



FINANCIAL PLANNING
ASSOCIATION of AUSTRALIA

9 October 2019

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

Email: ASICenforcementreview@Treasury.gov.au

Dear Sir / Madam

ASIC Enforcement Review Taskforce draft legislation - Search Warrants, Access to Telecommunications Intercept Material, Licensing and Banning Orders.

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide comments on the draft legislation to implement the ASIC Enforcement Review recommendations in relation to Search Warrants, Access to Telecommunications Intercept Material, Licensing and Banning Orders.

The FPA supports the draft legislation and the proposed explanatory memorandums to implement the recommendations of the ASIC Enforcement Review. The FPA provides the following comments and recommendations to enhance the alignment of the draft legislation with the intent of the recommendations from the Enforcement Review, and to improve the operation of the new laws in protecting consumers and the financial system.

We would welcome the opportunity to discuss the matters raised in our submission with you further. If you have any queries, please do not hesitate to contact me on 02 9220 4500 or heather.mcevoy@fpa.com.au.

Yours sincerely

Heather McEvoy

Policy Manager

Financial Planning Association of Australia¹

¹ The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- We are recognised as a professional body by the Tax Practitioners Board.



FINANCIAL PLANNING
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ASIC Enforcement Review Draft Legislation

**FPA submission to
Treasury**

9 October 2019



FPA feedback on draft legislation

ASIC search warrant powers

Information sharing

The FPA supports the *Exposure Draft Financial Regulator Reform (No. 1) Bill 2019: ASIC search warrant powers* and accompanying Explanatory Memorandum, as it aims to harmonise ASIC's existing search warrant powers into the ASIC Act.

The FPA notes and supports that the new ASIC search warrant powers includes two different thresholds – a high threshold required for ASIC to be approved to implement a search warrant; and a lesser standard for how and when the Regulator is permitted to use the evidential material resulting from the search.

It is unclear under the proposed s3ZQU and s3ZQUA whether ASIC is permitted to share evidential material seized under a warrant with a code monitoring body approved by ASIC to monitor and enforce the new legislated Financial Planner and Financial Adviser Code of Ethics set under s921U(2)(b) of the Corporations Act.

Under s921K of the Corporations Act, ASIC may approve a code monitoring body of a compliance scheme. An approved code monitoring body must monitor compliance with the Code including investigations of breaches under s921L.

Treasury's recent consultation on *Treasury Laws Amendment (Measures for a later sitting) Bill 2019: miscellaneous amendments*, proposed the following changes to s127(4) of the ASIC Act to permit ASIC to share information with code monitoring bodies:

After paragraph 127(4)(e) insert: or (f) if the information relates to a relevant provider (within the meaning of Part 7.6 of the Corporations Act 2001)—will enable or assist a monitoring body (within the meaning of that Part) for a compliance scheme (within the meaning of that Part) that covers the relevant provider to perform its functions or exercise its powers under that Part.

As stated in the Explanatory Memorandum to that draft Bill:

1.2 Part 1 of the Schedule also ensures that ASIC may disclose certain information relating to 'relevant providers' (certain financial advisers) to monitoring bodies of compliance schemes to enable them to perform their functions or exercise their powers under Part 7.6 of the Corporations Act.

Code monitoring bodies can impose sanctions on relevant providers found to have breached the Code, including cancelling the relevant provider's membership of the body. This is a significant sanction as a relevant provider must be a member of a compliance scheme's code monitoring body to be authorised to provide financial advice to consumers. Hence, the FPA supports this proposed Treasury amendment as information sharing is vital to enabling code monitoring bodies to effectively fulfil their duty and function under the law, and in protecting consumers.



The proposed changes to the ASIC Act in relation to search warrants permits the sharing of evidential material between a constable, Commonwealth officer, a member of ASIC or a staff member, as well as State or Territory enforcement agencies by Ministerial arrangements.

Proposed s3ZQUA is intended to apply appropriate limits to the use of material seized under search warrants by private litigants, as recommended by the ASIC Enforcement Review Taskforce and agreed to by the Government.

However, the FPA is concerned that this provision may inadvertently restrict ASIC's ability to share relevant information with an code monitoring body, as intended under the proposed changes in Treasury Laws Amendment (Measures for a later sitting) Bill 2019: miscellaneous amendments.

