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ASIC Enforcement Review
Financial Systems Division
The Treasury
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PARKES ACT 2600

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via: ASICenforcementreview@treasury.gov.au

SELF REPORTING OF CONTRAVENTIONS BY HOLDERS OF AFSLs or ACLs

The Australian Finance Conference is a national finance industry association; our member companies include general financiers, manufacturer/supplier captive financiers, banks and their finance subsidiaries. AFC also provides a directorate service to the Australian Equipment Lessors Association, Australian Fleet Lessors Association and the Discount and Invoice Finance Association. Many member companies hold ACLs; several also have AFSLs.

We welcome the opportunity to respond to the ASIC Enforcement Review Position and Consultation Paper Self-reporting of contraventions by financial services and credit licensees (**Paper**). We are also grateful for the extended timeframe granted to us to provide our comments.

The AFC's principal concern with the Paper is the recommendation that there be alignment between the Australian Financial Services Licensing (**AFSL**) regime and the Australian Credit Licensing (**ACL**) regime with respect to breach reporting to the Australian Securities and Investments Commission (**ASIC**). We note that such an approach is not aligned to the public policy rationale for the respective current regulatory structures themselves.

The AFSL regime exists to safeguard financial advice provided to customers with respect to managing their financial assets and how to effectively manage risk. The ACL regime exists to effectively manage the provision of credit to customers, which has a different risk profile to that of the AFSL regime.

The ACL regime requires ACL holders to have robust and effective compliance and risk management systems in place and is supported by an annual attestation process (the Annual Compliance Certificate) whereby ACL holders provide ASIC with, amongst other information, details of complaints and remediation amounts. It is our view that this level of information is sufficient for ASIC to effectively supervise ACL holders. Further, the range of customer protection obligations imposed on ACL holders in the National Consumer Credit Protection Act 2010 (NCCPA), from responsible lending obligations to hardship relief, more than adequately deal with the public policy issues. These are supported by the Annual Compliance Certificate (which is all that should be necessary) and the EDRS reporting of systemic issues to ASIC.

We also note the Government's commitment to strengthen competition in the financial services sector and efforts to remove inhibitors to facilitate new entrants with the flow on benefits to consumers including in access, pricing and product selection. In this regard it is noted that since the commencement of the NCCPA in 2010, the number of licensed credit providers has reduced significantly through consolidation and with few new entrants. In our view, adding the proposed reporting would be a further barrier to entry and consequently appears at odds to the Government's policy.

Further, we are not aware of evidence to support the proposed extension to ACLs. In its absence it is difficult to see whether the design solution is appropriately targeted to address the identified harm. In consequence, in its current form (including the continuation of the Annual Compliance Certificate), the proposed solution would appear to be at odds with the commitment the Government has given to its policies of best practice making regulation and red-tape reduction.

In the context of AFSL holders, we agree that amending the 'significance' test to a more objective would be beneficial and address some ambiguity that exists regarding its application. We note though, that further consultation and discussion is required to ensure that the implementation of the objective standard test solves, rather than creates different issues. The test needs to be such that the 'reasonable person' test is applied in a manner that takes into account the nature of the issue relative to the organisation in which it occurred. Therefore, the test needs to have regard to the size, scale and financial implications of the issue, as well as have regard to the different obligations publicly listed and private companies need to discharge.

We further note that in terms of timing and in the context of the Government's broader reform agenda for financial services that the evolution of the objective element of the significance test may be better to be finalised once the detail of the new ASIC product design and intervention powers is known.

Similarly, we believe that there is merit in the 'cooperative approach' concept identified in the Paper, however, we encourage further and more detailed consultation to occur to ensure that the mechanism, criteria and implications of introducing such an approach can be identified.

This would also allow the time-frames and resourcing demands for systems changes to be assessed and the consideration of a "teething" period before any new penalties and personal liability regime commences.

Moreover under both the ACL and AFSL regimes, licensees have an obligation to act efficiently, honestly and fairly. This means that when issues are raised they need to be identified, solved and remediated, a process which can involve extensive data capture and analysis. To accelerate the reporting timeline for AFSLs and to introduce it for ACLs, will mean that the analysis process may not be completed, resulting in the premature reporting and potential over-reporting of matters that turn out following completion of the analysis not to be significant, thereby adding to costs and delaying remediation.

We note that the Paper introduces material changes to the consequences of failing to report breaches to ASIC and also consequences for causing breaches. While we agree with the intended policy outcome we believe that such a material change should be subject to a transitional period. With respect to the proposal to require the reporting of significant misconduct by an employee or representative, our view is that this should only be triggered if the significant breach test is met. Other instances should be dealt with in line with the licensee's internal Human Resources policies and its broader licence obligations.

Please feel free to contact me (by phone 02 9231 5877 or via email helen@afc.asn.au) to discuss our comments further.

Thank you and kind regards.

A handwritten signature in black ink, appearing to read 'Helen M. Gordon'. The signature is written in a cursive style with a long horizontal line extending from the bottom of the 'G'.

Helen Gordon
Executive Director