



Australian Government

ASIC Enforcement Review

Positions and Consultation Paper 2

Harmonisation and Enhancement of
Search Warrant Powers

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Communications
The Treasury
Langton Crescent
Parkes ACT 2600

Email: medialiaison@treasury.gov.au

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EXECUTIVE SUMMARY

- I. For the purpose of carrying out its investigation functions under the *Corporations Act 2001* (Corporations Act), *Australian Securities and Investments Commission Act 2001* (ASIC Act), *National Consumer Credit Protection Act 2009* (NCCP Act), *Superannuation Industry (Supervision) Act 1993* (SIS Act), *Retirement Savings Accounts Act 1997* (RSA Act) and various other laws, ASIC is currently able to utilise specific search warrant powers contained in the ASIC Act, NCCP Act, SIS Act and RSA Act, as well as the more general search warrant powers contained in the *Crimes Act 1914* (Crimes Act).
- II. ASIC argues that there are problems with the search warrant powers available to it which limit their utility as an investigative tool. There are also a number of differences between the powers that lead to inconsistencies in the way that the search warrant powers available to ASIC operate.
- III. The ASIC Enforcement Review Taskforce has been established by the Government to assess the suitability of the regulatory tools available to ASIC and whether there is a need to strengthen ASIC's toolkit.¹ The Taskforce's Terms of Reference include the following:

"The adequacy of ASIC's information gathering powers and whether there is a need to grant the equivalent of Federal Crimes Act search warrant powers under ASIC's enabling legislation for market misconduct or other serious offences."
- IV. The Taskforce has conducted preliminary analysis of the issues relating to ASIC's search warrant powers and developed preliminary positions on a set of reforms aimed at harmonising the various powers and making them more effective. These positions are:
 - 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'.
 - 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.

¹ For more information about the ASIC Enforcement Review Taskforce see the Taskforce website (<http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>).

- V. The proposed effect of these positions are summarised in Annexure A.
- VI. In developing these positions the Taskforce has recognised the need to achieve an appropriate balance between the regulator's need to have access to effective investigative tools, the relevant harm or risk being addressed and the rights of individuals.
- VII. The Taskforce has prepared these positions on a preliminary basis, and now seeks industry and community feedback prior to reaching its final conclusions and preparing recommendations to Government.
- VIII. The background and reasons for the Taskforce's adoption of the positions set out above are described below.

1 INTRODUCTION

1.1 ASIC'S ENFORCEMENT FUNCTION AND RESPONSIBILITIES

1. ASIC has legislative responsibility for enforcement of the Corporations Act, the ASIC Act, the NCCP Act, the SIS Act, the RSA Act and various other laws.

2. Section 1(2)(g) of the ASIC Act provides:

"In performing its functions and exercising its powers, ASIC must strive to: ... take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it."

3. ASIC's core enforcement functions include (but are not limited to) the following:

- 3.1. conducting investigations² into suspected relevant contraventions of the law,³ which are variously enforceable by criminal prosecution, civil proceedings (including civil penalty proceedings) and/or administrative action;
- 3.2. commencing, and conducting or supporting the Commonwealth Director of Public Prosecutions (CDPP) to conduct, criminal prosecutions⁴ in respect of such contraventions;
- 3.3. commencing and conducting various types of civil proceedings⁵ in respect of such contraventions, such as proceedings for the imposition of civil penalties, proceedings to seek compensation for victims and interlocutory proceedings for injunctions in connection with investigations or proceedings being pursued by ASIC (for example, to freeze assets or prohibit persons from travelling overseas); and
- 3.4. taking various forms of administrative action⁶ in respect of such contraventions, (for example, proceedings to ban persons from managing corporations, providing financial services or engaging in credit activities).

2 See, for example, ASIC Act, s13 – 15; NCCP Act, s247 – 248.

3 Including (but not limited to) the Corporations Act 2001, ASIC Act, NCCP Act, SIS Act, RSA Act and (in certain circumstances) criminal codes and legislation at both the Commonwealth and State/Territory level.

4 See, for example, ASIC Act, s49(2); Corporations Act, s1315; NCCP Act, s274.

5 Civil penalty and civil compensation proceedings: see, for example, ASIC Act, Pt 2 & s50; Corporations Act, Pts 9.4B & 9.5 and Chaps 5 and 5A; and NCCP Act, Chap 6. Injunctions: see, for example, ASIC Act, s12GD and s12GN; Corporations Act, s1323 and 1324; and NCCP Act, s177.

6 See, for example, Corporations Act, Pt 2D.6 and s920A; and NCCP Act, Pt 2-4.

2 SEARCH WARRANT POWERS AVAILABLE TO ASIC

2.1 SEARCH WARRANT POWERS IN THE ASIC, NCCP, SIS & RSA ACTS

1. Search warrants are one of the most effective investigative tools available to investigators to obtain and secure evidential material and prevent the destruction and concealment of evidence. They are widely used by a range of law enforcement agencies and regulatory authorities at both the Commonwealth and state levels.
2. Search warrants are executed without prior notice. This limits the opportunity for individuals the subject of an investigation to destroy, alter or conceal evidence, which is a real risk in many investigations. By contrast, under some of the relevant Acts (but not the ASIC Act), ASIC is required, before applying for a search warrant, to first give the person concerned a notice to produce the book, effectively giving the investigated party notice of ASIC's interest in the books.⁷
3. For the purpose of carrying out its investigative functions ASIC is currently able to utilise specific search warrant powers contained in:
 - 3.1. Sections 35–37 of the ASIC Act;
 - 3.2. Sections 269–271 of the NCCP Act;
 - 3.3. Sections 271–273 of the SIS Act; and
 - 3.4. Sections 102–104 of the RSA Act.
4. Common features of all of these search warrant powers include the following:
 - 4.1. ASIC is empowered, for the purpose of exercising its investigative or compliance functions, to apply to a magistrate for a search warrant in respect of specific premises to search for and seize relevant 'books', a term which is widely defined and encompasses computer devices;⁸
 - 4.2. a magistrate may issue a warrant authorising seizure of specified 'particular books' if satisfied that there are reasonable grounds for suspecting that such books are, or may be within the next 72 hours, on those premises;⁹

7 See below, note 12.

8 See, for example, the definition of 'books' in s5(1) of the ASIC Act, s5(1) of the NCCP Act, s10(1) of the SIS Act, s16 of the RSA Act, each of which includes 'document'; the definition of 'document' in s25A of the Acts Interpretation Act 1901, as in force at 1 January 2005(see s5A of the ASIC Act); and *Australian Federation of Air Pilots v Australian Airlines Ltd* (1991) 28 FCR 360, 369; *Muin v Refugee Review Tribunal* [2002] HCA 30 at [105]; *Paxus Services Ltd v People Bank Pty Ltd* (1990) 9 ALR 728; *R v Mistic* [2001] NZCA 71 at [31]-[35]; *Integrated Financial Group Pty Ltd v ASIC* (2004) 49 ACSR 509, 515 at [51]; *Sony Music Entertainment (Australia) Ltd v University of Tasmania* (2003) 198 ALR 367.