A breach of the Code is not investigated by ASIC. This is the duty, function and power of a code monitoring body. While code monitoring bodies are approved under the law, they are not established under statute and will unlikely fall under proposed s3ZQU. Therefore there is a risk that code monitoring bodies and their representative would be caught under proposed s3ZQUA(3).

However, the obligations in the Code are set by legislative instrument hence, a breach of the Code is a breach of an obligation under statute. This is in line with proposed 3ZQU(2)(a) which permits the sharing of evidential material seized under a warrant for the purpose of preventing or investigating a breach of an obligation, other than an obligation of a private nature.

The FPA recommends the proposed changes to the ASIC Act make it clear that ASIC is permitted to share evidential material seized under a warrant with code monitoring bodies, in line with proposed information sharing permissions under s127(4) of the ASIC Act.

Timeframe for returning seized evidential material

The FPA notes that it is proposed that the return of evidential material seized under a search warrant used by ASIC, must occur in line with the provisions in s3ZQX of the Crimes Act.

The FPA is concerned about the potential impact this may have on innocent consumers. While ASIC may execute a search warrant against a licensee for an indictable offence under the Corporations Act, it could result in the seizure of client material such as share certificates, property title deeds, trust or powers of attorney, and other documentation that a client (unrelated to the investigation) may require access to in order to protect and manage their financial affairs.

Section 3ZQX(1) states:

If the Commissioner is satisfied that a thing seized under Division 2 or 4 is not required (or is no longer required) for a purpose mentioned in section 3ZQU or for other judicial or administrative review proceedings, the Commissioner must take reasonable steps to return the thing to the person from whom it was seized or to the owner if that person is not entitled to possess it.

However, the FPA suggests consideration should be given to the impact on clients whose information/material may have been seized during the execution of a search warrant, and therefore, an appropriate and specific timeframe should apply after which seized material must be returned unless a proceeding in which it may afford evidence has been commenced by ASIC.



The FPA recommends aligning with the ASIC's breach reporting requirements of 10 business days to allow ASIC to copy and return material to the licensee or the owner of the material directly (as appropriate); and allowing ASIC to apply for an extension of the time limit.

[Application of proposed search warrant powers](#)

The above FPA recommendations made in relation to ASICs search warrant powers in the ASIC Act should apply equally to credit activity and be replicated in the National Consumer Credit Protection Act.

Relevant providers must comply with the Code of Ethics. The overarching values of the Code are detailed in Section 5 of the legislative instrument and include the following requirements:

Trust requires you act with integrity and honesty in all your professional dealings, and these values are interrelated.

Acting to demonstrate, realise and promote the value of diligence requires that you perform all professional engagements with due care and skill.

These requirements imply that the requirements in the Code apply to the all professional services provided by relevant providers.

It is also important to consider the interrelated nature of Treasury's proposed amendments to ASIC banning orders and suggested changes to the Regulator's search warrant powers.

The banning order amendments propose:

In working out whether a person is a fit and proper person for the purposes of the Corporations Act, ASIC must have regard to the same matters that are relevant under the Credit Act.

It is therefore important that:

- ASIC is permitted to share with code monitoring bodies all evidential material that may have been seized during the execution of a search warrant, either under the Corporations act or Credit Act, that may be relevant to a potential breach of the Code; and
- for all original client documents seized under a warrant, either under the Corporations Act or Credit Act, be returned within 10 business days unless a proceeding in which it may afford evidence has been commenced by ASIC.

[ASIC banning orders](#)

[ASIC must have regard to past offence](#)

Item 11 of the draft legislation introduces a new fit and proper person test in s920A(1A). This includes a requirement that ASIC must have regard to:



(g) whether, in the past 10 years, the person has been convicted of an offence

We note the proposed s920A(1A) is subject to Part VIIC of the Crimes Act 1914. This includes:

- a meaning of conviction and spent conviction in s85ZM;
- a definition of offence; and
- a clear commencement date for the 10 years in the definition of 'waiting period' under s85ZL.

The definitions in the Crimes Act are extremely broad and (in general) relate to all Commonwealth laws, and laws of a Territory or State. The FPA understands the appropriateness of applying the Crimes Act provisions to a fit and proper person test relating to financial services licensing – serious offences that a person may have been convicted of outside of the Corporations Act, should not be excluded from ASIC's considerations for this test. We suggest this would be in line with community expectation.

However, equally, there must be a process to allow a person to be able to make their case in relation to s920A(1A)(g), about an offence that meets the definition of conviction under s85ZM of the Crimes Act, as per s920A(2) of the Corporations Act.

