

ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

20th November 2017

Email: ASICenforcementreview@TREASURY.GOV.AU

Position and Consultation Paper 8 ASIC's Directions Powers 8 November 2017

The FBAA as the leading national professional association to finance and mortgage brokers welcomes the opportunity to make a submission in response to Position and Consultation Paper 8: ASIC's Directions Powers.

Background

We have strong reservations about imbuing ASIC with more anticipatory powers. In clear cases where a licensee is contravening the law or is about to contravene, such a power makes clear sense and we support ASIC having power to issue directions relating to breaches. In many cases however, an imminent breach will not be as apparent.

A pre-emptive power has potential to irrevocably damage a business if it is exercised improperly. By analogy, if ASIC were able to take pre-emptive action against a business experiencing cashflow difficulties on the basis that it considered it likely the company would become insolvent, the company's insolvency could well be caused by ASIC's intervention interrupting the business's cashflow.

It is appropriate that ASIC should have to gather evidence and mount a case before taking action against a licensee given the serious ramifications regulatory intervention has on a business and its reputation. The significant challenge is finding a balance between inappropriately pre-emptive intervention and power to take swift action to protect the public. In our view, that balance lies in ASIC having power to issue directions in relation to breaches and non-compliance but not in relation to potential or anticipated compliance failures.

Position 1: ASIC should have the power to direct financial services or credit licensees in the conduct of their business where necessary to address or prevent compliance failures

QUESTIONS

1. Should ASIC be able to give a direction to a financial services or credit licensee requiring them to take or refrain from taking specified action in the conduct of their business where necessary to address or prevent compliance failures?
2. Should the directions ASIC can make be prescribed in the legislation (with an ability to extend the list by regulation)? If so, is the above list appropriate?
3. Alternatively, should a directions power be drafted broadly to allow for a wider variety of directions?

FBAA Response

Yes, ASIC should be able to give a direction to a licensee (financial services or credit) requiring them to take or refrain from specified action in the conduct of their business. The power should be limited to ASIC making such directions in response to identified compliance failures. Having this requirement ensures there is a body of evidence or 'probable cause' for the giving of such a direction.

Power to issue directions to prevent compliance failures goes one step further. We are unable to support such a power being granted to ASIC without specific detail around how such a power would be enlivened and exercised.

As a crown instrumentality, ASIC is largely exempt from liability for improper exercise of its power. As noted earlier, the impact of regulatory intervention on a business is significant. Pre-emptive action is necessarily based on a series of assumptions which if proven unfounded would see ASIC exercising pre-emptive regulatory action and damaging a business before adequate investigation is undertaken. The business would have no recourse against ASIC for compensation for any losses so caused.

We note the discussion under Chapter 4.1 of the Consultation paper relating to the risks of delayed powers. In our view, the paper incorrectly labels issues of ASIC having to compile evidence before taking administrative or injunctive action as "risks". We see them as necessary and logical protections for business. It is entirely

appropriate that ASIC should have a proper basis before exercising its powers. While taking administrative action or seeking injunctions are time consuming and costly, they require ASIC to compile sufficient evidence to convince a delegate or the court that on balance, the merits of allowing further action by way of administrative or injunctive relief outweigh the potential harm. These protections exist for good reason and they should remain.

We are concerned that on balance, the ability of licensees to conduct their affairs without fear of ASIC intervening prematurely outweighs the need for ASIC to have such a power.

Q2

We have given consideration to the list of proposed directions set out in the paper as:

- a. cease appointing authorised representatives;
- b. cease accepting new clients;
- c. conduct a review or audit of an authorised representative's records;
- d. engage properly qualified compliance staff;
- e. cease transferring business to another licence;
- f. cease making specific representations about financial products or services;
- g. appoint a person nominated by ASIC to review and report on compliance processes;
- h. establish a programme to assess claims for restitution or compensation to customers.

We support most of the suggested directions within the framework of ASIC having a basis to exercise such a power that involves having credible evidence on which to base its actions. We have concerns with b) and g).

Proposed direction b) would allow ASIC to direct a licensee to cease accepting new clients. This may impact a licensee's ability to continue to generate revenue, pay its staff and may ultimately cause it to cease trading. For a consequence of this magnitude, ASIC should have to take administrative or legal action.

Proposed direction g) is unduly restrictive. ASIC already has discretion on whether to accept a particular person or firm nominated by a licensee to undertake independent compliance reviews. Anyone who performs the work will have to be

accepted by ASIC as being suitably qualified and experienced to undertake such a review. We do not support ASIC having a power to nominate a particular person but would support a right for ASIC to refuse to allow the appointment of a particular person if such a power is not already clearly enough defined. The risks of giving ASIC power to nominate a particular person include:

1. It is anti-competitive – the power would remove the ability of a licensee to select from a pool of suitable options.
2. The nominated entity may be a ‘bad fit’ for the relevant licensee. The nominated entity may be too large for a small-scale licensee and the costs of their services could be prohibitively high.
3. It distorts the notion of independence – the power would enable ASIC to mandate the use of particular providers without any transparency about why those providers are preferred. This has potential to lead to the creation of a bank of preferred providers and of providers attempting to sway ASIC’s favour to include them on that list.

We strongly support any directions being embodied in legislation.