9 ASIC Act, s36(1); NCCP Act, s270(1); SIS Act, s272(1); RSA Act, s103(1).

- 4.3. the warrant is issued to, and executed by, a member of the Australian Federal Police (AFP),¹⁰ or an AFP member together with an ASIC officer (but never an ASIC officer alone); and
- 4.4. books seized pursuant to the execution of the warrant can be used for the purpose of relevant investigations and any criminal, civil or administrative proceeding.¹¹
5. Accordingly, books seized pursuant to any of these search warrant powers can be used for the full range of law enforcement functions carried out by ASIC.
6. The main difference between these search warrant powers is that ASIC can only apply for search warrants under the NCCP Act, SIS Act and RSA Act if it has previously issued a notice requiring the relevant person to produce the relevant books and the person has failed to do so,¹² whereas this 'forewarning' requirement was removed from the ASIC Act search warrant provisions in 2010.¹³
7. As discussed further below, the search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act do not contain the type of ancillary provisions applicable to the search warrant powers in both the Crimes Act and the Competition and Consumer Act 2010 (Competition and Consumer Act).

2.2 CRIMES ACT SEARCH WARRANTS

8. ASIC can apply to a magistrate for a search warrant to be issued under s3E of the Crimes Act for execution by the AFP which can then make seized material available to ASIC under s3ZQU of the Crimes Act. In practice, ASIC officers are designated by the executing AFP officer as 'constables assisting' and may assist the AFP in the execution of the search warrant.
9. Section 3E(1) of the Crimes Act authorises a magistrate to issue a warrant to search premises if the officer is satisfied that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any 'evidential material' at the premises. 'Evidential material' is widely defined in s3C of the Act to include a thing relevant to an indictable or a summary offence.

10 ASIC Act, s36(2); NCCP Act, s270(2); SIS Act, s272(2); RSA Act, s103(2).

11 See, for example, s37(4) & (5), and the definition of 'proceeding' in s5(1) and s37(10), of the ASIC Act; s271(4) and (5), and the definition of 'proceedings' in s5(1), of the NCCP Act; s273(4) & (5) of the SIS Act, which use the term 'proceeding' without limitation; s104(4) & (5) of the RSA Act, which use the term 'proceeding' without limitation.

12 NCCP Act, s269(1); SIS Act, s271(1); RSA Act, s102(1).

13 Pursuant to the Corporations Amendment (No 1) Act 2010 (Cth), Sch 1.

10. A 'thing relevant to an indictable offence' and a 'thing relevant to a summary offence' are defined in s3 as follows:
 - 10.1. anything with respect to which an indictable offence or summary offence against any law of the Commonwealth or of a Territory has been committed or is suspected, on reasonable grounds, to have been committed;
 - 10.2. anything with respect to which a State offence that has a federal aspect, and that is an indictable offence, summary or simple offence against the law of that State, has been committed or is suspected, on reasonable grounds, to have been committed; or
 - 10.3. anything as to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence;
 - 10.4. anything as to which there are reasonable grounds for suspecting that is intended to be used for the purpose of committing any such offence.
11. These definitions mean that material relating to the commission of Commonwealth offences and State offences that have a federal aspect or connection can be seized under a Crimes Act warrant.
12. Warrants issued under s3E(1) of the Crimes Act authorise, among other things, the search for 'the kinds of evidential material specified in the warrant'¹⁴ and the seizure of such material if the executing officer or constable assisting believes on reasonable grounds that it is evidential material in relation to an offence to which the warrant relates.¹⁵
13. The search warrant powers in the Crimes Act are supported by a range of regularly reviewed and updated ancillary provisions designed to ensure that they retain their effectiveness in the modern era, including (but not limited to) provisions authorising:
 - 13.1. seizure of evidential material identified during execution of a search warrant that relates to an indictable offence other than an offence to which the warrant relates (for example, authorising the seizure of illicit drugs or weapons that are located when exercising a search warrant for suspected fraud offences);¹⁶
 - 13.2. taking photographs and making video recordings of the search;¹⁷
 - 13.3. executing officers and persons assisting them to temporarily cease execution of a warrant and leave the premises for a short period;¹⁸
 - 13.4. using equipment on the premises, or brought onto the premises by investigators, for the purpose of examining or processing things found (such as computers and other electronic devices) in order to determine whether they may be seized;¹⁹

14 Crimes Act, s3F(1)(c).

15 Crimes Act, s3F(1)(d)(i).

16 Crimes Act, s3F(1)(d)(ii).

17 Crimes Act, s3J(1).

18 Crimes Act, s3J(2).

19 Crimes Act, s3K(1) & (4).

- 13.5. moving things found on the premises to another place for examining or processing in order to determine whether they may be seized;²⁰
 - 13.6. operating electronic equipment that has been removed from the warrant premises to access data from that equipment, including data held in another place;²¹
 - 13.7. operating or securing computers and other electronic devices on the premises and copying or printing data contained on such devices;²²
 - 13.8. an officer to apply for, and a magistrate to make, an order requiring a specified person with knowledge of a computer or electronic device on the premises to provide information (such as passwords) and/or other assistance necessary to enable data on that device to be accessed;²³ and
 - 13.9. an officer to apply for, and a magistrate to issue, a search warrant by telephone, telex, fax or other electronic means in urgent cases.²⁴
14. Evidential material obtained pursuant to Crimes Act search warrants may generally only be used for the purposes specified in s3ZQU, which (among other things) include:
- 14.1. investigating or prosecuting criminal offences;²⁵
 - 14.2. civil proceedings to restrain, confiscate or disgorge proceeds or instruments of crime;²⁶
 - 14.3. administrative action in relation to alleged or suspected misconduct by Commonwealth officials;²⁷ and
 - 14.4. the performance of any functions by the AFP under s8 of the *Australian Federal Police Act 1979* (AFP Act).²⁸
15. Accordingly, evidential material obtained pursuant to Crimes Act search warrants can only be used by ASIC for the purpose of investigating and prosecuting criminal offences. It cannot be used for the purpose of investigating contraventions that are actionable by only civil or administrative proceedings and it is not admissible in any kinds of civil or administrative proceedings undertaken by ASIC.²⁹ ASIC may also work with the CDPP or the AFP to take action to prevent dealings in or confiscate proceeds of crime under the Proceeds of Crime Act (Cth) 2002.

