

FINANCE INDUSTRY DELEGATION

Submission concerning

ASIC Enforcement Review Position and Consultation Paper 8

"ASIC's Directions Powers"

Introduction

The Finance Industry Delegation represents 187 Australian Credit Licensees and notes that the Position and Consultation Paper is primarily directed to Australian Credit Licensees and others.

The Delegation is concerned to read that this Position and Consultation Paper is suggesting that the Government adopt a new penalty regime for the Corporations Act, National Consumer Credit Protection Act and National Credit Code - for ASIC to exploit.

This submission comments on the suggestions that would impact on Australian Credit Licence (ACL) holders who are credit providers and on household goods lessors, both primarily regulated by the National Consumer Credit Protection Act 2009 and National Consumer Credit Protection Regulations 2010 (the Credit Act).

Five Solutions

Position 1 - a new ASIC directions' regime

We note that the Taskforce is attracted to an expanded directions regime that will include giving ASIC the power to direct credit providers and lessors to:

- (a) cease appointing authorised credit representatives;
- (b) cease accepting new consumers;
- (c) conduct a review or audit of the authorised credit representative's records;
- (d) engage properly qualified compliance staff;
- (e) cease transferring business to another licence;
- (f) cease making specific representations about financial products;
- (g) appoint a person - nominated by ASIC - to undertake a review and report on compliance processes (for which the lender or lessor must pay); and
- (h) establish a program to assess compensation for consumers.

This wide-ranging list of opportunities would ensure that this directions regime would be a significant part of the total ASIC activity associated with the imposition of penalties.

A consideration of the specific detail

Referring to the Paper by the numbers used, it is noted that:

3.

The Taskforce does not intend that the power to make directions will supplant other ASIC powers. They would "*support the effectiveness of negotiated outcomes*".

The Delegation recognises that this will thereby entail an increase in ASIC's variety of powers. The Delegation is concerned that this will introduce a substantial risk of abuse of power and, should it be adopted, the Delegation recommends the introduction of a sunset clause to ensure review after a trial period.

4.

The Taskforce wants specification in the Credit Act and Regulation to give flexibility to add further targeted directions to "*provide sufficient flexibility for unforeseen kinds of directions*".

The Delegation considers that this would create a 2-tier system. If the specification of directions is so important when introducing the new powers, that they are deemed appropriate to include in the legislation, then any additions should be accorded the same

recognition. Subordinate legislation is an opportunity to give Ministers (and therefore ASIC) unfettered powers. In reality very, very few regulations attract disallowance motions and debate. The dynamics of Parliamentary conduct and process tends to lead to the content and introduction of regulations being overlooked by both Houses.

The tabling of regulations has largely become a formality, with politicians too busy to review the mass of regulations tabled during a sitting period. They are also rarely debated in the party rooms before their introduction.

Question 1:

Should ASIC be able to give a direction to refrain from doing something to address a compliance failure?

Answer: Yes, but only if it is one of the areas on the legislated list.

Should ASIC be able to give a direction to refrain from doing something to prevent compliance failure?

Answer: No.

This gives ASIC the power to presume and to intimidate. Prevention from an event yet to happen implies pre-judgement of a possibility.

Question 2:

Should the directions ASIC can give be enshrined in the legislation?

Answer: Yes.

There must be a limit on ASIC's opportunity to use, or misuse power, with at least the opportunity for Parliamentary debate.

Should there be Regulation power to extend the type of directions?

Answer: No.

There should not be a 2-tier system. If the power is important enough to be enshrined in legislation at the beginning, then it is important enough to add new items by way of legislative amendment.

5.

The Taskforce believes that the directions power should be triggered "*when ASIC has reason to believe... that a credit licensee... has engaged, is engaged or is proposing to engage in (non compliant) conduct... or has refused or failed, is proposing to refuse or fail to do (some compliant action...)...*".

The Finance Industry Delegation considers such an approach is far too broad and involves an attempt to second guess behaviour occurring in the future.

This would only be acceptable if there was a clear division between directions for past and current actions and warnings for potential future actions, with the warnings not accompanied by any penalty. The latter should not be considered a penalty in the same manner that the former two circumstances would be considered as leading to the issuing of a direction.

7.

The alternative of giving ASIC the opportunity to make assessments of "*public interest*" as the basis for issuing a direction is of great concern, as it allows the importation of unconscionable subjectivity.

The writers can attest to a situation where one major ACL holder was told by a senior ASIC bureaucrat (non-lawyer), that they had to stop trading using a legal model, even though she agreed they had not breached any provision of the Credit Act, because as she said, "*I don't like it*".

The writers have also been subjected to highly subjective demands by ASIC officers to remove content from contract templates. These were demands that had nothing to do with the Credit Act, were not supported by any evidence of consumer detriment and were based on guesses as to the impact on consumers. This occurred while also demanding the removal of mandated content in another document - content that was actually specified in the template document prescribed by the Credit Regulations.

