

Parliamentary Joint Committee on Corporations and Financial Services

ANSWERS TO QUESTIONS ON NOTICE

Treasury

Corporations and Financial Sector Legislation Amendment Bill 2013

22 April 2013

Part 3 - International Business Regulators

1. What is meant by 'protected' information?
2. What are some of the concerns around dissemination of this information?
3. Re: the proposed amendment to subparagraph 234(a)(ii) of the *Australian Securities and Investments Commission Act 2001*, can you please:
 - a) explain what 'affect significantly' means; and
 - b) provide an example of a foreign business law or any other law of a foreign country, which could 'affect significantly the operation of the corporations legislation'. For example, could the 2010 US Dodd-Frank Act 'affect significantly' the operation of Australia's corporations legislation and therefore warrant the attention of the Parliamentary Joint Committee?

Answers:

1. Section 127 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) imposes obligations on ASIC to take all reasonable measures to protect from unauthorised use or disclosure information that is (a) given to it in confidence or in connection with the performance of its functions or the exercise of its powers under the corporations legislation; or (b) information that is protected information. Exceptions to this principle and additional conditions that may apply are provided in section 127.

'Protected information' is defined in section 127(9) of the ASIC Act and covers information that is obtained by or given to ASIC for the purposes of ASIC's functions under section 12A of the ASIC Act and which relate to the affairs of (a) a body, or person regulated by ASIC; (b) a body corporate related to a body regulated by ASIC; or (c) a customer of a body or person regulated by ASIC.

ASIC's functions under section 12A of the ASIC Act include functions conferred on ASIC by Division 2 of Part 2 of the ASIC Act (functions relating to unconscionable conduct and consumer protection in financial services), and functions conferred on ASIC by legislation other than the corporations legislation, for example the Insurance Contracts Act 1984, the National Consumer Credit Protection Act 2009, and the Business Names Registration Act 2011.

Protected information excludes information that has already been lawfully made available to the public from other sources.
2. The principles and rules that govern the authorised disclosure of confidential and protected information are critical to ASIC's ability to discharge its regulatory obligations as a corporations and financial markets regulator effectively and efficiently.

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The framework is central to the integrity of ASIC's regulatory objectives and operations – and provides important assurance to the market that information, given to ASIC under compulsion, or voluntarily (for example the contents of complaints given to ASIC) are accorded appropriate protection.

3. (a) Subparagraph 243(a)(ii) is intended to expand the matters under the ASIC Act that may be subject to inquiry and report by the Parliamentary Joint Committee on Corporations and Financial services (the Committee) in a way consistent with its existing s243(1)(ii) duties, and taking into account the new definition of foreign business law which encompasses the laws of multijurisdictional regulators such as European Commission bodies. Subparagraph 243(a)(ii) is amended to enable the Committee to inquire into matters relating to the operation of a foreign business law, expanding the existing scope of inquiries beyond inquiries into "any other law of the Commonwealth, of a State or Territory or of a foreign country...".

The term 'affect significantly' (are words currently in section 243(a)(ii) of the ASIC Act in relation to the Committee's current duties) is not a term of art and has its ordinary meaning. As such it is designed to confer on the Committee a broad flexibility in the matters that the Committee might consider would fall within that term to merit the Committee's inquiry and report.

(b) An example of a foreign business law or a law of a foreign country that could 'affect significantly the operation of the corporation legislation' is a foreign business laws that imposes requirements that conflict with requirements imposed under the corporations legislation.

Part 4 - Reporting on ASIC's Information Gathering Powers

1. Why is it necessary to formalise ASIC's annual reporting requirements in relation to ASIC's use of information gathering powers?
2. What kind of information will ASIC include in its annual report as a result of the proposed reporting requirements?
3. Will the categories of powers reported against be the same as those listed in the 2010–11 annual report or will they be more extensive?

At a hearing of the Senate Economics Legislation Committee in November 2010, Mr Malcolm Stewart, Vice President of the Rule of Law Institute, criticised ASIC for a lack of accountability in relation to reporting on its use of information gathering powers. Mr Stewart pointed to the omission of search warrants, wire taps, telephone logs and bank records obtained by ASIC in the preceding three years, from the figures provided by ASIC to the committee.