20 Crimes Act, s3K(2) & 3LAA.

21 Crimes Act, s3LAA.

22 Crimes Act, s3L.

23 Crimes Act, s3LA.

24 Crimes Act, s3R.

25 Crimes Act, s3ZQU(1)(a).

26 Crimes Act, s3ZQU(1)(b)-(d).

27 Crimes Act, s3ZQU(1)(f)-(j).

28 Crimes Act, s3ZQU(1)(l).

29 See, for example, *Williams v Keelty* (2001) 111 FCR 175; *ASIC v Rich* (2005) 220 ALR 324.

3 SEARCH WARRANT POWERS IN THE COMPETITION AND CONSUMER ACT

1. The Australian Competition and Consumer Commission (ACCC) is a Commonwealth regulatory agency with enforcement functions analogous to those of ASIC. The range of enforcement actions open to the ACCC following an investigation includes criminal proceedings,³⁰ civil penalty proceedings³¹ and civil proceedings seeking injunctions and non-punitive orders.³²
2. For the purpose of carrying out its investigative functions, the ACCC can utilise the specific search warrant powers contained in Div 4 of Pt XID of the Competition and Consumer Act, which were introduced in 2006.³³ In contrast to the case for ASIC in respect of warrants issued under the Crimes Act, material seized pursuant to search warrants issued under Div 4 of Pt XID of the Competition and Consumer Act can be used for the purposes of, and is admissible in, the full range of ACCC enforcement actions (criminal and civil).
3. The search warrant powers in Div 4 of Pt XID of the Competition and Consumer Act generally mirror the search warrant powers in the Crimes Act. For example, they authorise searches for 'the kind of evidential material specified in the warrant' and the seizure or copying of that material.³⁴ 'Evidential material' is widely defined to mean a document or other thing that may afford evidence relating to a contravention of the Competition and Consumer Act.³⁵ There is no 'forewarning' requirement. The search warrant powers in the Competition and Consumer Act are also supported by a range of ancillary provisions similar to those in the Crimes Act.³⁶
4. Following their introduction in 2006, amendments were made to the Competition and Consumer Act (then called the Trade Practices Act) search warrant provisions³⁷ in 2009 to better align the Act with the search and seizure provisions under the Crimes Act.³⁸

30 See for example offences relating to cartel conduct at ss44ZZRF and 44ZZRG of the Competition and Consumer Act and offences relating to false and misleading statements to consumers contained in Div 1 of Pt 4-1 of Sch 2 to the Act.

31 See, for example, misuse of market power in s46 of the Competition and Consumer Act which is made a civil penalty contravention by s76 of the Act.

32 See s80 of the Competition and Consumer Act which provides allows the ACCC to seek injunctions in relation to contravention various provisions of the Act; see also s86C(1) and s86C(4) of the Act which allows the ACCC to seek non-punitive order and remedial orders such as corrective advertising and compliance programs.

33 *Trade Practices Legislation Amendment Act (No. 1) 2005*.

34 Competition and Consumer Act, ss154G(1)(b) & (c), 154X(2), 154X(4)(b).

35 Competition and Consumer Act, s154A (definition of 'evidential material').

36 Sections 154G,154GA, 154H and 154J of the Competition and Consumer Act.

37 *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009*.

38 See Second Reading speech: Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2008, p12312 (Chris Bowen, Minister for Competition Policy and Consumer Affairs and Assistant Treasurer).

5. The Crimes Act provisions were updated in 2010 to address known problems and limitations associated with searching for and seizing electronic material (for a detailed discussion of those issues, see Schedule 2 of the Explanatory Memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2010). Similar amendments have not been made to the Competition and Consumer Act provisions. This means the deficiencies which prompted amendments to the Crimes Act have not been addressed in the search warrant provisions of the Competition and Consumer Act. As a result there are differences between the search warrant powers in the legislation administered by ASIC, the Competition and Consumer Act and the Crimes Act.

4 ISSUES WITH ASIC'S EXISTING POWERS

1. ASIC has identified problems with the search warrant powers available to it which limit their utility as an investigative tool in a number of circumstances. Those problems relate to:
 - 1.1. the inconsistencies between the specific search warrant powers contained in the ASIC Act, NCCP Act, SIS Act and RSA Act, especially in relation to the continued 'forewarning' requirement in the latter three Acts (but no longer in the ASIC Act);
 - 1.2. warrants issued under the ASIC Act, NCCP Act, SIS Act and RSA Act authorise the search for and seizure of only specified 'particular books',³⁹ rather than the more generally described 'evidential material' that can be seized pursuant to search warrants issued under the Crimes Act and Competition and Consumer Act;
 - 1.3. the lack of a range of ancillary provisions (including provisions relating to the search, seizure and copying of electronic material), such as those now contained in the Crimes Act, in the search warrant powers contained in the ASIC Act, NCCP Act, SIS Act and RSA Act; and
 - 1.4. ASIC's inability to use material lawfully obtained pursuant to Crimes Act search warrants for the purpose of investigating contraventions that are actionable by only civil or administrative proceedings or conducting any such proceedings creates practical difficulties for ASIC and impacts on its ability to effectively collaborate with the AFP and other criminal law enforcement agencies.
2. As a consequence of the problems outlined in sub-paragraphs 1.1 to 1.3 above, ASIC rarely exercises the search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act and generally favours Crimes Act search warrants, despite the limitations of the latter.
3. Since January 2011, ASIC has obtained just over 200 warrants to search premises.⁴⁰ Of those search warrants, two were obtained under the ASIC Act, and none were obtained under the NCCP Act, SIS Act or RSA Act.
4. These issues are discussed in more detail below.
5. In addition, this paper considers issues associated with the broader use of material that is seized under search warrants by ASIC and potentially third parties.

39 See the term 'particular books' in s36(1) of the ASIC Act, s270(1) of the NCCP Act, s272(1) of the SIS Act, s.102(1) of the RSA Act; the term 'those books' in s36(2)(d) of the ASIC Act, s.270(2)(d) of the NCCP Act, s272(2)(d) of the SIS Act, s102(2)(d) of the RSA Act; and the requirement for the warrant to 'specify ... the books reference to in subsection (1)' in s36(4)(a) of the ASIC Act, s.270(4)(a) of the NCCP Act, s272(5)(a) of the SIS Act, s102(5)(a) of the RSA Act.

40 A single search warrant operation may involve ASIC obtaining a number of search warrants in relation to multiple 'premises (such as business premises, and residential premises and motor vehicles) linked to individuals under investigation.

