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ASIC Enforcement Review
Financial System Division
The Treasury
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ASIC ENFORCEMENT REVIEW TASKFORCE
SUBMISSION ON POSITIONS AND CONSULTATION PAPER:
ASIC’S ACCESS TO TELECOMMUNICATIONS INTERCEPT MATERIAL

Thank you for the opportunity to make a submission to the Taskforce.

I note that the Taskforce’s Terms of Reference include ‘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 ... for market misconduct or other serious offences’. I also note that the Taskforce has developed a preliminary position described in the Positions and Consultation Paper that ASIC should be able to receive lawfully obtained telecommunications interception material (‘TI material’) to investigate and prosecute serious offences and has sought submissions on the following issues:

(a) Should ASIC be a recipient agency so that it can receive telecommunications intercept material lawfully obtained by the interception agencies and use that material for the purpose of investigating serious Corporations Act offences and other ‘serious’ or ‘relevant’ offences?

(b) If ASIC is made a recipient agency, are any additional reforms appropriate to address any negative consequences of this change?

My particular interest and focus is in the regulation of insider trading (a ‘serious offence’ under the Corporations Act 2001 (Cth)) and the recommendations contained in my submission are based on my academic research, the findings of which have been published in refereed papers and other publications.¹

It is my recommendation, consistent with the Taskforce's proposals, that ASIC be made a recipient agency in order that it be able to receive and use TI materials where appropriate, particularly in connection with insider trading offences.

Insider trading, detection and proof

Insider trading is prohibited under section 1043A of the Corporations Act, in order to protect market integrity, so that those who participate in securities markets can be confident that people who have access to inside information are not able to unfairly exploit that advantage. Insider trading is a complex, controversial offence with a reputation for being under-prosecuted, although AISC has been more active in insider trading enforcement in recent years.

A major difficulty in the enforcement and prosecution of insider trading laws lies in the detection of the offence. Despite the use of increasingly sophisticated methods of surveillance and real-time monitoring of securities trading, the difficulties in detecting insider trading are widely acknowledged. The difficulties of detection primarily arise as a result of the significant challenges in obtaining evidence of the commission of insider trading activity. This is particularly relevant for the elements of the offence which require proof as to the offender’s state of mind, as insider trading contains a knowledge element, which requires proof that the offender knew that the relevant information was inside information — that is, that the offender knew (or ought reasonably to have known) that the information was not general available and, if it were, that the information was likely to be material in relation to the price or value of certain securities or other financial products.

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In the context of insider trading, it is important to recognize the legal framework that governs these activities. As highlighted by Roman Tomasic and Brendan Pentony in their work, 'The Prosecution of Insider Trading: Obstacles to Enforcement' (1989) 22 Australian and New Zealand Journal of Criminology 65, the challenge lies in proving that a person had knowledge, which is often harder than it sounds unless there is a smoking-gun type of evidence. Alan Deans, in his piece 'The Fetter of the Law', The Bulletin (Sydney), 28 November 2000, 52, notes the complexity and difficulty in proving insider trading, particularly with the knowledge element.

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Footnotes:

2 Insider trading is generally acknowledged, if not universally accepted, as a significant threat to market integrity, which is widely regarded as an essential requirement for the proper, efficient functioning of securities markets. See, for example, ASIC, Consultation Paper 68: Competition for Market Services – Trading in Listed Securities and Related Data (2007); Utpal Bhattacharya and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 Journal of Finance 75; Laura N Beny, 'Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate' (2007) 32 Journal of Corporation Law 237. This rationale was confirmed by the majority of the High Court in Mansfield and Kizon v R (2012) 87 ALJR 20.


5 Corporations Act 2001 (Cth), s 1043(1)(b).
It can be very difficult, in the absence of evidence of conversations and communications made by or to the relevant offender, that a person had such knowledge. Currently ASIC is faced with the task of attempting to prove the state of mind of an alleged insider trader by relying on inadequate telecommunications data and stored communication. Communications across internet-based platforms make surveillance by traditional means increasingly difficult (with platforms such as Snapchat, WeChat and WhatsApp being increasingly used as communication tools for unlawful activities) but this position could be ameliorated if appropriate access to and use of TI material was made possible.

Impact of ASIC becoming a recipient agency

By making ASIC a recipient agency and enabling it to access and use TI material for the investigation of serious offences, such as insider trading, many of the difficulties in detection (as described above) may be overcome or significantly reduced. The Positions and Consultation Paper has described a number of case studies demonstrating real examples where ASIC was unable to prosecute suspected insider traders, due to a lack of proof. Access to TI material would enable ASIC to more effectively enforce insider trading laws, if evidence as to offenders’ state of mind can be obtained, which may be evident from conversations and communications that would not otherwise be available.

This is relevant in the context of detection of insider trading activity, as well as providing proof of the commission of the offence. Many overseas regulators and law enforcement agencies are able to rely on material that would be classified as TI material to effectively prosecute insider trading laws and it aids, not only in the detection of insider trading activity, but also in providing cogent evidence in court. Indeed, juries in the US indicate that TI material is highly influential on their deliberations and in securing convictions.6

The Positions and Consultation Paper quotes the former US Attorney for the Southern District of New York, Preet Bharara, at [39] in relation to the use of wire-tapping and the collection of evidence in insider trading cases. It is also worth considering other comments he has made in this context, noting that “ordinary” criminals are more likely to be the subject of electronic surveillance:

"I am here to tell you that court-authorised wiretaps, so long as the legal requirements can be met, will continue to be in our toolbox in insider trading cases. And especially when sophisticated business people begin to adopt the methods of common criminals, such as the use of anonymous cell phones, we have no choice but to treat them as such...It would be difficult to explain to the public why alleged financial fraudsters deserve a milder approach just because they wear a white collar."7

"[P]rivileged Wall Street insiders who are considering breaking the law will [now] have to ask themselves one important question: is law enforcement listening?"8

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6 See United States v Jiau, 14-2360 (2d Cir. 2015).
8 Preet Bharara, as quoted by Zachary Goldfarb, ‘Insider Trading Ensnares Six: Prosecutors Accuse Hedge Fund Manager, Others of Raking in $20 million’ Washington Post, 17 October 2009, and noted in Kenneth M Breen
The serious risk and damage to the integrity of Australian securities markets that results from insider trading warrants making ASIC a recipient agency to enable it to appropriately receive and use TI material, as proposed in the Positions and Consultation Paper.

I appreciate the opportunity to make this submission. Please feel free to contact me if I can be of any further assistance.

Yours sincerely

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