

20 November 2017

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

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### **ASIC's directions powers – position paper**

The Property Council welcomes the opportunity to comment on *ASIC Enforcement Review's position and consultation paper 8: ASIC's Directions Powers* (the paper).

The Property Council is the peak body for owners and investors in Australia's \$670 billion property investment industry. We represent, owners, fund managers, superannuation trusts developers and investors across all four quadrants of property investments: debt, equity, public and private.

Industry is supportive of the work that has been undertaken by the Taskforce to identify areas where ASIC's role can be strengthened to better protect consumers. We have set out below matters that should be considered further in developing the scope of ASIC's directions powers with respect to AFSL holders.

As a broad starting point, the proposed ASIC directions power for AFSL holders should have the following features:

- The licensee is given notice and an opportunity to rectify prior to a direction being given;
- The direction is limited to a short period (for example, 21 days); and
- ASIC is required to report to the Minister setting out reasons for giving the direction (with a copy to the licensee).

These features are consistent with other types of licences in respect of which ASIC has directions powers.

In relation to the three preliminary reform positions and the discussion questions raised in the paper, we note as follows:

*"Proposed 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."*

- Industry would prefer defining the specific directions available to ASIC in the legislation (with an ability to extend this list by regulation), as opposed to listing broad categories only. The use of broad categories will create uncertainty, particularly as these are new powers.

*"Proposed position 2: The directions power should be triggered where a licensee has, is or will contravene AFS or credit licensing requirements (including relevant laws)."*

- Industry supports the directions power being triggered by a combination of both the licensee's behaviour *and* the broad public interest considerations. In other words, any action taken by ASIC must be in line with clear public interest stated objectives (eg. APRA directions to ADIs) and can only be taken if the licensee has, is or will engage in conduct which would breach the legislation.

*"Proposed 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."*

- Industry supports the proposition that ASIC should be able to apply to a court to enforce a direction, with sanctions imposed on licensees who do not comply with a court order. Directions will be of limited effect without this.

However, industry does not support criminal sanctions for failure to comply with a direction. There will be sufficient recourse for ASIC through civil and administrative actions.

We would be happy to meet to discuss these issues with you further.

Please contact me (02 9033 1929) if you have any queries.

Yours sincerely



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