



26 July 2017

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

Email: [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

Dear Sir / Madam

**Re. Harmonisation and Enhancement of Search Warrant Powers**

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to the ASIC Enforcement Review on the Position and Consultation Paper 2 – Harmonisation and Enhancement of Search Warrant Powers.

Our submission presents our observations based on the considered impact on consumers and our members' businesses, and our broader goal of improving professional conduct in financial planning.

The FPA would welcome the opportunity to discuss with you the issues raised in our submission.

If you have any questions, please contact me directly on [heather.mcevoy@fpa.com.au](mailto:heather.mcevoy@fpa.com.au) or 02 9220 4500.

Yours sincerely

**Heather McEvoy**

*Policy Manager*

Financial Planning Association of Australia<sup>1</sup>

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<sup>1</sup> The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 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 super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Graham McDonald, deals 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 required of professional financial planning practices. This is being exported to 24 member countries and 150,000 CFP practitioners of the FPSB.
- We established the Financial Planning Education Council in 2011 as an independent body chartered with raising the standard of financial planning education. The FPEC has built a curriculum with 17 Australian Universities for Bachelor and Master degrees in financial planning. We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, as a minimum, an approved undergraduate degree.
- We are the only professional body in Australia licensed to provide the CFP® certification program. CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional designations, such as the Chartered Accountant designation of the Chartered Accountants Australia and New Zealand (CA).
- We are recognised as a professional body by the Tax Practitioners Board



FINANCIAL PLANNING  
ASSOCIATION *of* AUSTRALIA

# HARMONISATION AND ENHANCEMENT OF SEARCH WARRANT POWERS

## Position and Consultation Paper 2

**FPA submission to  
ASIC Enforcement Review**

**26 July 2017**



## SEARCH WARRANT POWERS

POSITION	CURRENT REQUIREMENT	EFFECT OF POSITION
<p><b>Position 1:</b> ASIC specific search warrant powers in various Acts should be consolidated into the ASIC Act.</p>	<ul style="list-style-type: none"> <li>ASIC is currently able to utilise specific search warrant powers contained in the ASIC Act, NCCP Act, SIS Act and RSA Act<sup>2</sup> (as well as the general search warrant powers contained in the Crimes Act).<sup>3</sup></li> <li>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.</li> </ul>	<ul style="list-style-type: none"> <li>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.</li> <li>Remove the forewarning requirement from the NCCP Act, SIS Act and RSA Act.</li> </ul>
<p><b>Position 2:</b> 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"> <li>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.</li> <li>Search warrant issued where there are reasonable grounds to suspect that there is or will be 'evidential material' at premises identified in the warrant.</li> <li>Search warrants provide for search and seizure of the 'kind of evidential material specified in the warrant'.</li> </ul>
<p><b>Position 3:</b> 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.<sup>4</sup></p>
<p><b>Position 4:</b> 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>	<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>

<sup>2</sup> 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).

<sup>3</sup> Crimes Act 1914.

<sup>4</sup> 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.



	<ul style="list-style-type: none"> <li>• the ability to apply for search warrants by telephone, telex, facsimile or other electronic means in urgent cases;</li> <li>• ability to seize material that relates to other indictable offences;</li> <li>• powers relating to the use of electronic equipment and copying or seizing data contained on electronic equipment;</li> <li>• photographing or recording the search;</li> <li>• temporarily ceasing the search;</li> <li>• with the exception of the ASIC Act there is no clear power to require an occupier to provide reasonable assistance.</li> </ul>	
<b>Position 5:</b> 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.
<b>Position 6:</b> 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.

**Position 1: ASIC-specific search warrant powers in various Acts should be consolidated into the ASIC Act.**

Consultation Paper question	FPA response
1. Should the 'forewarning' requirements in the search warrant powers in the NCCP Act, SIS Act and RSA Act be removed?	Yes, the FPA supports this proposal.
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?	Yes, the FPA supports this proposal.



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**Position 2: ASIC Act search warrants to provide for search and seizure of 'evidential material'.**

Consultation Paper question	FPA response
1. Should the 'particular books' requirements in the search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act be removed?	Yes, the FPA supports this proposal.
2. Should search warrants issued under the ASIC Act authorise ASIC to search for and seize evidential material?	Yes, in relation to an indictable offence as per the Taskforce's Position 3. The ASIC Officer should still be required to be accompanied by AFP Officer.

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**Position 3: ASIC Act search warrants to be issued when there is a reasonable suspicion of a contravention of an indictable offence.**

Consultation Paper question	FPA response
1. 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?	The FPA supports the Taskforce's preliminary position that ASIC search warrants should only be issued when there is a reasonable suspicion of an indictable offence.
2. If a threshold would be appropriate should it be reasonable suspicion of an indictable offence or indictable and summary offence?	Given the proposed extension of powers, ASIC search warrants should only be issued in investigations of a serious offence – that is, an indictable offence only.

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**Position 4: ASIC Act search warrant powers to include ancillary powers that mirror the Crimes Act provisions.**

Consultation Paper question	FPA response
1. Should ancillary provisions be included in the search warrant powers in the ASIC Act, NCCP Act, SIS Act and RSA Act?	Yes, the FPA supports this proposal.
2. Should those ancillary powers mirror the provisions in the Crimes Act?	Yes, those noted in paragraphs 1.1 – 1.3 of section 7 of CP2.

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**Position 5: Material seized under ASIC Act search warrants should be available for use in criminal, civil and administrative proceedings.**

Consultation Paper question	FPA response
1. 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')	Yes, the FPA supports this proposal.



seized under ASIC Act warrants for these purposes)?	
2. 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?	<p>The FPA agrees that an appropriate timeframe should apply after which seized material must be returned unless a proceeding in which it may afford evidence has been commenced by ASIC.</p> <p>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.</p> <p>The FPA suggests aligning with the ASIC's breach reporting requirements of 10 business days to allow ASIC to copy and return material to the licensee.</p>
3. Should ASIC be able to apply for an extension of the time limit?	The FPA supports the proposal to allow ASIC to apply for an extension of the time limit. Consideration should be given to the impact on clients whose information/material may have been seized during the execution of a search warrant.

**Position 6: Use of material seized under search warrants by private litigants should be subject to appropriate limits.**

Consultation Paper question	FPA response
1. Should there be limitations on the ability of private litigants to access material seized by ASIC under a search warrant?	<p>The FPA supports the provision of material seized by ASIC under a search warrant to be provided to and used by:</p> <ul style="list-style-type: none"> <li>• Private litigants</li> <li>• In a person's defence of legal proceedings under a State or Commonwealth law or civil action, and</li> <li>• Professional bodies in relation to disciplinary action of members in breach of professional standards.</li> </ul> <p>The information provided by ASIC to those parties listed, should be:</p> <ul style="list-style-type: none"> <li>• Copied</li> <li>• Compliant with the National Privacy Principles</li> <li>• Relevant to the individual, entity or professional body.</li> </ul>
2. 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?	Yes, the FPA supports this proposal
b. against a person who was not the subject of ASIC's investigation at the time the search warrant was issued?	Yes, the FPA supports this proposal