



ASIC

Australian Securities & Investments Commission

ASIC Enforcement Review

Position and Consultation Paper 3—Strengthening ASIC’s licensing powers

Submission by the Australian Securities and Investments Commission

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Executive summary

- 1 ASIC welcomes the opportunity to make a submission to the Enforcement Review Taskforce (Taskforce) in response to its Position and Consultation Paper 3 [Strengthening ASIC's Licensing Powers](#), issued 28 June 2017 (Consultation Paper 3).
- 2 ASIC is Australia's corporate, markets, financial services and consumer credit regulator. ASIC's fundamental objectives include promoting confident and informed investors and consumers; and maintaining, facilitating and improving the performance of the financial system and the entities within it.
- 3 The *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act) set out how ASIC administers the licensing regimes for financial services and credit activities. These regimes are designed to ensure that:
 - (a) only participants who are able to meet appropriate standards of conduct and competence are granted a licence; and
 - (b) participants continue to maintain those standards while they remain licensed.
- 4 As acknowledged in the Taskforce's Consultation Paper 3, the Government, in response to the Financial System Inquiry's final report in 2015, supported the recommendation that ASIC be provided with stronger regulatory tools in relation to the financial services and credit licensing regimes.

Note: See page 24 of [Improving Australia's financial system: Government response to the Financial System Inquiry](#).
- 5 Our experience in administering these regimes to date has shown that strengthening ASIC's licensing powers will further enhance our ability to ensure that licensed participants uphold our high standards of competence and conduct. This will benefit the wellbeing of all Australians and further enhance Australia's reputation for having a well-regulated financial market for investors and consumers.
- 6 We therefore share the Taskforce's support for reforms that are aimed at enhancing the current licensing regimes for Australian financial services (AFS) licences and Australian credit licences (credit licences), and achieving greater uniformity between the two regimes.

Note: See paragraph VIII of the Taskforce's Consultation Paper 3.

A ASIC's comments on the Taskforce's positions

Key points

ASIC generally supports the proposals in the Taskforce's Consultation Paper 3, with the following exceptions:

- ASIC acknowledges the Taskforce's position that a change in control of a corporate licensee does not require ASIC pre-approval, but suggests that the advantages of ASIC pre-approval merit further consideration; and
- ASIC considers the obligation to notify of the change in control, as well as the information required by ASIC to determine if the new controller is fit and proper, should be an obligation that rests with both the controller and the licensee.

Position 1: ASIC's power to refuse, cancel or suspend licences

Taskforce Position 1

ASIC should be able to refuse a licence application (or, for existing licensees, take licensing action) if it is not satisfied that controllers are fit and proper.

- 7 The Taskforce considers that ASIC should be able to:
- (a) refuse a licence application (or, for existing licensees, take licensing action) if it is not satisfied controllers are fit and proper; and
 - (b) suspend or cancel a licence if ASIC is not satisfied that new controllers are fit and proper to control a licence.

ASIC's power to refuse a licence in relation to controllers

- 8 ASIC considers that, indirectly, s913B(1)(ca) of the Corporations Act and s37(2)(i) of the National Credit Act already empower ASIC to refuse a licence application if we are not satisfied that the applicant will comply with its obligations if a licence is granted.
- 9 ASIC must consider the good fame or character of persons involved with a licence, including directors and company secretaries (responsible officers) of AFS licence applicants, and responsible officers and senior managers of credit licence applicants. ASIC can take into account other information that we consider relevant to the grant of a licence.
- 10 As controllers have the ability to influence the conduct, financial position and policies of a licensee, ASIC considers information about the good fame or character of controllers to be relevant to the grant of a licence, since it

relates to matters that may be taken into account in deciding whether to grant a licence (e.g. whether ASIC has reason to believe the applicant is likely to contravene its obligations). Accordingly, ASIC will consider this information and, if we do not believe the applicant will comply with its obligations, we may refuse to grant a licence.

Note 1: See the definition of control in relation to an AFS licensee that is a body corporate under reg 7.6.04(2) of the Corporations Regulations 2001 and reg 9(11) of the National Consumer Credit Protection Regulations 2009.

Note 2: See s913B(1)(ca) of the Corporations Act and s 37(4)(a) of the National Credit Act.

