



17 August 2017

ASIC Enforcement Review
Financial System Division
The Treasury
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PARKES ACT 2600

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ASIC Enforcement Review – Position Paper 5 ASIC Intercepts Access

The Australian Financial Markets Association (AFMA) is commenting on the ASIC Enforcement Review – Position Paper ASIC’s Access to Telecommunication Intercepts Material (Enforcement Review).

In brief, AFMA is of the view that no change to current arrangements is warranted in keeping with the previous decisions of Australian governments. The current law properly balances the investigation needs of professionally qualified and appropriately oversights criminal law enforcement investigation agencies with the privacy rights of persons. The Australian Securities and Investments Commission (ASIC) does not have the appropriate attributes or oversight arrangements to be an interception or recipient agency and administrative convenience for ASIC is an insufficient policy justification for a change to the law.

The fundamental starting point in this assessment must be that there is a general prohibition on interception¹. Under the Telecommunications (Interception and Access) Act 1979 (TIA Act) a person who contravenes subsection 7(1) is guilty of an offence punishable on conviction by imprisonment for a period not exceeding 2 years (section 105). The law then provides limited exceptions to the subsection 7(1) prohibition which

¹ *The 2005 Report of the Review of the Regulation of Access to Communications by Anthony Blunn affirmed the overarching importance of protection of privacy and stresses that any legislation allowing interception power should lend fundamental consideration to the protection of privacy of individuals. The findings seek to balance privacy with security and law enforcement. It is initially noted that ‘[t]he protection of privacy should continue to be a fundamental consideration. Attorney-General’s Department, Review of the Regulation of Access to Communications, 2005.*

are specified in other subsections of section 7. These include interception under an interception warrant.

Public policy is based on the fundamental principle that interception activities necessarily involve an encroachment on civil liberties. It is imperative to achieve a proper balance between the interests of national security or prevention of other serious offences, and the need to not unduly compromise the privacy of individuals. Since the enactment of the TIA Act in 1979, there have been a variety of amendments that have significantly extended the ambit of the operation of the TIA Act. This is consistent with public safety concerns about terrorism and the increasing sophistication and use of telecommunication technologies have given rise to a consistent expansion of the ambit of investigative powers of law enforcement agencies.

The proposals discussed in this consultation are not about the need to keep laws up to date to deal with technological change. They are about whether existing protections should be eroded on the basis that it would be administratively convenient to ASIC. Corporate crime has remained fundamentally unchanged in character and incidence over the last century or more. What has changed has been much lower community tolerance of corporate crime leading to more vigorous investigation and pursuit of offenders with the result that conviction rates are significantly greater than in previous generations. The public policy issue is then a very different one to dealing with novel societal threats presented by the ability of hackers or terrorists to leverage their reach and lethality through new telecommunication technologies.

Administrative inconvenience is not a sufficient public justification for undermining fundamental principles of good policy and civil protections. Laws often encroach on traditional rights through incremental mission creep and freedoms are eroded piecemeal. In *Malika Holdings v Stretton*, McHugh J said that ‘nearly every session of Parliament produces laws which infringe the existing rights of individuals’². Laws that interfere with traditional rights and freedoms are sometimes considered necessary for many reasons—such as public order, national security, public health and safety. The mere fact of interference will rarely be sufficient grounds for criticism. Incrementalism presents a serious threat to fundamental rights such as those relating to privacy. The underlying legislation when it was introduced struck the right balance with regard to enforcement agencies that should be able to intercept and access telecommunications directly.

Mere administrative inconvenience as claimed by ASIC is an inadequate policy rationale for undermining fundamental protections which have only vested extraordinary powers in specialised highly professional law enforcement agencies which have well developed, sophisticated training, control and integrity oversight mechanisms. It is crucial to distinguish the role of a conduct regulator, which is the character of ASIC, from a criminal investigation law enforcement agency. The law enforcement agencies which are currently authorised to intercept and receive under the TIA are in the nature of police and anti-corruption bodies. In contrast to ASIC, these agencies have very strong oversight mechanisms. For example, the Australian Commission for Law Enforcement Integrity

² *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, [28] (McHugh J)

