

**SENATE STANDING COMMITTEE  
FOR THE SCRUTINY OF BILLS**

**INQUIRY INTO ENTRY, SEARCH AND SEIZURE  
PROVISIONS IN COMMONWEALTH LEGISLATION**

**SUBMISSION NO :** 11

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**DATE :** 2 July 2004

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**ASIC**

Australian Securities & Investments Commission

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2 July 2004

Ms Janice Paull  
Acting Secretary  
Standing Committee for the Scrutiny of Bills  
Parliament House  
**CANBERRA**  
ACT 2600

By email: [scrutiny.sen@aph.gov.au](mailto:scrutiny.sen@aph.gov.au)

Dear Ms Paull,

**Inquiry into Entry, Search and Seizure Provisions in Commonwealth Legislation**

Thank you for your invitation to ASIC to make a submission to this inquiry. Thank you also for agreeing to extend the time for ASIC's submission.

I enclose ASIC's submission to the inquiry.

Yours sincerely

  
Jan Redfern



**ASIC**

Australian Securities & Investments Commission

**Submission to the Senate Standing Committee for the Scrutiny of Bills**  
**inquiry into the Government's response to its previous report on entry and**  
**search provisions**

**INTRODUCTION**

The Australian Securities and Investments Commission ("ASIC") made a submission on 30 April 1999 ("the Previous ASIC Submission") to the Committee's inquiry into search and entry provisions in Commonwealth legislation which resulted in the Committee's *"Fourth Report of 2000 – Entry and Search Provisions in Commonwealth Legislation"* ("the 2000 Report"). ASIC's then National Director, Enforcement, Joseph Longo, also appeared before the Committee on 13 September 1999. Many of the comments and submissions which ASIC made to that inquiry still apply. In particular, ASIC is still discussing with Treasury the proposal to integrate and consolidate its investigative powers (including its search warrant powers) in one piece of legislation.

ASIC administers a number of statutes which include entry and search provisions.

Under s35 and s36 of the *Australian Securities and Investments Commission Act 2001* (the "ASIC Act"), a member or a staff member of ASIC may apply to a magistrate for the issue of a warrant to a member of the Australian Federal Police ("AFP") to search premises for books where it has reasonable grounds to suspect that a notice to produce these books has not been complied with.

ASIC also has powers under the *Insurance Act 1973* (the "Insurance Act"), the *Life Insurance Act 1995* (the "Life Insurance Act"), the *Retirement Savings Account Act 1997* (the "RSA Act"), and the *Superannuation Industry (Supervision) Act 1993* (the "SIS Act"). Each of these Acts enable ASIC to enter premises in specified circumstances for the purposes of inspecting, making copies of or taking extracts of specified books or records. The Insurance Act also enables ASIC to take possession of books. The Life Insurance Act, the RSA Act and the SIS Act only allow this power to be exercised with the consent of the occupier of the premises. The Life Insurance Act, the RSA Act and the SIS Act also enable ASIC to apply for a warrant. The warrant provisions are based on the provisions of the ASIC Act described above.

ASIC or a liquidator may also obtain a warrant under s530C of the *Corporations Act 2001* ("the Corporations Act") where it can satisfy the court that a person has concealed or removed property of a company in liquidation with the result that the liquidation is prevented or delayed from taking custody or control of the property.

ASIC has a power to apply for a warrant under the *Crimes Act 1914 (Cth)* (the "Crimes Act") to be issued to an AFP member. ASIC also has the power to apply for a warrant under section 225 of the *Proceeds of Crime Act 2002* ("the Proceeds of Crime Act").

Under that Act, the warrant may be executed by an ASIC officer alone but ASIC's practice is always to involve members of the AFP in the execution of warrants in ASIC matters.

ASIC's policy is that search warrants are not used as a matter of course as they involve invasions of privacy. However, ASIC finds that search warrants form a necessary part of its investigation on a fairly regular basis. The most common search warrant used as part of ASIC investigations continues to be the warrant under the Crimes Act. In particular, this form of warrant is used in investigations where there is a suspicion that evidence may be destroyed or tampered with as warrants under the ASIC Act can only be obtained when a notice has been served and there is a reasonable suspicion that it has not been complied with. In cases where evidence may be destroyed, service of the notice gives a warning that the evidence is being sought by ASIC. The provisions of the Crimes Act inserted by the *Cybercrime Act 2001*, which help to clarify the powers of the executing officer in relation to computer records, are also an advantage which the Crimes Act regime has over the ASIC Act.

