

26 July 2017

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

By email: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

Harmonisation and Enhancement of Search Warrant Powers

The Insurance Council of Australia (the Insurance Council) appreciates the opportunity to respond to the ASIC Enforcement Review Taskforce's (the Taskforce) Positions and Consultation Paper 2, *Harmonisation and Enhancement of Search Warrant Powers* (the Consultation Paper).

While the Insurance Council is, in-principle, supportive of making ASIC's search warrant powers consistent across the legislation it administers, the broadening of ASIC's powers requires careful consideration. This is because of possible adverse consequences for Australian Financial Services (AFS) licensees (licensees) both directly in terms of their legal situation and indirectly through their obligation to fund ASIC supervisory activities. Our submission addresses the six positions outlined in the Consultation Paper.

Position 1

The Insurance Council is not opposed to the consolidation of ASIC-specific search warrant powers in various Acts into the *Australian Securities and Investments Commission Act 2001* (ASIC Act). We agree that one set of search warrant powers in the ASIC Act which would be available for investigating contraventions of legislation administered by ASIC, including the *Corporations Act 2001* (the Corporations Act) and ASIC Act, would promote consistency in the use of such powers by ASIC.

Positions 2, 4 and 5

Despite the merits of making ASIC's powers consistent across the different pieces of legislation it administers, we suggest that the broadening of ASIC's powers as proposed under positions 2, 4 and 5 requires greater consideration. The Consultation Paper proposes to broaden ASIC's existing powers:

- to provide for search and seizure of 'evidential material' (position 2);
- to include ancillary powers that mirror the Crimes Act provisions (position 4); and

- so that materials seized are available for use in criminal, civil and administrative proceedings (position 5).

In considering the merits of these changes, the Insurance Council suggests a detailed examination of the specific instances in which ASIC has been unable, using its existing powers, to obtain the material it required. Greater transparency around the need for such changes is critical given, under a user-pays model, the cost of ASIC investigations will be borne by industry.

It is important that ASIC's powers strike the appropriate balance between providing effective investigative tools for ASIC to fulfil its statutory functions and the right of licensees to conduct their business free from disruptive intrusions. The Consultation Paper suggests that search warrants are resource intensive, and this operates as a control on the excessive use of warrants in matters that do not justify such an invasive investigative measure. However, we are concerned that the Taskforce may not have fully considered the impact of a user-pays model on such controls. To the extent that there are limitations and restrictions to ASIC's existing search warrant powers, these may be appropriate within the context of industry funding where controls imposed by resource constraints may be weakened.

In the Consultation Paper, it is queried whether there should be a time limit after which seized material must be returned unless a proceeding in which it may be needed as evidence has been commenced by ASIC. The Insurance Council is supportive of the imposition of a time limit, and suggests that time limits imposed on the Australian Competition and Consumer Commission (ACCC) may be used as a starting point for consideration. We do not support ASIC being permitted to apply for an extension, as firm time limits provide certainty to entities being investigated.

Position 3

While the Insurance Council recognises that the proposed introduction of a threshold is intended to curb any excessive use of search warrant powers, we are concerned that the proposed threshold would increase ambiguity for ASIC and regulated entities. The subjective nature of what would constitute a 'reasonable suspicion' would be a source of uncertainty until it had been tested sufficiently over time through the Courts.

If the Government were minded to broaden ASIC's search warrant powers as proposed, we submit that a more nuanced threshold containing objective criteria would be more appropriate. Such a threshold should ensure proportionality to the offence being investigated.

Position 6

The Insurance Council agrees that the use by private litigants of material seized under search warrants should be subject to appropriate limits, and should only be made available to ASIC for the purposes of fulfilling its statutory functions.

Furthermore, private litigants should not be able to circumvent a licensee's ability to object to material being produced under preliminary or standard discovery by obtaining the same material from ASIC when the material was provided in the context of a regulatory investigation.

Consequently, if ASIC's powers are expanded as proposed, the Insurance Council strongly supports the imposition of legislative safeguards to prevent third parties accessing the material available to ASIC through its use of a search warrant.

If you have any questions or comments in relation to our submission, please contact John Anning, General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



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