- 11 However, we support the Taskforce's view that the power to refuse an application where we have concerns about an applicant's controllers should be made express in the Corporations Act and the National Credit Act. We also consider an express requirement for ASIC to assess whether the controller of a licence applicant is fit and proper will assist us seek the necessary information to make that assessment.

ASIC's power to suspend or cancel a licence in relation to a change of controllers

- 12 ASIC notes the Taskforce's view, outlined in paragraph 24 of Consultation Paper 3, that

it is not necessary or desirable ... [to require] new prospective controllers to seek ASIC approval prior to taking control or licensees to seek approval before a change of control takes place.

- 13 However, ASIC considers there are also good reasons why it may be seen as necessary or desirable that prior approval is sought from ASIC.

- 14 The Taskforce notes in paragraphs 2 and 8 (respectively) of Consultation Paper 3 that, notwithstanding the legal separation between controller and licensee, a controller is the 'directing mind and will' of a licensee, and can materially change the conduct of the licensee by changing

the licensee's directors, senior managers, responsible managers and financial, technological and human resources and the licensee's policies and procedures.

ASIC submits that, as the Taskforce's view is that ASIC should be able to refuse an application for a licence where ASIC is concerned about the controllers, the same concern applies to a change of controllers.

- 15 ASIC can also see advantages in requiring pre-approval of a change in controllers, which include that it would:
- (a) avoid the risk of exposing investors and financial consumers to a licensee with controllers that ASIC ultimately (after control passes) regards as not fit and proper (in the same manner as an express power to

- refuse to grant new applicants a licence if we have concerns about the new applicant's controllers' fitness and propriety);
- (b) make Australia consistent with a number of our peer regulators (i.e. the United Kingdom, Hong Kong and Singapore, as noted in paragraph 3 of the Taskforce's Consultation Paper 3);
 - (c) provide certainty for new controllers that they would not face regulatory action for the suspension or cancellation of a licence on grounds (i.e. whether the controllers are considered by ASIC to be fit and proper) that existed prior to acquiring control;
 - (d) have resourcing implications for ASIC, but not disproportionately more than under a regime of notification after a change in control. In both instances, ASIC would need to assess whether the new controllers were fit and proper, and in both instances if ASIC considered they were not, this would involve administrative action; and
 - (e) avoid complications associated with ASIC seeking to suspend or cancel a licence for exactly the same reasons after control has passed, such as:
 - (i) how the licensee's existing clients may be impacted by the suspension or cancellation; and
 - (ii) potentially denying a licensee a right to their income, an outcome that is arguably more onerous than preventing a new controller from acquiring control over that income.
- 16 If the Taskforce maintains its preliminary position that pre-approval of changes in control by ASIC should not be required, ASIC's ability to suspend or cancel the licence based on concerns about the new controllers should be broad and explicit, allowing for timely action by ASIC.
- 17 ASIC's responses to the specific questions asked by the Taskforce on Position 1 are set out in Table 1 in the Appendix.

Position 2: Notification of change of control

Taskforce Position 2

Introduce a statutory obligation to notify change of control within 10 business days of control passing and impose penalties for failure to notify.

- 18 If the Taskforce maintains its preliminary position, to only require notification of change in control under Position 1, then ASIC supports the Taskforce's Position 2, which is to introduce a statutory obligation to:
- (a) notify ASIC of a change of control;
 - (b) provide sufficient information about the new controllers (eg police check, bankruptcy check, references, statement of personal information

declaration) to enable ASIC to assess whether they are fit and proper to control the licensee;

- (c) confirm that the licensee remains competent and continues to have the financial, technological and human resources to provide the financial services covered by the licence and comply with its licence obligations under the new controller,

within 10 days of control passing, and to impose penalties for failure to comply.