The potential for ASIC officers to act in an even more autocratic manner cannot be overlooked. No encouragement by way of a “public interest” power is necessary. Industry sector experience does not provide confidence that ASIC knows what the public interest is and it is noted that ASIC does not have any process to determine such. Members of the public are not included in any of their advisory committees and there is no certainty that the well paid ASIC officers have any contact with a representative sample of the public. Such a provision moves well away from the need for certainty in any regulatory regime.

The supporting comments included in paragraph 7, at sub-points a. to d., are nonsense.

9.

Product intervention power may have relevance for a sophisticated, broadly regulated financial product that involves superannuation or investment opportunities, particularly those involving consumer investment of tens of thousands of dollars and more. However, the concept has no place in highly regulated leasing and smaller amount credit regimes, with consumer “investment” generally well under \$5,000. These are regimes that already have onerous legislation and regulation that is carefully prescribed, with little opportunity for alternative interpretation. In these circumstances, a product intervention power has no potential legitimate utility.

Question 4:

Application of the directions power?

Answer a.: This should not be triggered for 'suspected' future events that have yet to occur.

Answer b.: This should not be triggered for “*proposing to refuse to act or fail to do an act*”:

Both risk incredibly subjective assessments by ASIC officers and their use, or abuse, as a potent harassment weapon.

Question 5:

Directions to be issued on the basis of broad public interest?

To provide people working for government - with substantial guaranteed salaries well above Australian average incomes and certainty of employment, who are never likely to need to borrow small amounts of money or lease household goods - with the role of determining public interest on the run and without any input from representative advisory committees - is completely inappropriate.

10 and 13.

There will only be adequate procedural protection for licensees if it is clear, in the forthcoming legislation, that a decision to issue a direction is appealable to both the Administrative Appeals Tribunal, and to a court.

The opportunity for ASIC to seek a court order - to enforce an order - must be accompanied by a clearly defined power for the same court to examine the veracity of the direction being issued in the first place. We note that this opportunity has been overlooked in paragraph 11 and, therefore, the process outlined cannot be considered “appropriate”, as is claimed in that paragraph.

12.

A process that is “efficient” for ASIC is not the criteria that should determine Taskforce consideration. A concern for “sufficient flexibility” and an illegitimate claim of “procedural fairness”, cannot be championed at the expense of justice and fair treatment.

14 and 16.

Providing a criminal penalty, if there is a failure to comply with an ASIC direction, is basically turning a relatively minor matter that does not justify an Enforceable Undertaking or prosecution, into a major matter.

Only civil penalties can possibly be considered and these must only be available via a court application, in order to avoid ASIC having the ability to be investigator, instigator, prosecutor and judge.

15.

The proposed internal ASIC “hearing” for a licensee should not have to wait for the matter to be deemed a criminal offence. This mechanism should be available for all, from the start of the directions process.

18.

The further sanctions to be applied when a court determines that a licensee has ignored or breached a valid direction might be made available, but only for imposition at the court’s - not ASIC’s - discretion.

Question 6:

Should ASIC be able to apply to the court for an order seeking enforcement of a direction?

Answer: Yes, but only if that application provides a right for the licensee to ask the court to examine the veracity of the direction.

Question 7:

Should there be sanctions, as well as contempt, to penalise a licensee’s failure to obey a court order?

Answer: Yes, but only if the court has the discretion to impose them - not ASIC.

Question 8:

Failure to comply with a direction should be - ?

Answer: Limited to a civil penalty, so that the court can examine all the circumstances.

The court must be provided with the flexibility of penalty for the contempt. ASIC has no place in such a determination, with its administrative penalties. Criminal penalties imply that the causal matter is so serious that it should have been the subject of a prosecution - not a direction - in the first place.

Question 9:

Should ASIC provide notice that it is contemplating issuing a direction?

Answer: Yes, but only if there is no accompanying opportunity for ASIC to seek publicity.

Question 10:

The opportunity for a hearing before issuing a direction or the issuing of an interim direction and then a hearing?

Answer: The opportunity for an interim direction, followed by a hearing, is attractive because it provides the licensee with a clear view as to exactly what ASIC has in mind.

However, such a process would have to involve a delayed commencement to the direction, to allow the hearing to take place before it became an operating and enforceable direction.

If there was no delay, the licensee could be forced to discontinue business, or take some cost attracting action which, following a success at the hearing, would not ultimately be required.

We trust that the above will assist in the formulation of reasonable and appropriate laws that protect the consumer, while allowing Australian Credit Licensees the possibility of being able to remain in business, dealing with a fair and reasonable process overseen by an ASIC that has not been provided with excess and autocratic powers.

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