Paragraph 1.37 refers to ASIC's consideration of Part VIIC of the Crimes Act in relation to a spent conviction. However, as mentioned above, Part VIIC includes other definitions which may not be well known or understood by members of the industry. As drafted, proposed s920A(1A) implies all of this part would apply to the new fit and proper person test. As such the FPA recommends the Explanatory Memorandum include more detail about the pertinent definitions in the Crimes Act as they relate to s920(1A), particularly provision (g).

The FPA recommends the Explanatory Memorandum should include an explanation of the meaning of a convicted offence, the commencement of the 10 year timeframe, and require that ASIC guidance be provided on the process for making a case about a previous conviction in relation to clause (g) under the right to appear requirements in s920A(2).

ASIC licensing obligations

Consistency – Determinations made by AFCA

Proposed s920A(1)(j) and (k) require a refusal or failure to give effect to a determination made by AFCA, to have occurred at least twice, or in relation to two or more corporations.

Proposed s913BB(e) of the amended licensing requirements require ASIC to have regard to whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA (ie. just one occurrence).

The FPA is concerned that this creates an inconsistency in the amended requirements, which may result in confusion and increase the complexity of the Bill.

There may be reasonable grounds for a failure to give effect to a determination made by AFCA. It is however appropriate to consider whether a systemic issue may exist if two or more failures have occurred.



The FPA suggests that it is reasonable for two refusals or failures to give effect to a determination made by AFCA should apply consistently to the amended provisions for banning orders and licensing.

Section 913B(1)(ca)

Item 31 of the draft licensing legislation inserts the following provision in the Corporations Act:

1666(2) - The reference in paragraph 915C(1)(g), as inserted by the amending part, to information lodged with ASIC in accordance with a request under subsection 913B(3) in relation to an application for a licence includes information provided in accordance with paragraph 913B(1)(ca) before the commencement day.

However, item 4 of the draft legislation repeals s913B(1)(ca) from the Act. It is therefore difficult to assess whether item 31 poses any unintentional consequences.

Insolvent under administration

New provisions proposed in s913BB(f), s915B(2)(ba), s915B(3)(ba), and s915B(4)(ca), all require ASIC to consider whether an individual, including an 'officer', has ever been 'an insolvent under administration' in assessing whether the individual satisfies the proposed 'fit and proper' person test for the purpose of granting a licence or variation to a licence.

We note ASIC is required to give the applicant the opportunity to make a case to ASIC and at a hearing in relation to the licence application before the Regulator can make a decision about the granting of the licence (for example, under s913B(5)).

The granting, suspension or cancelling of a license can have significant impacts on all persons associated with the entity – the permission for the business to operate can impact the employment status of its representatives, any suppliers or associates of the business, and importantly its clients.

The FPA suggests it would be appropriate for ASIC to consider the potential nature of a bankruptcy of an individual or officer, and any extenuating circumstances that may have caused the insolvency. For example, whether the individual had been forced into bankruptcy due to divorce proceedings coming out of a domestic violence situation.

Competency

The proposed licensing obligations must be considered in parallel with the proposed changes to ASIC banning orders. As such, the FPA supports the introduction of 80(1)(fa) which permits ASIC to consider a banning order:

“if ASIC has reason to believe that the person is not adequately trained, or is not competent, to:

- (i) engage in one or more credit activities; or*
- (ii) perform one or more functions as an officer (within the meaning of the Corporations Act 2001) of another person who engages in credit activities;...”*



This will ensure the knowledge and skill requirements similar to the current requirements for a Responsible Officer will appropriately apply to an entity and its officers in relation to licensing obligations.

Penalties Exposure Draft

Section 1308

The FPA supports the proposed re-structure of s1308 of the Corporations Act. This provides greater clarity, improves the readability of the obligations, and allows for the appropriate application of 'reasonable steps' provisions to acts where a person did not knowingly make or approve a false or misleading statement or document.

The FPA suggests the removal of the prescriptive nature of the 'safe harbour' steps in the current s1308(10) to (13) and the introduction of a principled-based requirement, may remove some certainty for industry.

ASIC access to telecommunications interception information

The FPA supports the *Exposure Draft Financial Regulator Reform (No. 1) Bill 2019: Access to telecommunications interception information* and accompanying Explanatory Memorandum.