

2 August 2017  
ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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### **In PDF and Word formats**

Dear Colleagues

### **Consultation: Harmonisation and Enhancement of Search Warrant Powers**

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic. We note that the Positions and Consultation Paper 2 *Harmonisation and Enhancement of Search Warrant Powers* (**Paper**)<sup>1</sup> discusses this topic and sets out certain positions as follows-

**Position 1:** *ASIC-specific search warrant powers in various Acts should be consolidated into the ASIC Act.*

**Position 2:** *ASIC Act search warrants to provide for search and seizure of 'evidential material'.*

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<sup>1</sup> Abbreviations used in the Paper are adopted in this submission for convenience.

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**Position 3:** *ASIC Act search warrants to be issued when there is a reasonable suspicion of a contravention of an indictable offence.*

**Position 4:** *ASIC Act search warrant powers to include ancillary powers that mirror the Crimes Act provisions.*

**Position 5:** *Material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings.*

**Position 6:** *Use of material seized under search warrants by private litigants should be subject to appropriate limits.*

For ease of reference, we will provide comments under each of these Positions.

### **Position 1: ASIC-specific search warrant powers in various Acts should be consolidated into the ASIC Act.**

1. We accept that there is much to be said for consolidating ASIC-specific search warrant powers into the ASIC Act. We also accept the force of the ASIC contentions (vide the ASIC website) that the changes outlined in the Paper will harmonise and strengthen ASIC's powers by aligning them with those available to other law enforcement agencies and regulators and to make adjustments that ensure the scope of material that may be subject to search and seizure activity will not be limited by narrow or outdated terms in relevant legislation;

2. We appreciate also the issue outlined in the Paper concerning "forewarning" under the legislation identified. Given that the legislature previously has deemed it appropriate to remove the requirement from the ASIC Act, we assume the public policy issues have been ventilated and appropriately considered. We understand that the rule of law and appropriate judicial oversight would apply as they currently do in terms of exercise of powers under the Crimes Act and ASIC Act. On this basis, the proposal seems to us to be reasonable;

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### **Position 2: ASIC Act search warrants to provide for search and seizure of 'evidential material'.**

3. As we understand it, the proposal here is that the requirement for search warrants issued under the ASIC Act, NCCP Act, SIS Act and RSA Act to specify particular books that can be searched and seized under the warrant be removed. This is to be achieved by modelling the ASIC Act search warrant powers on the powers in that regard contained in the Crimes Act and the Competition and Consumer Act. The approach in that legislation applied to the ASIC Act would be that

(a) a warrant could be issued under the ASIC Act where there are reasonable grounds for suspecting that there is or will be 'evidential material' at premises identified in the warrant; and  
(b) there would be an adoption of a broader 'kind of evidential material specified in the warrant' criterion for search and seizure under the warrant.

4. It is not clear to us that the need for these very far-reaching changes has been sufficiently demonstrated in the Paper. In our view, a very high threshold is needed to be satisfied to meet the requirements for the issue of a warrant under the Crimes Act and the Competition and Consumer Act. It may well be in a practical sense that this is too high a threshold for ASIC to exercise its powers properly.

5. In addition, we note that the policy focus of each of the Crimes Act and the Competition and Consumer Act are quite different from those of the ASIC Act, NCCP Act, SIS Act and RSA Act. In this regard, we refer to the discussion in the Paper as to Position 3. It is not clear to us why such a broad-ranging power of such wide import should be introduced here. It seems to us that the existing requirement that the warrant identify particular books causes the investigator to address appropriately the matter in hand and the range of documents to which the search warrant should be directed.

### **Position 3: ASIC Act search warrants to be issued when there is a reasonable suspicion of a contravention of an indictable offence.**

6. In our view, the test should at least be reasonable grounds for suspecting that there is evidential material at the premises relevant to the commission of an indictable offence. In this regard, we suggest that the threshold should be higher than a reasonable suspicion of a

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contravention of an indictable offence – there must be a nexus to the evidence sought to be seized under warrant.

7. One of the questions posed here is whether there should be a threshold when applying for an ASIC Act search warrant or should search warrants be available where there is a reasonable suspicion of any contravention of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act?

8. In our view it is appropriate that a threshold is applied here given

(a) the broad nature of the material to which access is sought, ie 'evidential material' rather than 'particular books', and;

(b) the purposes to which seized material may be put, ie, civil and penalty provisions as well as criminal provisions.

9. If that threshold is introduced our view is that it should not be a reasonable suspicion of commission of either an indictable or a summary offence. This is because the two factors we have mentioned above. Accordingly, the relevant threshold should be one of reasonable suspicion of contravention of indictable offence provisions only.

### **Position 4: ASIC Act search warrant powers to include ancillary powers that mirror the Crimes Act provisions.**

10. We note that the Paper adopts a preliminary position that the search warrant powers in the ASIC, NCCP, SIS and RSA Acts should include ancillary provisions that mirror the provisions in the Crimes Act. We also note the Crimes Act is directed to matters related to the commission of criminal offences.

11. We understand the policy arguments set out in the Paper in terms of "updating" provisions to ensure that the most up-to-date provisions are available to assist in the exercise of powers in relation to electronic equipment. However, our concern is the different policy focuses of the Crimes Act and the other legislation mentioned. Accordingly, we would support this updating but only to the extent to which this is reasonably necessary and certainly the powers should be co-extensive with those under the Crimes Act and not extend beyond that point.

### **Position 5: Material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings.**

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12. We note that the Paper adopts as a preliminary position that ASIC should continue to be able to use and permit the use of material seized under an ASIC Act search warrant for the purposes of criminal, civil and administrative proceedings. If the other proposals suggested in the Paper are adopted this outcome would apply to material seized in investigations of suspected contraventions of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act.
13. We accept the comments in the Paper that there is a need to arrive at an appropriate balance between various considerations (at paragraph 10). However, the powers proposed are extremely broad. We submit that evidential material seized under a revised ASIC Act warrant should be available for use only in respect of criminal offence proceedings, that is the evidential material should not be available for the purpose of investigating contraventions that are actionable by only civil or administrative proceedings. We accept that currently ASIC may use 'particular books' seized under ASIC Act warrants in any criminal, civil or administrative proceeding. However, the scope of the proposed warrant power is much wider than exists at the moment and should be subject to limitations we have suggested.
14. However, we do accept that it may be appropriate to qualify the general proposition so that material may only be used in civil or administrative proceedings if there is also related criminal enforcement action (e.g. to compensate victims where a crime has occurred). Under this proposal, the material would only be available for civil and/or administrative components where there is an enforcement component.
15. As to the other points raised under this position, our view is that time frames for return of seized material ought to be reasonable and practicable and it is appropriate for ASIC to have the ability to apply for an extension of the time limit.
16. At this juncture, we do express our reservations as to the availability to private litigants of seized material—a point which we discuss further in relation to Position 6.

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**Position 6: Use of material seized under search warrants by private litigants should be subject to appropriate limits.**

17. We note the comments in the Paper at paragraph 23 concerning the reasons why it *may be appropriate to provide additional protection to material seized under a search warrant that would limit the ability of private litigants to access that material*. We agree with the reasoning set out there questioning why third parties should have the benefit of access to search warrant material.
18. In our view, particularly given the enhanced nature and scope of the proposed power, there should be a general rule that private litigants, in the absence of an appropriate Court order, should not be able to access material seized by ASIC under a search warrant.

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Should you have any questions, please contact the writer on 02-9299 3022.

**Yours Faithfully**



**Paul Callaghan**

**General Counsel**