### **TERMS OF REFERENCE**

- (1) **The Government's responses to the Committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation* and, in particular whether there has been any resultant impact on the practices and drafting of entry and search provisions.**

ASIC generally supports the *"Government Response to the Senate Standing Committee for the Scrutiny of Bills Fourth Report – Entry and Search Provisions in Commonwealth Legislation"* ("the Government Response") released in August 2003.

There have been no new entry and search provisions included in the financial sector legislation administered by ASIC enacted since the release of the Committee's report. ASIC does however, have the power to execute a search warrant under the Proceeds of Crime Act which was enacted in 2002. ASIC notes that the search warrant provisions in the Crimes Act were amended by the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* ("the Proceeds of Crime (CATP) Act") to enable "evidential material" or "tainted property" within the meaning of the Proceeds of Crime Act to be seized under a Crimes Act warrant.

Comments on each of the recommendations which relate to the practice of agencies involved in the execution of search warrants are made below. ASIC has confined its comments to those recommendations which relate to the practice of agencies such as ASIC. As a general observation, ASIC notes that it is normal practice for ASIC officers to consult the Office of the Commonwealth Director of Public Prosecutions ("DPP") before applying for a warrant. With the exception of section 530C of the Corporations Act and the Proceeds of Crime Act, provisions authorising ASIC to apply for a warrant require that the executing officer is, or that the executing officers include, a member of the AFP. In practice, a member of the AFP is always present when a warrant is executed by ASIC. In the case of Crimes Act warrants which are, as noted above, the type of warrant most commonly used by ASIC, the sole executing officer is the AFP member and it is he or she who will ultimately decide if the seizure of any particular item is appropriate.

***Recommendation 3: The Committee recommends that each agency, person or organisation which exercises powers of entry and search under legislation should maintain a centralised record of all occasions on which those powers are exercised, and should report annually to the Parliament on the exercise of those powers.***

ASIC notes that this recommendation was not accepted by the Government but notes that it is ASIC's policy that a copy of each warrant issued in an ASIC investigation is placed on ASIC's Litigation Support System which is discussed further below. This effectively forms a centralised record of warrants.

***Recommendation 10: The Committee recommends that, unless there are exceptional circumstances involving clear physical danger, all occupiers of premises which are to be entered and searched should be given a written document setting out in plain words their rights and responsibilities in relation to the search. Occupiers should be informed that the proposed entry and search is either for the purpose of monitoring compliance with a statute, or for the purpose of enforcement or gaining evidence and possible prosecution, but not for both purposes.***

As noted above, AFP members are always present when warrants are executed as part of an ASIC investigation. On those occasions, the AFP member provides the occupier with a document setting out their rights and responsibilities which has been prepared by the AFP.

In addition, under subsection 3H(1) of the Crimes Act, the executing officer or a constable assisting must make a copy of the warrant available to the occupier of premises searched under warrant (if present) or another person who apparently represents the occupier (if present).

***Recommendation 11: Where search and entry powers are used by an investigative authority, the Committee recommends that:***

- ***those who are being investigated should have an ongoing right to be informed of the current status of those investigations; and***
- ***where an investigation has been concluded with no charges laid, those whom have been investigated should have the right to be informed of this fact immediately; the right to have all seized material returned to them; and the right to compensation for any property damage and damage to reputation.***

ASIC notes that this recommendation was accepted by the Government only in part. For the reasons set out in the Government Response, ASIC does not support:

- the recommendation that subjects of investigations should have an ongoing right to be informed of the current status of those investigations; and
- the recommendation that subjects of investigations or occupiers of premises searched under warrant should have a cause of action for compensation for any property damage and damage to reputation.

ASIC does not always inform the subject of an investigation in circumstances where the investigation has been concluded without enforcement action but does

so in some circumstances and will always do so when the subject has requested to be kept informed.

Seized material is returned by ASIC. Where the material was seized by the AFP under a Crimes Act warrant, the material is returned to the AFP which will then return it to the owner in accordance with paragraph 3ZV(1)(a) of the Crimes Act.

