

**Submission from:**  
**Dr Juliette Overland**  
Senior Lecturer, Business Law  
University of Sydney Business School  
[juliette.overland@sydney.edu.au](mailto:juliette.overland@sydney.edu.au)

**16 August 2017**

ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600  
Email: [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

**ASIC ENFORCEMENT REVIEW TASKFORCE  
SUBMISSION ON POSITIONS AND CONSULTATION PAPER:  
ASIC'S ACCESS TO TELECOMMUNICATIONS INTERCEPT MATERIAL**

Thank you for the opportunity to make a submission to the Taskforce.

I note that the Taskforce's Terms of Reference include 'the adequacy of ASIC's information gathering powers and whether there is a need to amend legislation to enable ASIC to utilise the fruits of telephone interception warrants ... for market misconduct or other serious offences'. I also note that the Taskforce has developed a preliminary position described in the Positions and Consultation Paper that ASIC should be able to receive lawfully obtained telecommunications interception material ('TI material') to investigate and prosecute serious offences and has sought submissions on the following issues:

- (a) Should ASIC be a recipient agency so that it can receive telecommunications intercept material lawfully obtained by the interception agencies and use that material for the purpose of investigating serious *Corporations Act* offences and other 'serious' or 'relevant' offences?
- (b) If ASIC is made a recipient agency, are any additional reforms appropriate to address any negative consequences of this change?

My particular interest and focus is in the regulation of insider trading (a 'serious offence' under the *Corporations Act 2001* (Cth)) and the recommendations contained in my submission are based on my academic research, the findings of which have been published in refereed papers and other publications.<sup>1</sup>

---

<sup>1</sup> In particular, J Overland, 'Insider Trading, Materiality and the Reasonable Person: Who Must Be Influenced for Information to have a "Material Effect"?' (2017) 45 *Australian Business Law Review* 213; J Overland, 'Re-evaluating the Elements of the Insider Trading Offence: Should there be a Requirement for the "Possession" of Inside Information?' (2016) 44 *Australian Business Law Review* 256; J Overland, 'Insider Trading, General Deterrence and the Penalties for Corporate Crime' (2015) 33 *Company and Securities Law Journal* 317; J Overland, 'The Possession and Materiality of Information in Insider Trading Cases' (2014) 32 *Company and*

It is my recommendation, consistent with the Taskforce's proposals, that ASIC be made a recipient agency in order that it be able to receive and use TI materials where appropriate, particularly in connection with insider trading offences.

### **Insider trading, detection and proof**

Insider trading is prohibited under section 1043A of the *Corporations Act*, in order to protect market integrity, so that those who participate in securities markets can be confident that people who have access to inside information are not able to unfairly exploit that advantage.<sup>2</sup> Insider trading is a complex, controversial offence with a reputation for being under-prosecuted, although AISC has been more active in insider trading enforcement in recent years.

A major difficulty in the enforcement and prosecution of insider trading laws lies in the detection of the offence. Despite the use of increasingly sophisticated methods of surveillance and real-time monitoring of securities trading, the difficulties in detecting insider trading are widely acknowledged.<sup>3</sup> The difficulties of detection primarily arise as a result of the significant challenges in obtaining evidence of the commission of insider trading activity. This is particularly relevant for the elements of the offence which require proof as to the offender's state of mind,<sup>4</sup> as insider trading contains a knowledge element, which requires proof that the offender knew that the relevant information was inside information – that is, that the offender knew (or ought reasonably to have known) that the information was not general available and, if it were, that the information was likely to be material in relation to the price or value of certain securities or other financial products.<sup>5</sup>

---

*Securities Law Journal* 353. For a full list of my publications on the topic of insider trading and corporate crime, please see: <http://sydney.edu.au/business/staff/julietto>

<sup>2</sup> Insider trading is generally acknowledged, if not universally accepted, as a significant threat to market integrity, which is widely regarded as an essential requirement for the proper, efficient functioning of securities markets: See, for example, ASIC, *Consultation Paper 68: Competition for Market Services – Trading in Listed Securities and Related Data* (2007); Utpal Bhattacharya and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 *Journal of Finance* 75; Laura N Beny, 'Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate' (2007) 32 *Journal of Corporation Law* 237. This rationale was confirmed by the majority of the High Court in *Mansfield and Kizon v R* (2012) 87 ALJR 20.

<sup>3</sup> Roman Tomasic and Brendan Pentony, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 *Australian and New Zealand Journal of Criminology* 65; Explanatory Memorandum, Financial Services Bill 2001 (Cth) [2.78]-[2.79]; Gregory Lyon and Jean J du Plessis, *The Law of Insider Trading in Australia* (Federation Press, 2005) 163-8.