- 19 However, in distinction from the Taskforce's Consultation Paper 3, ASIC considers the obligation should be imposed on both the controller and the licensee, rather than the licensee alone. Imposing an obligation on the controller would be consistent with the obligation on substantial holders to notify listed companies or schemes and market operators under Chapter 6C of the Corporations Act and acknowledges the legal separation that exists between the licensee and its controllers. It would also acknowledge that it is the controller, rather than the licensee, who holds knowledge of their control in the first instance.
- 20 ASIC submits that requiring licensees to 'have in place systems and procedures to ensure that they can comply with the notification requirement within the 10 day time frame' (paragraph 34 of the Taskforce's Consultation Paper 3) imposes an additional obligation on the licensee that is more easily and logically managed by a controller.
- 21 ASIC prefers the notification be imposed as a statutory obligation, with penalties for non-compliance, rather than as a licence condition.
- 22 ASIC's responses to the specific questions asked by the Taskforce on Position 2 are set out in Table 2 in the Appendix.

Position 3: Alignment of assessment requirements

Taskforce Position 3

Align the assessment requirements for AFS licence applications with the enhanced credit licence requirements.

- 23 ASIC supports the Taskforce's position to align the assessment requirements for AFS licence applications with the enhanced credit licence assessment requirements where there are no policy reasons for treating them differently.
- 24 We agree that the AFS licence assessment criteria in the Corporations Act should be updated and made consistent with the equivalent and enhanced provisions adopted in the National Credit Act in 2010.

- 25 ASIC's responses to the specific questions asked by the Taskforce on Position 3 are set out in Table 3 in the appendix.

Position 4: Licence suspension or cancellation on licensee's failure to commence business

Taskforce Position 4

ASIC to be empowered to cancel or suspend a licence if the licensee fails to commence business within six months.

- 26 ASIC supports the Taskforce's position that ASIC be empowered to cancel or suspend a licence if the licensee fails to commence business within six months.
- 27 ASIC's responses to the specific questions asked by the Taskforce on Position 4 are set out in Table 5 in the Appendix.

Position 5: Alignment of consequences for making false or misleading statements

Taskforce Position 5

Align consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts.

- 28 ASIC supports the Taskforce's position to align the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts.
- 29 ASIC's responses to the specific questions asked by the Taskforce on Position 5 are set out in Table 5 in the Appendix.

Position 6: Effect of making false or misleading statements in licence applications

Taskforce Position 6

Making a materially false or misleading statement in a licence application should be a specific basis for refusing to grant the licence.

- 30 ASIC supports the Taskforce's position to make a materially false or misleading statement (or omission) in a licence application a specific basis for refusing to grant the licence.
- 31 ASIC submits that we must be entitled to rely on the accuracy of information that is submitted to us when making our assessment of a licence application. ASIC considers that, if information within the awareness and control of the

licensee applicant turns out to be false or materially misleading, the basis on which ASIC assessed and granted the licence is fundamentally undermined. The applicant's failure to disclose this to ASIC should be sufficient grounds to refuse an application.

- 32 ASIC's responses to the specific question asked by the Taskforce on Position 6 are set out in Table 6 in the Appendix.

Position 7: Confirmation of no material changes to information in licence application

Taskforce Position 7

Introduce an express obligation requiring applicants to confirm that there have been no material changes to information given in the application before the licence is granted

- 33 ASIC supports the Taskforce's position to introduce an express obligation requiring applicants to confirm that there have been no material changes to information given in the application before the licence is granted.
- 34 ASIC is now implementing a process to require confirmation of this at the 'requirements' stage of an application. This procedure means that, once ASIC is satisfied that an applicant should be granted a licence, there are a number of matters that the applicant will need to meet before the licence is issued. These include matters that it would not make sense to require before an applicant knows that ASIC considers there is no reason why a licence should not be granted – for example, purchasing the necessary insurance or injecting the necessary capital.
- 35 An express statutory obligation on an applicant to provide this confirmation has the benefit of making it the applicant's fundamental obligation, and is akin to a licensee's obligation to self-report breaches once a licence is granted.
- 36 ASIC's responses to the specific questions asked by the Taskforce on Position 7 are set out in Table 7 in the Appendix.

Appendix: ASIC responses to the questions for each position

Table 1: Responses to questions related to Taskforce Position 1.