***Recommendation 12: The Committee recommends that all agencies which exercise powers of entry and search should introduce best practice training procedures and other internal controls to ensure that the exercise of those powers is as fair as possible, and should set out the appropriate procedures and scope for the exercise of those powers in enforcement and compliance manuals.***

Training courses available to ASIC staff include a two day workshop entitled "Search Warrants Law and Procedure". The workshop was introduced into ASIC's training program eight months ago and includes practical exercises and demonstrations. The workshop deals in detail with the legal limits on the power to execute search warrants and the clear message from the Courts that strict compliance is required. In the six months from January to June 2004, the workshop was conducted once in Sydney and once in Melbourne. The majority of warrants executed by ASIC are executed by either our Sydney or Melbourne offices. It is proposed that the workshop will be open to staff at all ASIC offices by the end of 2004.

In addition, training on the execution of warrants is included as part of ASIC's induction course for Enforcement staff which is presented four times a year and is open to new Enforcement staff from any of ASIC's offices. The induction course follows the life of a mock investigation and includes a number of practical exercises which simulate the steps that would be taken in a live investigation. These include the execution of a search warrant and the giving of evidence (subject to cross examination) in a simulated Court environment. When available, AFP members attend at the search warrant sessions of the induction courses.

ASIC's Electronic Enforcement training course includes a segment specifically dealing with powers and practices relevant to seizing computers and digital evidence. Over 300 ASIC officers have attended this course.

ASIC has recently introduced a Capabilities Framework as part of its performance management system. Under the Framework, all ASIC investigators and lawyers working within investigations should have the following capability: *"Assesses and/or conducts investigations – Maintains an understanding of, and the ability to make sound judgments based on the philosophy of the organisation"*. This capability is stated to include the following: *"Maintains up to date knowledge and understanding of... interview, search and inspection techniques and disciplines, at a detailed level"*. Under the Capabilities Framework system any deficiency which relevant staff have in that capability, including the reference to "interview, search and inspection techniques", should be identified in the staff member's annual performance review. As part of that process, staff will complete a development planner which will identify measures to be taken to address any deficiency in capabilities such as attending the "Search Warrants Law and Procedure" workshop. Completion of measures

identified in the development planner will be considered at the next performance review or mid point review (which takes place half way through the review cycle).

Applications for search warrants are discussed in ASIC's internal Enforcement Manual and ASIC staff are also expected to comply with the Search Warrants Manual published by the DPP. ASIC's Enforcement Manual in turn refers staff to the protocols agreed between the AFP and the Law Council of Australia relating to the execution of warrants on lawyer's premises.

A specific "Search Warrants Handbook", to be used in the Search Warrants Law and Procedure Workshop, is being developed. It is anticipated that the Search Warrants Handbook will be completed by 31 July 2004. It will be made available in electronic and printed format to all ASIC Enforcement staff.

***Recommendation 13: The Committee further recommends that, where practical, all executions of warrants are video-taped or tape-recorded, and that where the person is a suspect, a verbal caution is given and tape-recorded.***

As noted above, AFP members are always involved in the execution of warrants in ASIC investigations. The AFP members involved audio-tape or video-tape the execution of warrants.

As noted in the Government Response, a verbal caution may already be required under section 23F(1) of the Crimes Act.

**(2) A review of the fairness, purpose, effectiveness and consistency of entry and search provisions in Commonwealth legislation made since the Committee tabled its Fourth Report of 2000 on 6 April 2000.**

ASIC has the power to apply for a search warrant under the Proceeds of Crime Act which was enacted in 2002. ASIC is one of a number of agencies who have this power under the Act including the Australian Crime Commission and Customs. ASIC has not yet applied for such a warrant. However, during the course of one recent ASIC investigation, the AFP seized material under subsection 3E(7)(a)(ii) of the Crimes Act which was inserted by the Proceeds of Crime (CATP) Act (also enacted in 2000).

Given that we have had little direct experience of these powers to date, ASIC does not have any comments on them.

**(3) A review of the provisions in Commonwealth legislation that authorise the seizure of material and, in particular:**

- (a) the extent and circumstances surrounding the taking of material that is not relevant to an investigation and the use and protection of such material; and**
- (b) whether the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material.**

***Provisions which authorise the seizure of material***

All the provisions which enable ASIC to apply for warrants (included in the legislation set out above) authorise the person named in the warrant to take possession of specified things.

One current issue for ASIC is the uncertainty as to the power to seize computer records when executing a warrant under the ASIC Act. The ASIC Act does not contain a provisions such as section 3L of the Crimes Act which provides for the seizure of computer records. Due to the almost universal use of computers in the industries regulated by ASIC, much critical evidence acquired by ASIC is in the form of computer records.