5 THE 'FOREWARNING' REQUIREMENTS

1. The 'forewarning' requirements in the NCCP Act, SIS Act and RSA Act require ASIC, when seeking a search warrant, to demonstrate that it has previously issued a notice to a relevant person requiring the production of books and the person has failed to produce those books.⁴¹ In effect this provides a warning to individuals under investigation that ASIC is seeking to obtain particular evidential material, thereby affording them the opportunity to destroy, alter or conceal evidence prior to the execution of search warrants.
2. As stated above the 'forewarning' requirement was removed from the ASIC Act search warrant provisions in 2010.⁴² However, the 2010 reforms did not remove the identical requirements in the search warrant provisions in the NCCP Act, SIS Act or RSA Act, with the consequence that the problems identified persist with respect to the specific search warrant powers under those Acts.

POSITION 1: ASIC-SPECIFIC SEARCH WARRANT POWERS IN VARIOUS ACTS SHOULD BE CONSOLIDATED INTO THE ASIC ACT

3. The Taskforce adopts as its preliminary position that ASIC-specific search warrant powers in various Acts should be consolidated into the ASIC Act. This would mean that search warrants obtained in investigations of contraventions of all legislation administered by ASIC, including investigations of suspected contraventions of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act, would be centralised in the ASIC Act.⁴³ General search warrant powers such as those in the Crimes Act would not be affected by this measure and could still be used by ASIC in appropriate circumstances.
4. This will in effect remove the forewarning requirement from the NCCP Act, SIS Act and RSA Act, reducing the risk of the destruction, concealment and alteration of evidence by individuals under investigation by ASIC in relation to contraventions of those acts.
5. In addition, this will result in consistent search warrant powers across the legislation in respect of which ASIC has specific enforcement responsibility and enable consistency to be maintained. If amendments are considered necessary in the future, only one set of provisions will need to be amended. This may be particularly relevant given the other proposals suggested in this paper.

41 NCCP Act, s269(1); SIS Act, s271(1); RSA Act, s102(1).

42 Pursuant to the *Corporations Amendment (No 1) Act 2010* (Cth), Sch 1.

43 Search warrants under the enhanced ASIC Act provisions would continue to be issued to, and executed by, a member of the AFP or an AFP member together with an ASIC officer.

6. The Taskforce notes that the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) creates a standard framework for monitoring and investigation powers and includes provisions relating to the issue and execution of search warrants.⁴⁴ The Regulatory Powers Act has effect where a Commonwealth act specifically triggers its provisions. Amongst other things, the Regulatory Powers Act provides a means for ensuring greater consistency in the monitoring and investigative powers exercised by regulatory agencies thereby reducing the administrative burden on agencies and providing greater certainty for those who are the subject of investigations. The Regulatory Powers Act may provide another means by which to achieve the harmonisation of ASIC's search warrant powers.

QUESTIONS

1. Should the 'forewarning' requirements in the search warrant powers in the NCCP Act, SIS Act and RSA Act be removed?
2. Should there be one set of search warrant powers in the ASIC Act that would be available for investigations of contraventions of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act?

⁴⁴ See sections 32 and 18 to 22 of the Regulatory Powers Act. The Act also includes provisions relating to the conduct of investigations and enforcement provisions relating to civil penalties, infringement notices, enforceable undertakings and injunctions.

6 APPLYING FOR A WARRANT AND THE 'PARTICULAR BOOKS' REQUIREMENTS

1. Search warrants issued under the ASIC Act, NCCP Act, SIS Act and RSA Act authorise the search for and seizure of specified 'particular books',⁴⁵ rather than the more generally described 'evidential material' that can be seized pursuant to search warrants issued under the Crimes Act and Competition and Consumer Act. This limits the utility of the search warrant powers available to ASIC in the following ways:
 - 1.1. the 'particular books' sought to be seized must be specified in advance of conducting the search in order to identify the particular documents thought to exist, rather than more generally describe a category of relevant documents; and
 - 1.2. the subsequent search and seizure is limited to those books.
2. For example, if during the course of a search of a premises under an ASIC Act warrant for 'particular books' specified in the warrant, an ASIC officer identifies books which constitute highly relevant evidence relating to offences to which the warrant relates but which books are not within the 'particular books' specified in the warrant, the ASIC officer has no authority to seize those books and must leave them at the premises where they may be subsequently destroyed, altered or lost.
3. When the ASIC Act included the forewarning requirement the search warrant power was, in effect, an adjunct to, or means of enforcing, the notice power. In this context any warrant issued had to specify the 'particular books' that could be seized, namely the books the person had previously failed to produce under notice. Once the forewarning requirement was removed in 2010, the nexus between notice and warrant was broken. There no longer appears to be a need for the warrant to specify 'particular books', particularly given the practical difficulties identified above.

POSITION 2: ASIC ACT SEARCH WARRANTS TO PROVIDE FOR SEARCH AND SEIZURE OF 'EVIDENTIAL MATERIAL'

4. The Taskforce adopts as its preliminary position 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 should be removed.

45 See the term 'particular books' in s36(1) of the ASIC Act, s270(1) of the NCCP Act, s.272(1) of the SIS Act, s102(1) of the RSA Act; the term 'those books' in s36(2)(d) of the ASIC Act, s270(2)(d) of the NCCP Act, s272(2)(d) of the SIS Act, s102(2)(d) of the RSA Act; and the requirement for the warrant to 'specify ... the books reference to in subsection (1)' in s36(4)(a) of the ASIC Act, s270(4)(a) of the NCCP Act, s272(5)(a) of the SIS Act, s102(5)(a) of the RSA Act.

5. This could be achieved by modelling the ASIC Act search warrant power on the search warrant powers in the Crimes Act and Competition and Consumer Act, such that:
 - 5.1. 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
 - 5.2. adopting the broader 'kind of evidential material specified in the warrant' criterion for search and seizure under the warrant.
6. In the Crimes Act, evidential material means a thing relevant to an indictable offence or a thing relevant to a summary offence, including such a thing in electronic form.⁴⁶ As stated in paragraphs 0 and 11 above the definitions of a 'thing relevant to' an indictable and a summary offence mean, amongst other things, that material relating to the commission of Commonwealth offences and State offences that have a federal aspect or connection can be seized under a Crimes Act warrant.⁴⁷
7. In the Competition and Consumer Act evidential material means a document or thing that may afford evidence relating to a contravention of that Act and contraventions of other acts in respect of which the ACCC performs an enforcement role.⁴⁸ The broad definition of evidential material in the Competition and Consumer Act means that the ACCC can theoretically seek a search warrant in any investigation where there are reasonable grounds to suspect a contravention of the Competition and Consumer Act, whether or not those contraventions would give rise to criminal or civil consequences.

