



ASIC

Australian Securities & Investments Commission

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16 April 2014

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional
Affairs Legislation Committee

Dear Ms Dunstone

**Submission to the Inquiry into the Regulatory Powers (Standard Provisions) Bill
2014 [Provisions]**

Thank you for your letter of 1 April 2014. We are pleased to again have the opportunity to provide a submission addressing the Regulatory Powers (Standard Provisions) Bill 2014.

ASIC

As you know, ASIC is charged with broad regulatory responsibilities which are, and need to be, supported by extensive regulatory powers. These powers are generally well settled and understood among the ASIC stakeholder cohort, and have enabled us to achieve a 95% litigation success rate in 2012–13 as well as domestically and internationally recognised performance during the Global Financial Crisis.

ASIC's power to issue a notice to produce documents, to examine a person, to pursue civil penalties in response to misconduct involving long lead times, and our flexibility in fashioning enforceable undertakings and seeking injunctions reflect the breadth of ASIC's regulatory remit. These broad powers are critical in underpinning our activities.

Previous submission

By letter dated February 2013 Julie Read, Special Counsel in ASIC's Chief Legal Office provided ASIC's previous submission to the Committee Secretary. In that submission, ASIC sought exemption from the operation of the Bill and set out the reasons for that exemption.

Attorney-General's Department previous advice

As you may be aware, early last year the Attorney-General's Department informed ASIC that it is not their intention, nor the intention of the Treasury, to seek to apply the provisions in the Bill to ASIC. The Attorney-General's Department also informed ASIC that the proposed Drafting Direction in respect of the regulatory powers legislation will state that the investigation powers in the legislation will not be used for certain named agencies under the Attorney-General's portfolio. We were then told that the Drafting Direction will go on to add:

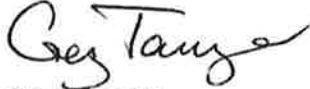
"The investigation powers in Part 3 may also not be appropriate in the case of other agencies, such as the Australian Securities and Investments Commission that have powers tailored to deal with particular policy issues."

Further submission

Our further submission is enclosed. It confirms our view that the Bill should not, at any stage, apply to ASIC. In support of that position our submission further demonstrates how various of the provisions contained in the Bill do not meet ASIC's requirements.

Should you wish to further discuss this or our previous submission, please do not hesitate to contact myself or Mark Bielecki, Senior Executive, Chief Legal Office.

Yours sincerely



Greg Tanzer
Commissioner



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Submission to the Inquiry into the Regulatory Powers (Standard Provisions) Bill 2014 [Provisions]

April 2014

Introduction

The Australian Securities and Investments Commission ('ASIC') welcomes the opportunity to make further submissions in relation to the Regulatory Powers (Standard Provisions) Bill 2014 ('the Bill').

ASIC previously (in February 2013) made a submission in relation to this Bill. The Committee is referred to that submission, a copy of which we understand the Committee has retained. This submission enters into a more detailed analysis in furtherance of ASIC's position set out in our previous submission.

ASIC's monitoring, investigation and enforcement powers are vital to our role as Australia's corporate, markets, financial services and consumer credit regulator. ASIC's regulatory powers derive principally from three key pieces of legislation: the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'), the *Corporations Act 2001* (Cth) ('Corporations Act') and the *National Consumer Credit Protection Act 2009* (Cth) ('Credit Act'). We have again considered the powers contained in the Bill by comparison to our current powers under these three Acts.

This submission:

- Demonstrates that the Bill should not, at any stage, apply to ASIC; and

- Identifies how the powers contained in the Bill do not meet ASIC's requirements.

We make the following submissions for your consideration.

The Bill should not apply to ASIC

ASIC's regulatory powers are a particularly important and necessary part of the work we do. The powers contained in the Bill are not appropriate or sufficient for ASIC's requirements.

ASIC is charged with broad responsibilities including to oversee, license, regulate and pursue enforcement action in respect of a wide range of entities and individuals in the financial services, markets and corporate sectors.

We conduct a large number of surveillances and investigations in complex areas. Frequently these involve numerous entities and individuals as well as financial transactions that are heavily document-based and often large scale.

Routinely entities and individuals are not willing to provide documents to ASIC or answer questions on a voluntary basis, even if they wish to assist ASIC. Through the use of our compulsory information-gathering powers, these people are afforded statutory protection from a potential breach of confidentiality or other liability because they are acting in compliance with a compulsory request.

The explanatory memorandum for the Bill states that where substantial amendment is required to existing monitoring, investigation and enforcement regimes in Acts, those regimes will be reviewed and, if appropriate, existing regulatory powers will be removed and the relevant provisions of the Bill triggered. We confirm that it would not be appropriate for ASIC's powers to be removed in order for provisions of the Bill to operate in their place.

If ASIC were required to rely on the powers in the Bill there would be a material reduction in the quantity, quality and scope of information that ASIC could gather. This would result in a direct and material adverse impact on the quantity, quality and scope of surveillance, enforcement and regulatory outcomes that ASIC presently delivers.

ASIC has a solid 'track record' with a 95% litigation success rate in 2012–13.¹ Also, ASIC's performance during the Global Financial Crisis has been domestically and internationally acknowledged. In the absence of ASIC's full suite of powers, our ability to continue to deliver results and outcomes at this level will be diminished.

We also note that various international benchmarks, such as the IOSCO *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the*

¹ ASIC Annual Report 2012–13, p. 18.