(ACLEI) oversees the Australian Federal Police (AFP), Australian Crime Commission, and others along with an AFP Fraud & Anti-Corruption Centre. This Enforcement Review arises out of the Capability Review of ASIC³ which emphasises that ASIC's role is not primarily to be a police-like law enforcement agency but a more effective conduct regulator. Preventative rather than remedial / punishment regulatory action is the key to effective financial market regulation which serves the interests of investors. The remit of ASIC is to carry out surveillance of the markets and where it deems necessary to commence an investigation. In regard to market surveillance ASIC already receives huge quantities of real time market trading data and can access taped telephone conversations related to market dealing and has very extensive information collection powers.

The direction of markets is towards automation and the downgrading of the human element for both efficiency and compliance risk reasons. Stored communications are the key source of information in financial markets in an increasingly automated world and ASIC is already able to obtain stored telecommunications data. Beyond this, as the Enforcement Review notes ASIC already has unique powers for gathering information and evidence and obtaining assistance. These powers allow it to effectively investigate

³ Fit For The Future: A Capability Review of The Australian Securities And Investments Commission - A Report to Government 20 April 2016

Some key observations relating to ASIC's enforcement role in the Capability Review Report were:

- ASIC has a tendency to be reactive and is often excessively issue driven (that is, responding to high-profile events) rather than strategic in its focus.
- ASIC has too heavy an emphasis on enforcement (often a reactive tool) in the articulation of its role, often describing itself as an 'enforcement agency' above all else.
- Notably, some 38 per cent of ASIC's resources are allocated to the enforcement function, which is significantly greater than domestic and international peer regulators.
- In the result, the Enforcement Review said: 'While enforcement is a critical element of ASIC's toolkit, especially in terms of its deterrence impact and overall credibility of the regulator, in the Panel's view, a better balanced approach emphasising the full scope and use of ASIC's regulatory toolkit would be more appropriate for a modern and dynamic conduct regulator.'
- The origin of ASIC's culture is, partly, the 'police-like' culture of its predecessors, the ASC, NCSC and the Corporate Affairs Commissions of the states. The 'police-like' culture is distinct from the culture of a conduct regulator with enforcement powers like ASIC is today. ASIC's internal culture is more defensive, inward looking, risk averse and reactive than is desirable for a conduct regulator.
- ASIC's approach to litigation sometimes lags behind recent progress made by other Australian regulators.
- There is a perception that ASIC's selection of cases for litigation can be risk averse (tending to prefer cases with a higher probability of success, rather than selecting cases that have strong merits, but also allow ASIC to test the veracity of the law).
- Although not specifically an enforcement issue and hardly controversial, it was also noted that data management and analytics should be improved across ASIC. This is indirectly relevant to ASIC's ability to deal with large volumes of data in investigations.

matters and determine whether criminal prosecutions should be recommended to the Director of Public Prosecutions or if civil penalty enforcement actions should be undertaken. Given the gravity of the interception powers it would be very troubling, for example, if ASIC were able to use information obtained in telecommunications for a criminal investigation in a downgraded civil penalty case.

There should be no doubt in the community's mind that ASIC is a very well-resourced regulator that has received ample funding through large levies on industry to conduct enforcement and investor protection. In April 2016 the Government announced a series of further measures of reforms to enforcement and consumer protection in the reform package. The Government's reform package, with funding totalling \$127.2 million, is expressly aimed at better enabling ASIC to combat misconduct in the banking and financial services industry⁴. Additional powers for ASIC are not warranted at this time.

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Yours sincerely



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⁴ Key reforms in this package directly relating to enforcement and consumer protection include:

- \$9.2 million in funding for ASIC and the Treasury to accelerate implementation of, among other things, a review of ASIC's enforcement regime, including penalties, to ensure that it can effectively deter misconduct. This is to ensure ASIC has the powers it needs to protect consumers and 'police' the financial sector.
- \$57 million in funding for increased surveillance and enforcement on an ongoing basis in the areas of financial advice, responsible lending, life insurance and breach reporting.
- \$61.1 million to enhance ASIC's data analytics and surveillance capabilities as well as improving ASIC's information management systems