QUESTIONS

3. Should the 'particular books' requirements in the search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act be removed?
4. Should search warrants issued under the ASIC Act authorise ASIC to search for and seize evidential material?

46 Section 3C of the Crimes Act.

47 Section 3 of the Crimes Act.

48 Including contraventions of: Part 20 of the *Telecommunications Act 1997*; Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*; and ss137.1, 137.2 or 149.1 of the Criminal Code that relate to the search and seizure provisions. See s154A of the Competition and Consumer Act.

POSITION 3: ASIC ACT SEARCH WARRANTS TO BE ISSUED WHEN THERE IS A REASONABLE SUSPICION OF A CONTRAVENTION OF AN INDICTABLE OFFENCE

8. The Taskforce adopts as its preliminary position that ASIC Act search warrants should only be issued when there is a reasonable suspicion of a contravention of an indictable offence. This would impose a threshold for the issue of an ASIC Act search warrant. A search warrant could only be issued under the ASIC Act where there was a reasonable suspicion of a contravention of a provision of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act that would be an indictable offence as defined in s4G of the Crimes Act. That is, an offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears.
9. The Taskforce considers it may be appropriate to impose a limit on the types of investigations in which the ASIC Act search warrant powers would be available given:
 - 9.1. ASIC's broad legislative responsibility and the range of conduct that may give rise to contraventions that ASIC may investigate;
 - 9.2. If the other reforms proposed in this paper are adopted ASIC Act search warrants will enable ASIC to search and seize a broader range of material and use that material in a broad range of proceedings, including criminal, civil and administrative proceedings;
 - 9.3. The exercise of a search warrant involves an exercise of state power by a law enforcement agency that impacts on a person's rights and dignity, including with respect to privacy and to avoid self-accusation;
 - 9.4. Search warrants are resource intensive for the regulator and those on whom the warrant is executed.
10. At the same time the Taskforce recognises that:
 - 10.1. The types of investigations in which the ACCC can seek a search warrant are not limited albeit that it also has a broad legislative responsibility, with a range of conduct giving rise to contraventions it may investigate;
 - 10.2. The fact that search warrants are resource intensive operates as a control on the excessive use of warrants in matters that do not justify such an invasive investigative measure.
11. Nevertheless the Taskforce considers that imposing a threshold would ensure that search warrants are only issued in investigations of serious offences and potentially achieve an appropriate balance between the need for the regulator to have access to effective investigative tools, the relevant harm or risk and the rights of individuals.

QUESTIONS

5. Should there be a threshold for 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?
6. If a threshold would be appropriate should it be reasonable suspicion of an indictable offence or indictable and summary offence?

7 THE LACK OF ANCILLARY POWERS

1. The specific search warrant powers contained in the ASIC Act, NCCP Act, SIS Act and RSA Act are not supported by the range of ancillary provisions contained in the Crimes Act (described in paragraph 13) above and the Competition and Consumer Act. As a result, amongst other things:
 - 1.1. there is no ability to apply for search warrants by telephone, telex, facsimile or other electronic means in urgent cases;
 - 1.2. there are no clear powers relating to the use of electronic equipment and copying or seizing data contained on electronic equipment;
 - 1.3. with the exception of the ASIC Act there is no clear power to require an occupier to provide reasonable assistance (such as opening locked storage cupboards, providing passwords, lighting, power, work spaces or facilities) during the execution of the search warrant.
2. Business practices have evolved in recent years to the point that core documentary evidence relevant to ASIC investigations, such as business and financial records, are now held predominantly, if not solely, in electronic form on computers and other electronic devices and not in paper form (for example, 'paperless offices'). Additionally, as methods of business communications have evolved from paper correspondence (such as letters and memoranda) through to electronic communications (such as emails and SMS texts) and recently to internet-based messaging and communication platforms (such as Snapchat, WeChat and WhatsApp) and social media platforms (such as Facebook), mobile phones and tablets have become key repositories of communication records that may be important in ASIC investigations. Accordingly, there appears to be a need for ancillary powers expressly addressing the operation of, copying, and seizure of data from computers and electronic equipment.
3. In addition, given that search warrants are often sought and issued in circumstances where there is a concern that relevant evidence will be destroyed, tampered with or not produced under a notice, there may be situations where swift action is required to ensure that the effective execution of the warrant is not frustrated. In those urgent cases it may be appropriate to enable a warrant to be applied for in the most efficient way possible.
4. A number of the other ancillary powers in the Crimes Act are practical in nature and appear intended to allow for the efficient execution of search warrants.

POSITION 4: ASIC ACT SEARCH WARRANT POWERS TO INCLUDE ANCILLARY POWERS THAT MIRROR THE CRIMES ACT PROVISIONS

5. The Taskforce adopts as its 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. Given that the Crimes Act provisions have been most recently amended they provide the most 'up to date' provisions, which have addressed issues associated with searching and seizing electronic equipment. This would:
 - 5.1. enhance the search warrant powers in relation to the search, seizure and copying of electronic evidence to reflect modern business and communication practices in which information is stored and transmitted electronically rather than in paper form;
 - 5.2. provide other ancillary powers of practical utility such as the ability to obtain search warrants from a magistrate by telephone and the ability to seize evidence of other corporate crime which is identified in the course of executing the warrant;
 - 5.3. harmonise the ASIC Act, NCCP Act, SIS Act and RSA Act search warrant powers with the search warrant powers contained in other legislation (Crimes Act, Competition and Consumer Act) that are well understood by regulatory and law enforcement agencies and the Courts; and
 - 5.4. increase the overall effectiveness of the search warrant powers available to ASIC and lead to consequential efficiencies in relation to ASIC's investigations and enforcement proceedings.
6. It is not anticipated that this will lead to a substantial increase in the number of search warrants sought by ASIC. Search warrant operations are a logistical exercises that involve significant cost, planning, and coordination with the AFP. They also require considerable resources to be available, both from ASIC, the AFP and, in certain circumstances, external computer forensic providers. Consequently, search warrants will only be appropriate in serious cases where there is a risk of destruction or concealment of evidence.

QUESTIONS

7. Should ancillary provisions be included in the search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act?
8. Should those ancillary powers mirror the provisions in the Crimes Act?

