



ASIC bolsters cross border powers with landmark agreement

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AT A GLANCE

- ASIC recently announced that it has become one of the first signatories to a new co-operative agreement between leading international securities regulators in the UK, USA, Hong Kong, British Columbia and Singapore.
- The implications for any company that engages in cross-border financial transactions, conducts business through online platforms where data may be hosted overseas, or who has personnel in multiple jurisdictions is significant.
- Moving forward, companies will be subject to greater scrutiny as we are likely to see more streamlined and effective co-operation between regulators across borders, with a far greater ability to trace assets, transactions and data, to obtain evidence, and freeze assets and funds.

On 22 June 2018, the Australian Securities and Investments Commission (**ASIC**) announced that it has become one of the first signatories to a new co-operative agreement between leading international securities regulators in the UK, USA, Hong Kong, British Columbia and Singapore.

Until now, ASIC has been a signatory to the International Organization of Securities Commissions (**IOSCO**) 2002 *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (**MMoU**), which allows signatory regulators to obtain assistance from international counterparts by seeking information held in the foreign jurisdiction, including details of financial transactions, shareholder information or the financial records of an entity under investigation.

However, the MMoU scheme is somewhat outdated, with no specific provisions around the exchange of electronic data and the conduct of compulsory examinations by foreign regulators. These limits often made information exchange under the MMoU cumbersome, with complex issues around the admissibility of evidence obtained abroad.

Expanded international powers – the EMMoU

By signing the *Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (**EMMoU**), ASIC has fallen into stride with the globalisation of financial markets.

In addition to existing powers under the MMoU (which will continue alongside the new regime), the EMMoU will allow ASIC and other signatories to obtain and use **information** regarding:

- securities, derivatives and similar transactions, including records of fund or asset transfers into or out brokerage or other financial accounts;
- the beneficial ownership of an entity in the co-operative jurisdiction;
- account holders, persons conducting transactions, amounts purchased, the time and price of transactions;
- audit or review of financial statements; and
- Internet Service Providers and telephone records, which is particularly important for online financial transactions.

“**Information**” is given a very broad definition under the EMMoU, and includes data, documents, metadata, recordings, images, data compilations, file inventories, folders, and lists.

Perhaps most importantly, the EMMoU permits ASIC and other signatories to request that their foreign counterpart:

- compel a person to physically attend a witness examination and give testimony in that foreign jurisdiction; and
- take direct action to freeze or sequester assets or funds held in that jurisdiction, or to use local legal procedures to do so.

This means that in addition to its coercive powers to conduct compulsory examinations in Australia under section 19 of the *ASIC Act 2001*, under the expanded scope of the EMMoU, ASIC can now ask foreign regulators to conduct examinations offshore.

Confidentiality under the EMMoU

ASIC and other regulators are permitted to use information obtained pursuant to the EMMoU in conducting a surveillance, investigation, in a civil or administrative enforcement proceeding, or in a criminal investigation or prosecution.

However, under Article 7 of the EMMoU, the substance of all requests for co-operation must be kept confidential. ASIC may disclose that an international request has been made, but otherwise must not disclose the substance or nature of the request to a person or entity subject to the investigation or proceeding, or even to a court.

What does the EMMoU mean for you?

The impact of ASIC expanded powers under the EMMoU are potentially far reaching. Over 95% of the world’s securities markets are regulated by IOSCO members, in over 115 jurisdictions¹.

As ASIC Chair James Shipton put it, the EMMoU has expanded “*the range of enforcement powers that signatories may use to safeguard the integrity and stability of markets, protect investors, and deter misconduct and fraud.*”²

For any company that engages in cross-border financial transactions, that uses online platforms where data may be hosted overseas, or who has personnel in multiple jurisdictions, they are now at risk of greater scrutiny.

Under the EMMoU, we are likely to see more streamlined and effective co-operation between regulators in Australia, the UK, USA and other countries, with a far greater ability to trace assets, transactions and data, to obtain evidence, and to freeze assets and funds.

¹ International Organization of Securities Commissions, [About IOSCO](#).

² Australian Securities and Investments Commission, ASIC Enhances its enforcement toolkit beyond Australia’s borders (22 June 2018).

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