Questions	ASIC’s response
<p>1. Should ASIC be able to refuse a licence application if it is not satisfied that the applicant’s controllers are fit and proper to control a licensee?</p>	<p>Yes, ASIC supports this position. ASIC considers that we already have this power under our existing powers, but support the Taskforce’s position to make this express, and to elevate it as a direct ground for refusing a licence application.</p>
<p>2. What would be the impact of this position on licence applicants?</p>	<p>Licence applicants would be required to provide information about controllers with their licence application, sufficient to enable an assessment of whether they are fit and proper to control a licence. However, ASIC can currently require applicants to provide this information under s 913B(1)(ca), at least to the extent that it relates to a matter that ASIC can take into account in deciding whether to grant the licence (e.g. matters that give ASIC reason to believe that the applicant is likely to contravene its obligations).</p>
<p>3. When notifying ASIC of a change of control should licensees be required to provide ASIC with sufficient information to enable ASIC to assess whether:</p> <ul style="list-style-type: none"> a. The proposed new controllers are fit and proper to control a licensee? and/or b. The licensee remains competent to provide the financial services covered by the licence and able to comply with its obligations under the new controller? 	<p>ASIC agrees that it should be provided with sufficient information to enable it to assess whether the proposed new controllers are fit and proper to control the licensee. ASIC considers this information is critical and submits that it should be an obligation imposed on the controller as this ensures that the person who has the knowledge is responsible for providing it to ASIC. The circumstances of the controller’s failure to comply with the obligation may also suggest they are not fit and proper.</p> <p>ASIC further agrees that, as stated at paragraph 22.3 of the Taskforce’s Consultation Paper 3, it should be provided with ‘a confirmation that the licensee remains competent and continues to have the financial, technological and human resources to provide the financial services covered by the licence and comply with its licence obligations under the new controller’.</p>

Questions	ASIC's response
4. Should ASIC be able to take action to suspend or cancel an AFS or credit licence (after offering a private hearing) if it is no longer satisfied that the controllers of the licensee are fit and proper to control the licensee?	<p>Yes, ASIC supports this position. ASIC considers we already have this power under our existing powers, but supports the Taskforce's position to make this express, and to elevate it as a direct ground for refusing a licence application.</p> <p>If the Taskforce maintains its position that pre-approval of changes in control by ASIC should not be required, ASIC's ability to suspend or cancel the licence based on concerns about the new controllers should be broad and explicit, allowing for timely action by ASIC.</p>
5. Should a change of control require pre-approval by ASIC?	ASIC can see that there are advantages with requiring pre-approval (see paragraphs 14–15).

Table 2: Responses to questions related to Taskforce Position 2.

Questions	ASIC's response
6. Would it be appropriate for the requirement to notify ASIC of licensee changes in control to be a statutory obligation rather than a statutory licence condition?	ASIC considers that a statutory obligation would be appropriate and that the obligation should be imposed on both the new controller and the licensee.
7. Would it be appropriate for the obligation to require notification within 10 business days of the change of control taking effect?	ASIC supports this position, subject to its response to question 5 above.
8. Would it be appropriate to introduce penalties for failure to notify ASIC of a change in licensee control?	Yes, ASIC considers introduction of penalties for breaches of this obligation is appropriate.
9. If so, what penalties should apply? Should the penalty be criminal, civil penalty or both?	ASIC considers there should be both criminal and civil penalties and that infringement notices should also be available, to enable a proportionate response to different degrees of wrongdoing, i.e. oversight/negligence, recklessness, systemic failure, deliberate/dishonest conduct.

Table 3: Responses to questions related to Taskforce Position 3.