8 USE OF SEIZED MATERIAL BY ASIC AND ACCESS BY THIRD PARTIES

8.1 ASIC'S USE OF SEIZED MATERIAL

1. Section 37(5) of the ASIC Act permits ASIC to seize 'particular books' for as long as a reason exists under the Act to retain it. ASIC may use or permit the use of seized books for the purposes of a proceeding,⁴⁹ which is defined broadly and includes criminal, civil and administrative proceedings.
2. In contrast, evidential material obtained pursuant to a Crimes Act search warrant can only be used by ASIC for the purpose of investigating and prosecuting criminal offences. It cannot be used for the purpose of investigating contraventions that are actionable by only civil or administrative proceedings and it is not admissible in any kinds of civil or administrative proceedings undertaken by ASIC.⁵⁰
3. ASIC considers that restrictions on the permissible use of evidence obtained pursuant to Crimes Act search warrants creates practical difficulties because:
 - 3.1. most ASIC investigations will have actual or potential criminal, civil and administrative enforcement components;⁵¹
 - 3.2. at the early stages of an investigation (which is when search warrants are typically executed) it will rarely be known which type or types of enforcement action will ultimately be available and most appropriate; and
 - 3.3. the receipt of evidential material obtained pursuant to Crimes Act search warrants (that can only be lawfully used for 'criminal' law enforcement purposes) can potentially 'taint' non-criminal aspects of an ASIC investigation and/or invite costly and time-consuming legal challenges.⁵²
4. The practical consequences for ASIC can include the following:
 - 4.1. ASIC may not utilise Crimes Act search warrants in cases in which it would otherwise be desirable to do so, and thereby potentially prejudice ASIC's investigation, because of concerns about the possibility of adversely affecting any future non-criminal enforcement action. In such circumstances, production notices issued under Division 3 of Part 3 of the ASIC Act are utilised as the primary evidence gathering tool. While documents produced pursuant to production notices may be used for the range of ASIC's enforcement functions, the use of such notices carries the inherent risk of the destruction of evidence and the selective or otherwise inadequate production of books by notice recipients;

49 Subsection 37(4) of the ASIC Act.

50 See, for example, *Williams v Keelty* (2001) 111 FCR 175; *ASIC v Rich* (2005) 220 ALR 324.

51 A single ASIC investigation may eventually identify multiple contraventions of the law by multiple persons that are punishable/enforceable by multiple different means (for example, criminal prosecution, civil proceedings and/or administration action).

52 See, for example, *ASIC v Rich* [2005] NSWSC 62; *Williams v Keelty* [2001] FCA 1301; (2001) 111 FCR 175.

- 4.2. ASIC may prematurely foreclose non-criminal enforcement options, with the risk that ASIC is unable to take civil and/or administrative action that may otherwise be in the public interest (for example, to assist/compensate victims or protect the public);
 - 4.3. existing investigations may need to be split into two separate parts which are conducted by separate staff divided by an information barrier, one part focussing on potential criminal outcomes (in respect of which Crimes Act search warrant material can be used) and the other focussing on potential non-criminal outcomes (in respect of which Crimes Act search warrant material cannot be used). Investigations conducted in this way can be inefficient, overly time-consuming, costly for ASIC and persons under investigation, and vulnerable to legal challenge;
 - 4.4. ASIC may seek to re-obtain Crimes Act search warrant material, or copies of such material, by other means which enable it to be used for a broader range of law enforcement purposes (for example, by issuing notices or executing search warrants under the ASIC Act), which involves duplication of effort and cost and greater disruption of persons against whom search warrant powers are exercised.
5. Further, the restriction on the permissible use of Crimes Act search warrant material can also impact on ASIC's ability to undertake cooperative operations with other Commonwealth agencies (such as the AFP) where the investigation is in respect of conduct that potentially involves both criminal and civil or administrative contraventions of the law. It also impacts upon ASIC's capacity to conduct investigations on the basis of referrals from other agencies, where the evidence upon which the referral is based has been obtained through Crimes Act warrants and discloses contraventions of legislation within ASIC's remit in respect of which criminal proceedings may not be open or most appropriate.
 6. A hypothetical example of this is a foreign bribery investigation where the AFP may be investigating whether bribes had been paid by company employees. In this scenario, the AFP may seek to refer to ASIC potential civil penalty contraventions of directors' duties under s180 of the Corporations Act in respect of a failure by the board to implement appropriate measures to detect and prevent such bribery. However, any evidential material obtained by the AFP under a Crimes Act search warrant could not be used by ASIC in its civil penalty investigation. Additionally, the receipt of such material by ASIC (or communication to ASIC of information derived from such material) creates the risk of tainting any investigation that may be commenced by ASIC and leaving the investigation open to challenge. The ability for ASIC and the AFP to conduct any kind of genuine 'joint' investigation would be extremely limited.
 7. Against the matters and issues raised in paragraphs 1 to 6 above, queries arise as to whether it is appropriate for ASIC's use of material seized under search warrants to be unrestricted in any way given the intrusive nature of the search warrant power.

8. The following scenarios illustrate some of the uses that may be made of search warrant material without any restriction:
 - 8.1. Material seized for the purpose of a criminal investigation into individual A, who is a director of company X, also identifies breaches of directors duties by co-director B relating to separate events and transactions;⁵³
 - 8.2. Material seized for the purpose of a criminal investigation into whether individual C engaged in insider trading is used in a prosecution alleging contraventions of State based fraud offences;⁵⁴
 - 8.3. Material seized for the purpose of a criminal investigation into whether company M provided unlicensed financial services is used to take administrative action to cancel company M's licence;
 - 8.4. Material seized in an investigation of company P identifies misconduct by a number of financial advisers employed by company P and is used to take administrative banning action against those advisers.
9. In each of the above scenarios material seized under a search warrant is proposed to be used in a proceeding that may not have been contemplated at the time the warrant was issued.
10. The Taskforce considers that there needs to be an appropriate balance between the following considerations:
 - 10.1. the desire of the regulator to have the ability to use seized material for the full range of enforcement actions available to it when it identifies contraventions of the law;
 - 10.2. any practical impact on the efficient conduct of investigations and/or ASIC's ability to undertake cooperative operations with other Commonwealth agencies or rely on referrals from other agencies (as outlined in paragraphs 3 to 6 above);
 - 10.3. concerns around the broad use of material obtained pursuant to intrusive powers of search and seizure exercised by the State.

53 Currently, where ASIC obtained such material pursuant to a s3E warrant it could use it for a criminal investigation into 'co-director B'.

54 ASIC's general power of investigation includes a power to commence an investigation where it has reason to suspect a contravention of a law of a State or Territory that involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products - see subsection 13(b)(ii) of the ASIC Act. Currently, where ASIC seized such material pursuant to a s3E warrant it could use it for a prosecution of a State based fraud offence.