<sup>4</sup> Corporations and Markets Advisory Committee, *Insider Trading Report* (2003), [2.139]; Roman Tomasic, *Casino Capitalism? Insider Trading in Australia* (Australian Institute of Criminology, 1991) 115-26. As has been noted by the former Chair of ASIC, Alan Cameron, 'proving that a person had knowledge is often harder than it sounds unless there is smoking-gun type of evidence': Alan Deans, 'The Fetter of the Law', *The Bulletin* (Sydney), 28 November 2000, 52; Simon Rubenstein, 'The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading' (2002) 20 *Company and Securities Law Journal* 89, 106.

<sup>5</sup> *Corporations Act 2001* (Cth), s 1043(1)(b).

It can be very difficult, in the absence of evidence of conversations and communications made by or to the relevant offender, that a person had such knowledge. Currently ASIC is faced with the task of attempting to prove the state of mind of an alleged insider trader by relying on inadequate telecommunications data and stored communication.

Communications across internet-based platforms make surveillance by traditional means increasingly difficult (with platforms such as Snapchat, WeChat and WhatsApp being increasingly used as communication tools for unlawful activities) but this position could be ameliorated if appropriate access to and use of TI material was made possible.

### **Impact of ASIC becoming a recipient agency**

By making ASIC a recipient agency and enabling it to access and use TI material for the investigation of serious offences, such as insider trading, many of the difficulties in detection (as described above) may be overcome or significantly reduced. The Positions and Consultation Paper has described a number of case studies demonstrating real examples where ASIC was unable to prosecute suspected insider traders, due to a lack of proof. Access to TI material would enable ASIC to more effectively enforce insider trading laws, if evidence as to offenders' state of mind can be obtained, which may be evident from conversations and communications that would not otherwise be available.

This is relevant in the context of detection of insider trading activity, as well as providing proof of the commission of the offence. Many overseas regulators and law enforcement agencies are able to rely on material that would be classified as TI material to effectively prosecute insider trading laws and it aids, not only in the detection of insider trading activity, but also in providing cogent evidence in court. Indeed, juries in the US indicate that TI material is highly influential on their deliberations and in securing convictions.<sup>6</sup>

The Positions and Consultation Paper quotes the former US Attorney for the Southern District of New York, Preet Bharara, at [39] in relation to the use of wire-tapping and the collection of evidence in insider trading cases. It is also worth considering other comments he has made in this context, noting that "ordinary" criminals are more likely to be the subject of electronic surveillance:

*"I am here to tell you that court-authorized wiretaps, so long as the legal requirements can be met, will continue to be in our toolbox in insider trading cases. And especially when sophisticated business people begin to adopt the methods of common criminals, such as the use of anonymous cell phones, we have no choice but to treat them as such...It would be difficult to explain to the public why alleged financial fraudsters deserve a milder approach just because they wear a white collar."*<sup>7</sup>

*"[P]rivileged Wall Street insiders who are [P]considering breaking the law will [now] have to ask themselves one important question: is law enforcement listening?"*<sup>8</sup>

---

<sup>6</sup> See *United States v Jiau*, 14-2360 (2d Cir. 2015).

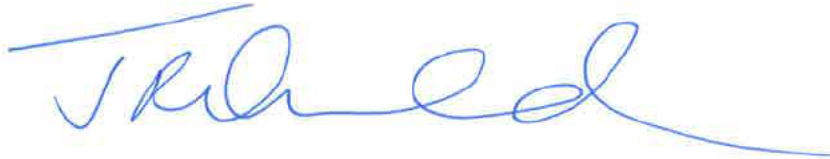
<sup>7</sup> Preet Bharara, 'The Future of White Collar Enforcement: A Prosecutor's View' (Speech delivered at the New York City Bar Association, New York, 20 October 2010).

<sup>8</sup> Preet Bharara, as quoted by Zachary Goldfarb, 'Insider Trading Ensnarers Six: Prosecutors Accuse Hedge Fund Manager, Others of Raking in \$20 million' *Washington Post*, 17 October 2009, and noted in Kenneth M Breen

The serious risk and damage to the integrity of Australian securities markets that results from insider trading warrants making ASIC a recipient agency to enable it to appropriately receive and use TI material, as proposed in the Positions and Consultation Paper.

I appreciate the opportunity to make this submission. Please feel free to contact me if I can be of any further assistance.

Yours sincerely



**Dr Juliette Overland**  
Senior Lecturer, Business Law  
University of Sydney Business School  
[juliette.overland@sydney.edu.au](mailto:juliette.overland@sydney.edu.au)