Questions	ASIC's response
10. Should the assessment requirements for AFS and credit licence applications be uniform? Or are there factors relevant to each sector that justify differences?	ASIC supports the position that they be uniform, and considers there are not sufficiently different factors to justify maintaining different assessment requirements.
<p>11. If so, should the Corporations Act be amended to reflect the provisions of the National Credit Act with respect to licence applications? In particular should:</p> <ol style="list-style-type: none"> a. directors, secretaries and senior managers, rather than only responsible officers be assessed for AFS licence applications? b. individuals be assessed against a 'fit and proper' rather than a test of 'good fame or character' for AFS licence applications? c. the requirement to consider whether an AFS licence applicant's ability to provide financial services would nevertheless not be significantly impaired after forming a reasonable belief that individuals are not of good fame and character (or fit and proper) be removed? d. ASIC be able to require an audit report from AFS licence applicants? e. a failure to provide additional information requested by ASIC result in a deemed withdrawal of an AFS licence application? 	<p>Yes, ASIC supports this position.</p> <p>Of specific note:</p> <ul style="list-style-type: none"> • ASIC submits that senior managers should be included for AFS licence applicants because they are persons who can significantly impact on the delivery of the relevant financial services or financial products. <p style="margin-left: 40px;">Note: Section 9 of the Corporations Act defines a senior manager as a person who (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) has the capacity to affect significantly the corporation's financial standing.</p> <ul style="list-style-type: none"> • The fit and proper test is more appropriate as it will then make the test consistent with the assessment requirements that apply to liquidators and auditors under the Corporations Act, as well as bringing it into line with many overseas licensing regimes.
12. What will be the impact on AFS licence applicants?	ASIC expects that alignment with the National Credit Act will impose additional burdens on AFS licence applicants. However, ASIC regards these amendments as consistent with the objective of raising and reinforcing the need to maintain high standards of conduct and governance by AFS licence applicants.

Table 4: Responses to questions related to Taskforce Position 4.

Questions	ASIC's response
13. Should ASIC be able to immediately suspend or cancel an AFS or credit licence if the licensee fails to commence engaging in a financial services or credit business within six months of being granted a licence?	Yes, ASIC supports this position.
14. If so, should licensees be given an opportunity to seek an extension of time?	Yes, ASIC considers the regime should provide such flexibility. However, ASIC submits that a licensee should only be entitled to seek an extension provided it is made prior to the end of the six month period.
15. Is six months an appropriate initial time frame?	Yes, ASIC considers an extendable six months period is appropriate. This will help ensure that only applicants with a genuine business case for a licence apply, thereby enabling ASIC resources to be deployed more efficiently to those seeking a legitimate current business need, rather than those that may be seeking to 'warehouse' the licence for future use.

Table 5: Responses to questions related to Taskforce Position 5.

Questions	ASIC's response
16. Should the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts be aligned?	Yes, ASIC supports the alignment of these regimes.
17. Should the same penalties, including a combination of criminal and civil penalties, apply?	Yes, ASIC considers the same penalties should apply.

Table 6: Responses to questions related to Taskforce Position 6.

Questions	ASIC's response
18. Should ASIC be able to refuse to grant an AFS or credit licence if the application or documents accompanying the licence application are false or materially misleading?	Yes, ASIC supports this position.

Table 7: Responses to questions related to Taskforce Position 7.

Questions	ASIC's response
<p>19. Should applicants seeking an AFS or credit licence, or to vary an existing licence, have an express obligation to confirm, before the licence is granted, that there have been no material changes in the applicant's circumstances that would render statements or information in the application false or materially misleading?</p>	<p>Subject to our response to Question 20 below, yes, ASIC supports this position.</p>
<p>20. Alternatively, should applicants be required to notify ASIC of material changes in the applicant's circumstances on an ongoing basis between the time of lodging an application for a licence or licence variation and ASIC making a decision with respect to the application?</p>	<p>ASIC considers there are merits in requiring notification of material changes on an ongoing basis. It ensures that applications are dealt with efficiently, by ensuring that ASIC only assesses the relevant circumstances. In contrast, if the applicant is only required to confirm these matters immediately prior to granting of the licence, it will result in additional delays and reassessment at a time when ASIC is otherwise ready to grant the licence.</p>

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
Consultation Paper 3	Position and Consultation Paper 3, <i>Strengthening ASIC's licensing powers</i> , issued 28 June 2017 by the Taskforce
controller	A person who controls an AFS licensee, where control has the meaning in Corporations Regulation 7.6.04(2)(b); and a person who controls a credit licensee, where control has the meaning in National Credit Regulation 9(11)(b).
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit licensee	A person who holds a credit licence under s35 of the National Credit Act
licensee	An AFS licensee or a credit licensee
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Regulations	National Consumer Credit Protection Regulations 2010
s913B(1)(ca) (for example)	A section of the Corporations Act (in this example numbered 913B(1)(ca)), unless otherwise specified
Taskforce	ASIC Enforcement Review Taskforce