POSITION 5: MATERIAL SEIZED UNDER ASIC ACT SEARCH WARRANTS BY ASIC SHOULD BE AVAILABLE FOR USE IN CRIMINAL, CIVIL AND ADMINISTRATIVE PROCEEDINGS

11. The Taskforce adopts as its 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 reforms proposed in this paper are adopted this would apply to material seized in investigations of suspected contraventions of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act.
12. In addition, there would be a threshold for applying for warrants under the ASIC Act of reasonable suspicion of an indictable offence. This threshold in combination with the broad use that ASIC will be able to make of seized material may achieve an appropriate balance between the factors identified in paragraph 10 above in the ASIC Act context.
13. The Taskforce also considers that it may be appropriate to impose a limit on the length of time that ASIC can hold or use seized material before it must be returned. The Competition and Consumer Act provides that items seized under a search warrant can be kept by the ACCC for up to 120 days. After this time reasonable steps must be taken to return the thing to a person unless:
 - 13.1. proceedings in respect of which the thing may afford evidence have been commenced and have not been completed;
 - 13.2. an application has been made before the expiry of the 120 days and a magistrate has made an order that the inspector may retain the thing for a period specified in the order for the purposes of an investigation;
 - 13.3. the seizer is otherwise authorised to retain, destroy or dispose of the thing.⁵⁵
14. Imposing a time limit for retention of seized material may ensure that investigations with the benefit of seized material are conducted efficiently and as a priority and potentially limit the period during which seized material is available to be released to third parties by ASIC.

55 These requirements create some practical problems associated with the drafting of the provisions. If proceedings are commenced after the initial 120 days but within a period covered by an extension order the ACCC is required to return the seized things at the conclusion of the extension period (whatever granted, up to three years), notwithstanding that proceedings may still be ongoing because: (1) the exemption for court proceedings in subsection 154U(2)(a) applies only to proceedings commenced within the original 120 days, and not within any extension period granted under s154V; and (2) the ACCC cannot seek a further extension under s154V as an inspector can only apply for an order if proceedings have not commenced, and a magistrate can only make an order if satisfied that the thing can be used for the purposes of an investigation (which would arguably have already been completed if proceedings had commenced).

15. However, 120 days may not be a sufficient time frame given the complexity of ASIC investigations and delays associated with commencing and progressing court proceedings, and in particular criminal prosecutions. Delay in the prosecution of white collar crime has been recognised by the courts as 'not unusual'.⁵⁶

CASE STUDIES

Charges were laid against Oliver Curtis 4 years after the commencement of ASIC's investigation and the trial was 6 years after the investigation commenced.

In the case of Andrew Sigalla, there was almost 4 years between commencing investigation and charges being laid and 7 years between commencing investigation and trial. The investigation involved over 2,300 hours of forensic accounting analysis of more than 27 bank accounts to trace stolen funds that led to the charges. 24 charges were laid against Mr Sigalla involving almost \$9 million of company funds. Mr Sigalla received a 10 year prison sentence.

16. It is rare for criminal proceedings to have commenced within 120 days of a search warrant being executed by ASIC. ASIC has suggested that 12 months may be a more realistic initial timeframe (with the ability to apply for extensions in appropriate circumstances) for the types of investigations that ASIC undertakes. The Taskforce draws no conclusion on what may be an appropriate time frame at this stage and invites comment.

QUESTIONS

9. Should ASIC be entitled to use evidential material obtained under an enhanced ASIC Act search warrant power in any criminal, civil or administrative proceeding? (noting that it may currently use 'particular books' seized under ASIC Act warrants for these purposes).
10. Should there be a time limit after which seized material must be returned unless a proceeding in which it may afford evidence has been commenced by ASIC? What would be an appropriate time frame?
11. Should ASIC be able to apply for an extension of the time limit?

56 See, for example, *R v Wall* [2002] NSWCCA 42; (2002) 71 NSWLR 692, which involved an ASIC investigation into fraud offences and a six-year period between commission of the offence and conviction, Wood CJ at CL (with whom Meagher JA and Bell J agreed) stated at [89]:

"Delay in the prosecution of white-collar crimes is not unusual and the fact that they are so difficult to discover and successfully prosecute is one of the reasons why general deterrence is so important".

8.2 THIRD PARTY ACCESS TO SEIZED MATERIAL

17. ASIC is required to protect from unauthorised use or disclosure, information that is provided to it in confidence or that is protected information.⁵⁷ However, there are a number of circumstances in which ASIC is permitted to or may be required to release information, which may include material seized under a search warrant. ASIC can disclose information to Australian and international governments and agencies to enable or assist them to perform their functions and exercise their powers.⁵⁸
18. In addition, in the following circumstances information may be provided to private litigants:
 - 18.1. ASIC may provide a transcript of an examination conducted by ASIC (which may refer to seized material) to a person's lawyer if the person is commencing a proceeding to which the examination relates;
 - 18.2. ASIC may release books obtained under a compulsory notice or warrant to third parties for use by them in proceedings;
 - 18.3. ASIC may be served with a subpoena or summons requiring production of the material;
 - 18.4. ASIC may be required to respond to a notice for non-party discovery.⁵⁹
19. In each of the above situations there may be safeguards that will prevent or limit ASIC's ability to release the information. However, the extent to which these safeguards apply will depend on the specific circumstances applying to the request.
20. In a 12 month period ASIC may receive up to 100 requests of varying kinds for the release of information relating to enforcement matters. This is in a context where ASIC has approximately 350 enforcement matters on foot at any given time, the majority of which will not have involved the issue of a search warrant. As stated in paragraph 3 above since January 2011 ASIC has issued just over 200 search warrants and a single search warrant operation may involve the issuing of a number of search warrants in relation to multiple premises.
21. Accordingly, although not very common, material seized under a search warrant may be, or may be required to be, released to private litigants for the purposes of separate legal proceedings. This provides a further example of how material seized under a search warrant may come to be used in a manner or proceeding that was not contemplated at the time that the search warrant was issued and executed.
22. At the same time, there are a number of considerations that provide support for a facilitative regime for private enforcement, including efficiency in the use of regulator resources, additional deterrence rather than reliance on public action only, enhancing the ability of affected parties to seek compensation given that regulators do not primarily focus on and may not have the resources to pursue compensation proceedings.

57 Section 127 of the ASIC Act.

58 Section 127(4) of the ASIC Act.

59 See Information Sheet 181 'Providing information and documents to private litigants' and Regulatory Guide 103: Confidentiality and release of information.

POSITION 6: USE OF MATERIAL SEIZED UNDER SEARCH WARRANTS BY PRIVATE LITIGANTS SHOULD BE SUBJECT TO APPROPRIATE LIMITS

23. Despite the matters referred to in paragraph 22 above 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. The Taskforce queries whether private third parties should have the benefit of access to search warrant material given:
- 23.1. the invasive nature of search warrants;
 - 23.2. that they involve an exercise of state power by a law enforcement agency;
 - 23.3. the impacts on a person's rights and dignity, including with respect to privacy and to avoid self-accusation; and
 - 23.4. the enhanced ASIC Act search warrant power proposed in this paper will enable ASIC to search and seize a broader range of material, including data from electronic devices.