An additional concern for ASIC is the ongoing uncertainty as to the circumstances in which law enforcement agencies may seize email and voice mail records with a conventional search warrant rather than a warrant under the *Telecommunications (Interception) Act 1979*. In this regard, ASIC welcomes the introduction into Parliament of the *Telecommunications (Interception) Amendment (Stored Communications) Bill 2004*.

***The extent and circumstances surrounding the taking of material that is not relevant to an investigation and the use and protection of such material***

ASIC generally tries to avoid the seizure of significant amounts of irrelevant material during the execution of a search warrant. ASIC understands that the seizure of irrelevant material increases the intrusive nature of the search warrant. In addition, the seizure of large amounts of irrelevant material will occupy additional secure storage space within ASIC's offices.

In many cases, the seizure of irrelevant material is unavoidable. There are a number of reasons why this may be the case: It may not be possible to finally determine the relevance of some material until the investigation is more advanced or the volume of material present at the premises where a warrant is executed may be such that it is not possible to identify all irrelevant evidence which is included among files containing relevant material. In the case of computer records, it may not practicable for all such records to be viewed on the premises so that relevant information may be identified. This is recognised by section 3L of the Crimes Act.

As noted above, in the case of Crimes Act warrants, the executing officer is an AFP member. The decision as to whether seizure of a thing is appropriate is ultimately one for that officer.

The seizure and protection of material obtained from other parties is subject to the Commonwealth Protective Security Manual ("PSM") published by the Attorney General's Department (which covers the security clearance of staff accessing sensitive material), the Search Warrants Manual published by the Office of the Commonwealth Director of Public Prosecutions as well as a number of confidential ASIC policies and manuals. The principal manual dealing with the handling of material obtained from other parties, ASIC's confidential Document Control Manual, is available to all staff on ASIC's intranet. The relevant procedures are outlined in general terms below. The procedures are continually reviewed and were subject to an audit by KPMG in November – December 2002. Any changes to procedures which were recommended by KPMG following that audit have been considered and several changes have been implemented.

These procedures apply to all evidential material obtained by ASIC but the particular sensitivity and importance of material seized under warrant is well understood by ASIC staff. Adherence to the procedures is considered to be important not only for the appropriate protection of material seized under



compulsion but also for the preservation of the integrity of potential evidence. Procedures relevant to the treatment of material seized under warrant are as follows:

- When material is seized under warrant in an ASIC investigation, the occupier of the premises is given an opportunity to review the material before it is taken away and raise any objection to the removal of the material. A receipt is issued.
- In the case of warrants executed under legislation which requires that an AFP member be the sole executing officer (such as warrants under the Crimes Act 1914), the material is taken to the AFP before it is released (under subsection 3F(5) of the Crimes Act) to ASIC. Receipts are again issued.
- ASIC procedures require that material brought to or delivered to ASIC offices will be taken directly to a secure facility within ASIC, approved in accordance with the requirements of the PSM. Secure storage facilities include a centralised Document Control Registry where the majority of records are stored and also approved ASIC workrooms where officers can store seized material whilst reviewing it. Access to these areas is restricted. ASIC's security system records any access or attempts at access to these areas.
- ASIC utilises an internally developed electronic document management system, the Litigation Support System (LSS), for regular review of relevant seized documents. The use of this system reduces physical handling of original documents and can facilitate expeditious provision of electronic copies of seized material for approved purposes. LSS provides database level security, which means that ASIC officers must be granted access on a case by case basis.
- Where authorised investigators require access to original documents, these may be removed from the DCU but their removal is recorded.
- Irrelevant material is returned as soon as practical after its irrelevance has been finally established. Again, this has the additional benefit for ASIC of increasing available secure storage space. Material seized under Crimes Act warrants is returned to the AFP as the warrant holder.

***Whether the rights and liberties of individuals would be better protected by the development of protocols governing the seizure of material***

There are already a number of protections in relation to the rights and liberties of individuals during the execution of search warrants. However, ASIC is not opposed in principle to the development of protocols governing the seizure of material. ASIC's ultimate view would depend on the nature of the protocols which are proposed. ASIC accepts the importance of the protection of the rights and liberties of members of the public whose premises are subject to a search warrant. However, it will also be important to ensure that unreasonable strain is not placed on the resources of law enforcement agencies including their human resources and their storage facilities.

Jan Redfern  
Executive Director, Enforcement  
2 July 2004