Exchange of Information require ASIC to exercise regulatory powers that are not encompassed in the Bill.

Inadequacy for ASIC of powers contained in the Bill

A number of ASIC's regulatory requirements are not met by the provisions contained in the Bill. The following discussion compares a selection of the powers contained in the Bill with powers currently exercised by ASIC. This comparison demonstrates that the Bill is not appropriate or sufficient for ASIC's requirements.

Monitoring and Investigation

The Bill does not contain a notice to produce power such as those currently exercised by ASIC under Pt 3 Div 3 of the ASIC Act and under s266 and 267 of the Credit Act. The notice procedure has a proven, successful track record and was used by ASIC 2,671 times in the year 2012–13.² A notice power is a less intrusive and oppressive method of obtaining evidence than a monitoring or investigation warrant. Advantages of the existing notice power include:

- the recipient is given a reasonable time to search for and collate the relevant material (of particular importance where very significant numbers of documents are to be produced, or where they cannot be readily located);
- a notice to produce is less burdensome on an agency's resources than executing a search warrant and seizing documents;
- there is an opportunity for discussion between the recipient and the agency to explain and refine the nature of the material required;
- original documentation can be obtained, as is required in some jurisdictions for admissibility;
- the provisions protect a person who provides assistance to ASIC (a person will not be subject to a liability merely by reason of complying with an ASIC notice);
- the notice clearly sets out the terms upon which people can provide documents to ASIC; and
- the recipient is able to take legal advice.

The Bill contemplates some monitoring and investigatory activities that are permitted by consent of the occupier of the premises. For example, at s18 and 48 of the Bill an occupier can consent to an authorised person entering their premises. It is unclear whether, by implication, this means that other monitoring and investigatory activities cannot be

² ASIC Annual Report 2012–13, p. 158.

undertaken, even if consented to, in the absence of a provision in the Bill enabling that person to give consent.

The Bill contains a requirement to answer questions when a monitoring or investigation warrant is executed under s24 or 54 of the Bill. The Bill requires a person to answer any questions 'relating to: (a) the operation of the provision; or (b) the information'. By contrast, s19 of the ASIC Act and s253 of the Credit Act allow ASIC to require a person to appear for examination if 'ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a matter that it is investigating, or is to investigate'. Important advantages of the existing ASIC examination power include:

- a wide range of questions can be asked during an examination;
- the examination can occur without having to first execute a warrant and enter the person's premises;
- any person served with a notice may be examined (as compared to any person on the premises the subject of a warrant);
- the recipient receives advance notice of the general nature of the matters to be the subject of examination (and can therefore spend time reflecting and preparing);
- the examinee is compelled to answer questions on oath; and
- the examinee has a right to legal representation.

Civil penalty provisions

Section 82(2) of the Bill allows the authorised applicant 4 years from the alleged contravention to apply to a relevant court for a civil penalty order. ASIC believes that this is a relatively short period of time in which to bring a civil penalty action. Investigations are often complex and lengthy, and misconduct generally does not become known for a considerable period of time, in a number of instances, not until an enterprise fails. Under s1317K of the Corporations Act and s166 of the Credit Act, the time allowed is 6 years from the contravention.

The Bill only enables the agency to apply to the court for an order that the person pay the Commonwealth a pecuniary penalty. Under s1317J of the Corporations Act, ASIC can similarly apply to the court for a pecuniary penalty, but can also apply for a compensation order or a declaration of contravention.

A declaration of contravention is conclusive evidence of the matters listed in s1317E(2) and enables ASIC to apply for an order that the person be disqualified from managing a corporation under s206C of the Corporations Act. Compensation orders require the person to compensate a corporation, registered scheme or an individual for damage suffered as a result of the contravention. It is critical that ASIC is able to continue to pursue these outcomes in addition to pecuniary penalty orders. These are the outcomes most often desired by those who have been impacted by the contravening conduct.

Enforceable undertakings

Section 114 of the Bill allows for only three kinds of undertakings:

- that the person will take specified action in order to comply with a provision;
- that the person will refrain from taking specified action in order to comply with a provision; or
- that the person will take specified action directed towards ensuring that the person does not contravene, or is unlikely to contravene, a provision in the future.

Undertakings accepted by ASIC often go beyond, and therefore do not fit within, these constraints. Section 93AA(1) of the ASIC Act states broadly that ASIC may accept a written undertaking ‘in connection with a matter in relation to which ASIC has a function or power’. Undertakings accepted by ASIC often include rectification or compensatory action, or the publication of corrective notices.

Injunctions

Section 121 of the Bill provides for the grant of an injunction in only one circumstance, namely in relation to conduct which is in contravention of a provision. By contrast, under s12GD of the ASIC Act, s1324 Corporations Act, and s177 of the Credit Act the court may grant an injunction more broadly, on the basis of conduct that constitutes or would constitute:

- a contravention of the Act; or
- attempting to contravene the Act; or
- aiding, abetting, counselling or procuring a person to contravene the Act; or
- inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
- being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the Act; or
- conspiring with others to contravene the Act.

Further, the Bill does not permit the court to grant an injunction by consent of all the parties, as is available under s1324(3) of the Corporations Act, s12GD(2) of the ASIC Act, and s177(2) of the Credit Act even if the court has not satisfied itself that the improper conduct has been engaged in.

Should you wish, we would be pleased to discuss our submission with you.