Corporations Act, which are often strict liability offences, and are punishable by imprisonment for 2 years.

For example, a breach of s1021E of the Corporations Act, which relates to the preparation of a defective disclosure document or statement or giving the document or statement, whether or not it is known to be defective. A breach of this provision now has a maximum criminal penalty of 2 years imprisonment. Aspects of this offence have strict liability, and in criminal proceedings, a defendant bears an evidential burden in relation to certain matters.

The search warrant powers would no longer be limited to “serious criminal offences” that incur larger penalties. We would argue, therefore, that such powers should be limited to the investigation of serious offences, and that the appropriate balance has not been struck between ASIC’s logistical requirements and the protection of individuals’ rights and property.

We submit that ASIC’s search powers should be limited to “serious criminal offences”, as set out in the Corporations Act, which largely relate to dishonest or fraudulent behaviour.

Additionally, AFMA has concerns about the extent to which the sharing powers of law enforcement agencies are being broadened.

It is proposed that this power can now make available evidential material, or anything that is seized for the prevention or investigation of “a breach of an obligation (whether under statute or otherwise), other than an obligation of a private nature (such as an obligation under a contract, deed, trust or similar arrangement)”. This is extremely broad application.

Again, the proposed exercise of the proposed new search warrant power is not proportionate to the seriousness of the offence that is being investigated or prevented. The list of potential purposes for the use of the sharing power that is set out in the proposed section 3ZQU of the ASIC Act is not

exhaustive and the powers are not limited to indictable offences, or even to the prosecution of civil penalty provisions. Such powers should be limited to more serious offences, or at a minimum, to the prosecution of civil penalty provisions and offence provisions, and should not apply to the investigations of breaches of obligations.

Penalties

AFMA made a substantial submission to the original Enforcement Taskforce consultation on penalties in December 2017 which covered our concerns around the penalties changes and the process that produced the changes. We will not repeat all the concerns raised in that submission here.

Among many concerns around consistency with the changes since introduced, including with regard to the proportionality of the penalties when compared to similar offences elsewhere and with the degree of alignment with Government guidelines, of particular concern are the changes introduced potentially large civil penalties for failures of firms to deliver financial services “efficiently, honestly and fairly” which is a vague and ill-defined requirement for a provision where a penalty is applicable.

We note the cancellation of the previous Exposure Draft consultation days before it was due to conclude was disappointing.

In relation to the provisions covering false statements to ASIC currently in the Exposure Draft we note many of these would fall into the category of offences that we discussed in our initial submission that:

“...tend on the spectrum towards categorisation as “primarily concerned to facilitate the achievement of collectivist goals by discouraging behavior which is considered to be inimical to those goals and thus detrimental to collective welfare”¹ (sometimes termed ‘regulatory offences’) such as failures to keep proper records as opposed to variations on traditional criminal offences which raise moral opprobrium such as theft and fraud which might be considered equivalent to market manipulation.

Some commentators argue that “the punishment of regulatory offences is a practical means of controlling an activity, without necessarily implying the element of social condemnation which is characteristic of traditional crimes”² which has implications for variances in the penalties depending on where on the spectrum offences fall”.

Insofar as this is the case it should guide the penalties and treatment of failures in relation to the provision. In this regard the justification for the creation of strict liability offences in relation to documents submitted to ASIC, may not find an appropriate balance. The justification given in the draft Explanatory Memorandum is:

“A strict liability offence is appropriate as it will greatly enhance enforcement of provision [sic], and greatly improve compliance with the fundamental policy objective of the provision

¹ <http://www.austlii.edu.au/au/journals/MelbULawRw/1999/18.html>

² *Ibid.*

of ensuring that persons taking [sic] all reasonable steps to ensure that documents are not false or misleading.”

These are generic justifications and do not say anything in particular about why this particular provision should abrogate what the Attorney General calls “one of the most fundamental protections in criminal law”³. The reasons provided in the draft Explanatory Memorandum are insufficient to justify the introduction.

Making almost any provision in any Act subject to strict liability will likely:

- Enhance enforcement, as there is no fault element to prove, a significant simplification; and
- Increase compliance with the provision – to the extent there is awareness there are no excuses for the practice.

These generic advantages of strict liability are not in question, rather it is that they come at a cost to fundamental protections. For there to be a justification on balance for such fundamental protections to be abrogated there should be sound public policy reasons articulated for the importance of the provision that justify the loss of liberty to the public.

Need for Systemic Balance and Review

AFMA holds that the scale and rate of change in relation to regulatory powers and penalties creates a risk of unintended legal consequences.

We are concerned that there is the potential at least, that disproportionate penalties could result in risks to justice if firms take a view they cannot risk being incorrectly found guilty of offences and will be leveraged into agreeing to penalties they do not believe they deserve. Academic work has identified such effects in the US justice system where prosecutors have large leverage⁴. Stuntz argued in the US this has produced a system of official discretion rather than law.

Regulators will be far more powerful and less constrained in their ability to impact businesses and the general business environment than they have been historically through:

- increased penalties and their associated leverage;
- an increased range of offences, particularly with multiple versions of penalties for a single offence⁵ - which allow for multiple points of leverage;
- increased budgets and staffing including a dedicated commissioner for enforcement activities;
- greater powers of search and surveillance;
- greater technology for market and other surveillance;
- greater flexibility in banning orders; and

³ Attorney Generals A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, p. 22.

⁴ Stuntz, W. (2011). *The Collapse of American Criminal Justice*. Cambridge, Massachusetts; London, England: Harvard University Press.

⁵ For example, the fault-based offence, strict liability offence, civil penalty, and civil penalty for failure to take reasonable steps provisions in relation to the same requirement to submit accurate documents to ASIC.

- other measures introduced and in train.

At the same time regulators over recent years have never been more active in the process of the development of regulations, and actively calling for increased penalties including in its submission to the Taskforce in relation to Penalties.

ASIC is also an active direct prosecutor (and indirect via the CDPP) and maintains a high public profile in relation to its enforcement activities.

It is imperative that regulators use these increased powers and discretions fairly. With the new powers in the draft Bill, now might be the appropriate time to conduct a review into the systems, checks and balances that regulators have in place to ensure that their conflicts are optimally managed, and that the business environment will be delivered fair outcomes that are of economic benefit to Australia.

Conclusion

We thank you for considering our comments in relation to this Exposure Draft. If you would like more information, I can be contacted via the Secretariat at AFMA.

Yours sincerely

A handwritten signature in black ink that reads "Damian Jeffree". The signature is written in a cursive, slightly slanted style.

Damian Jeffree
Director of Policy and Professionalism