4. Will the proposed formalised reporting requirements mean that this information will be included in ASIC's annual reports?
5. How do these requirements address concerns about ASIC's accountability in relation to its use of information gathering powers?

Answers:

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1. The proposed amendments will give legislative backing to ASIC's current reporting of the use of information gathering powers under the *Corporations Act 2001*, the *Crimes Act 1914*; *Australian Securities and Investments Act 2001* (the ASIC Act); the *National Consumer Credit Protection Act 2009* (NCCP) and future reporting under the *Mutual Assistance and Business Regulation Act 1992* (MABRA). Given the importance that the Senate Economics Legislation Committee attached to ASIC reporting it was appropriate that ASIC be under a legal obligation to provide specified information rather than relying on ASIC to provide that information voluntarily.

While ASIC currently provides reporting of its use of information gathering powers in its Annual Report to Parliament, this is not a requirement under the law. It is intended to prescribe by Regulation the matters that are the subject of ASIC's Annual Reporting, including the use of its information sharing powers under the MABRA in response to requests from foreign regulators.

2. This will depend on what is prescribed by Regulation, but as noted in response to question 1 above, it is intended to prescribe by Regulation the matters that are the subject of ASIC's voluntary annual reporting, as well as the use of its information sharing powers under the MABRA in response to requests from foreign regulators.
3. This is answered under questions 1 and 2, of Part 4 above.
- 4-5. In response to the Committee's earlier criticisms of ASIC for a lack of accountability in relation to reporting on its use of information gathering powers, in a letter to the Committee, ASIC undertook to provide such reporting in the absence of any legislative requirement to do so. As a result, since 2010-2011, ASIC has provided annual reporting of its use of compulsory information-gathering powers under the Corporations Laws, the Crimes Act, the NCCP Act and ASIC Act. (See extract of Appendices ASIC Annual Report 2011-12 at page 150)

ASIC's Annual Reporting of its information gathering powers already report on the use of its powers such as search warrants to obtain information. Access to bank records are also obtained through ASIC's information gathering powers under section 30 and, or, 33 of the ASIC Act, which are also included as part of ASIC's Annual Report.

In relation to the use of wire taps, ASIC is an enforcement agency under section 5 of the Telecommunications (Interception and Access) Act 1979 (TIA Act), and is not an interception agency. As such, ASIC cannot apply for warrants to intercept telephone calls or otherwise access intercepted telecommunications. As an enforcement agency, ASIC may only obtain the following types of telecommunications data for use in its investigations:

- (a) specified information or documents that already exist and which are sought under an authorised request (under sections 178 and/or 179 of the TIA Act) (these are distinguishable from communications that are passing over a telecommunications system such as intercepted communications and includes, for e.g. telephone call charge records); and (b) stored communications: either (i) under a stored communications warrant (under section 108(2)(a) of the Act); or (ii) with the

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knowledge of either the intended recipient or the sender of the stored communication/s (under section 108(1)(b) of the Act).

The TIA Act contains a comprehensive reporting regime, and under that regime those who access TIA regulated information (including ASIC) report in writing to the responsible Minister (the Attorney General) each year. The Act also requires the Attorney General to table a report to Parliament on the mechanisms used under the TIA Act to obtain information.

ASIC reports about the following matters:

- (i) the number of authorisations for access to existing data that it has made between 1 July and 30 June under sections 178 and 179 of the TIA Act (as required by sub sections 186(1)(a) and (b));
- (ii) statistics about its use of stored communications warrants (the number of applications made, whether any were made by telephone, whether any application was refused and so forth) (as required by section 162(1));
- (iii) statistics "about the effectiveness" of the stored communications warrants (i.e. whether stored communications data obtained by warrant was used in evidence in enforcement proceedings or contributed to any criminal convictions) (as required by section 163(b));
- (iv) a report confirming whether and to what extent ASIC has destroyed stored communications "information and records" in accordance with section 150(1) (as required by section 150(2)).