Q3

We do not support a proposal to have a broadly drafted directions power. Industry needs certainty to continue to engage in activities with confidence. There is already a significant volume of regulatory change at any given time brought about by legislative amendments, industry consultation and creation of new instruments. Further open-ended powers will contribute to the lack of certainty and make it more difficult for businesses to operate.

Position 2: The directions power should be triggered where a licensee has, is or will contravene financial services or credit licensing requirements (including relevant laws)

QUESTIONS

4. Should the directions power be triggered if ASIC has reason to believe that a licensee:
 - a. has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes, or would constitute a contravention of a law

- relevant to the provision of services by the licensee?
- b. has refused or failed, is or is proposing to refuse or fail to do an act or thing that the legislation requires a financial services or credit licensee to do?
5. Alternatively, should broad public interest considerations or objectives provide the basis for ASIC making a direction? If so, are the objectives outlined above appropriate?

FBAA Response

We support ASIC having power to engage with licensees where it has reason to believe the licensee is contravening or about to contravene relevant laws or obligations. ASIC already has such power through use of notices, its powers to make inquiries for the purpose of ensuring compliance with the legislation (ASIC Act and NCCP Act notices) and power to commence investigations in relation to suspected breaches (ASIC Act).

The case studies provided in the consultation paper do not always support the proposition that further powers are required by ASIC. It appears ASIC could have acted much more quickly and been more diligent with its handling of matters to obtain sufficient evidence to proceed with administrative or legal action earlier than it did. The powers proposed in this paper are to enhance ASIC's capabilities and to close loopholes rather than to circumvent proper process or offset inefficiency.

In relation to Case Study 1 it is not clear why the appointment of the independent expert did not lead to the issues being identified and remediated, although it is likely the review undertaken by the independent expert was deficient. It is not clear why ASIC wrote to the licensee outlining a series of concerns but then elected not to take any further action at the time. From this case study it appears ASIC should have identified the deficiencies with the advice documents much sooner and would have been able to initiate administrative action off the back of this.

We recognise that a power to direct the licensee to cease appointing representatives and to retain records of departing representatives would have assisted. Licensees already have an obligation to have adequate human resources and it would appear the third direction in Case Study 1 to engage sufficiently qualified compliance experts would be akin to a restatement of an existing licence obligation.

We agree that Case Study 2 demonstrates where an additional power would have been beneficial.

In relation to Case Study 3, we support the position advanced by the licensee that it would not be appropriate to direct a licensee to comply with the recommendations of an independent expert where the review had not yet been undertaken and recommendations not yet been made. We recognise the expectation that a licensee would adopt recommendations resulting from an independent review however there must be some safeguards that permit a licensee to challenge unreasonable recommendations. As Case Study 1 identifies, independent expert reviews may not deliver outcomes expected by the parties. ASIC is the correct body to direct the licensee on the appropriate course of action. Case Study 3 actually demonstrates why there is such risk in giving ASIC too much latitude to issue directions.

It would be a very poor outcome of this consultation paper if ASIC were given a power such as the one identified in Case Study 3 to require a licensee to implement recommendations that have not yet been written.

Position 3: ASIC should be able to apply to a court to enforce the direction and take administrative action if an AFS or credit licensee does not comply with a direction

QUESTIONS

6. Should ASIC be able to apply to a court to seek an order requiring a licensee to comply with the direction?
7. If so, should there be sanctions, in addition to those relating to contempt, for a licensee and/or its directors if the licensee breaches the court order?
8. Should failure to comply with an ASIC direction be a:
 - a. criminal offence?
 - b. civil penalty provision?
 - c. breach of a financial services law or credit legislation and therefore a basis for administrative action?
9. Should ASIC be required to give written notice to a licensee before making a direction setting out: its intention to make a direction, reasons and a period of time for the licensee to respond that is reasonable in the circumstances?
10. Alternatively, should ASIC be required to offer the affected licensee an opportunity to appear, or be represented at a hearing and to make submissions

on the matter before making a direction? If so, should ASIC also be able to make an interim direction without providing a hearing and be required to provide a hearing within a certain time frame?

FBAA Response

There must logically be some enforceability of an ASIC direction, otherwise it has little weight. ASIC should be able to apply to the court seeking an order requiring the licensee to comply with the direction, however the licensee should be entitled to challenge the direction. The power to enforce a direction in court should not be confined to the question of compliance with the direction but must also address the reasonableness of any such direction.

If the court orders compliance with a direction and a licensee does not comply with the court order, then sanctions should follow. Contempt is a serious enough consequence that further consequences are not necessary.

Failure to comply with an ASIC direction should be a breach of a financial services law / credit legislation and be the basis for administrative action - provided such direction is reasonable. In response to Questions 9 and 10 we support the position that ASIC must be required to give written notice to a licensee setting out its intention to make a direction, its reasons and the time period for the licensee to respond. We also support giving licensees an opportunity to appear at an administrative hearing. Given that the directions powers are intended to expedite action by a licensee it would be appropriate for ASIC to be able to make an interim direction and bring the hearing on as a matter of urgency. This could operate in a similar manner to disclosure document stop orders.

END.

Yours faithfully



Peter J White CPFB FMDI MAICD
Executive Director

Advisory Board Member – Small Business Association of Australia (SBA)