QUESTIONS

12. Should there be limitations on the ability of private litigants to access material seized by ASIC under a search warrant?
13. Should material seized under a search warrant be able to be accessed and used by a private litigant in a proceeding:
 - a. or relating to contraventions that were not contemplated at the time the warrant was issued?
 - b. against a person who was not the subject of ASIC's investigation at the time the search warrant was issued?

ANNEXURE A

EFFECT OF PRELIMINARY POSITIONS

POSITION	CURRENT REQUIREMENT	EFFECT OF POSITION
<p>Position 1: ASIC specific search warrant powers in various Acts should be consolidated into the ASIC Act.</p>	<ul style="list-style-type: none"> ASIC is currently able to utilise specific search warrant powers contained in the ASIC Act, NCCP Act, SIS Act and RSA Act⁶⁰ (as well as the general search warrant powers contained in the Crimes Act).⁶¹ When seeking a search warrant under the NCCP Act, SIS Act and RSA Act ASIC must demonstrate that it has previously issued a notice to a relevant person requiring the production of books and the person has failed to produce those books. 	<ul style="list-style-type: none"> Search warrant powers to be centralised in the ASIC Act, for investigations of contraventions of legislation administered by ASIC, including investigations of suspected contraventions of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act. Remove the forewarning requirement from the NCCP Act, SIS Act and RSA Act.
<p>Position 2: ASIC Act search warrants to provide for search and seizure of 'evidential material'.</p>	<p>Search warrants issued under the ASIC Act, NCCP Act, SIS Act and RSA Act authorise the search for and seizure of specified 'particular books' and the subsequent search and seizure is limited to those books.</p>	<ul style="list-style-type: none"> Remove 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. Search warrant issued where there are reasonable grounds to suspect that there is or will be 'evidential material' at premises identified in the warrant. Search warrants provide for search and seizure of the 'kind of evidential material specified in the warrant'.

⁶⁰ Australian Securities and Investments Commission Act 2001 (ASIC Act), National Consumer Credit Protection Act 2009 (NCCP Act), Superannuation Industry (Supervision) Act 1993 (SIS Act), Retirement Savings Accounts Act 1997 (RSA Act).

⁶¹ Crimes Act 1914.

POSITION	CURRENT REQUIREMENT	EFFECT OF POSITION
<p>Position 3: ASIC Act search warrants to be issued when there is a reasonable suspicion of a contravention of an indictable offence.</p>	<p>A magistrate may issue a warrant authorising seizure of specified ‘particular books’ if satisfied that there are reasonable grounds for suspecting that such books are, or may be within the next 72 hours, on premises.</p>	<p>Search warrants to be issued under the ASIC Act where there is a reasonable suspicion of a contravention of a provision of the Corporations Act, ASIC Act, NCCP Act, SIS Act and RSA Act that would be an indictable offence.⁶²</p>
<p>Position 4: ASIC Act search warrant powers to include ancillary powers that mirror the Crimes Act provisions.</p>	<p>Search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act are not supported by the range of ancillary provisions contained in the Crimes Act and the Competition and Consumer Act, including:</p> <ul style="list-style-type: none"> • the ability to apply for search warrants by telephone, telex, facsimile or other electronic means in urgent cases; • ability to seize material that relates to other indictable offences; • powers relating to the use of electronic equipment and copying or seizing data contained on electronic equipment; • photographing or recording the search; • temporarily ceasing the search; • with the exception of the ASIC Act there is no clear power to require an occupier to provide reasonable assistance. 	<p>The search warrant powers in the ASIC, NCCP, SIS and RSA Acts to include ancillary provisions that mirror the provisions in the Crimes Act.</p>

⁶² Indictable offence is defined in s4G of the Crimes Act, being an offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears.

POSITION	CURRENT REQUIREMENT	EFFECT OF POSITION
Position 5: Material seized under ASIC Act search warrants by ASIC should be available for use in criminal, civil and administrative proceedings.	Books seized pursuant to the execution of ASIC Act, NCCP Act, SIS Act and RSA Act search warrants can be used for the purpose of relevant investigations and any criminal, civil or administrative proceeding.	ASIC should continue to be able to use and permit the use of material seized under an enhanced ASIC Act search warrant for the purposes of criminal, civil and administrative proceedings.
Position 6: Use of material seized under search warrants by private litigants should be subject to appropriate limits.	In some circumstances material seized under a search warrant may be, or may be required to be, released by ASIC to third parties for the purposes of separate legal proceedings.	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.

ANNEXURE B – ASIC ENFORCEMENT REVIEW TASKFORCE TERMS OF REFERENCE

The Taskforce will review the enforcement regime of the Australian Securities and Investments Commission (ASIC), to assess the suitability of the existing regulatory tools available to it to perform its functions adequately.

The review will include an examination of legislation dealing with corporations, financial services, credit and insurance as to:

- The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
- The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally;
- The adequacy of existing penalties for serious contraventions, including disgorgement of profits;
- The adequacy of enforcement related financial services and credit licensing powers;
- The adequacy of ASIC's power to ban offenders from occupying company offices following the commission of, or involvement in, serious contraventions where appropriate;

- 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 or to grant the equivalent of Federal Crimes Act search warrant powers under ASIC's enabling legislation for market misconduct or other serious offences;
- The adequacy of ASIC's powers in respect of licensing of financial services and credit providers, including the threshold for granting or refusing to grant a licence, the circumstances in which ASIC may vary, suspend, or cancel licenses; and its coercive powers (including whether there is a need for ASIC to have a power to direct licensees to take, or refrain from taking, particular action);
- The adequacy of the frameworks for notifying ASIC of breaches of law, including the triggers for the obligation to notify; the time in which notification is required to be made; and whether the obligation to notify breaches should be expanded to a general obligation (currently confined under the Corporations Act to auditors, liquidators, and licensees, and noting that obligations to report offences exist under other Federal or State statutes); and
- Any other matters, which arise during the course of the Taskforce's review of the above, which appear necessary to address any deficiencies in ASIC's regulatory toolset.

Upon completion of the Review, the Taskforce will identify any gaps in ASIC's powers and make recommendations to the Government which it considers necessary to strengthen any of ASIC's regulatory tools and as to the policy options available that:

- address gaps or deficiencies identified in a way that allows more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- do not impose undue regulatory burden on business, and promote engagement and cooperation between ASIC and its regulated population;
- promote a competitive and stable financial system that contributes to Australia's productivity growth; and
- relate to other matters that fall within this Terms of Reference.

Further information on the ASIC Enforcement Review taskforce is available at our website: <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>.