

2 August 2017
ASIC Enforcement Review
Financial System Division
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In PDF and Word formats

Dear Colleagues

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3 Strengthening ASIC's Licensing Powers

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic. We note that the Position and Consultation Paper 3 *Strengthening ASIC's Licensing Powers (Paper)*¹ discusses this topic and sets out certain positions as follows-

Position 1: *ASIC should be able to refuse a licence application (or, for existing licensees, take licensing action) if it is not satisfied controllers are fit and proper.*

¹ Abbreviations used in the Paper are adopted in this submission for convenience.

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

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.*

Position 3: *Align the assessment requirements for AFS licence applications with the enhanced credit licence requirements.*

Position 4: *ASIC to be empowered to cancel or suspend a licence if the licensee fails to commence business within six months.*

Position 5: *Align consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts.*

Position 6: *Making a materially false or misleading statement in a licence application should be a specific basis for refusing to grant the licence.*

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.*

For ease of reference, we will provide comments under each of these Positions and the questions put in the Paper.

General comment

However, we do make this general observation that for dual regulated entities (APRA regulated) there should be consultation with APRA before any action is proposed or taken. This will avoid any inconsistency with fit and proper requirements and enable prudential issues to be dealt with in a sensible manner. This will be very important if the proposed BEAR legislation is introduced. The potential for overlap, inconsistent or different approaches for dual regulated entities must be addressed.

We also note that there are already special procedures in s915I of the Corporations Act relating to cancellation or suspension of licences for APRA regulated bodies.

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

Position 1: ASIC should be able to refuse a licence application (or, for existing licensees, take licensing action) if it is not satisfied controllers are fit and proper.

1. Should ASIC be able to refuse a licence application it is not satisfied that applicant's controllers are fit and proper to control a licensee?

1. We note the paper proposes that the legislation should expressly require ASIC to assess whether a licensee's controllers are fit and proper and enable ASIC to refuse to grant a licence application if they are not. In this regard, the relevant benchmark should change from one of "good fame or character to "fit & proper". ASIC should be able to cancel or suspend an AFSL if it is no longer satisfied that controllers are fit and proper to control licensee.
2. In this regard, we note that ASIC already in effect does this as a matter of practice for licence applications (see paragraph 6 of the Paper).
3. In our view, it is appropriate that ASIC have an express right to refuse a licence application or to take licensing action if it is not satisfied controllers are fit and proper. However, it is important as a matter of fairness that this power be qualified-thus the power should be exercisable only if ASIC can establish that the controller has, or is likely to have, an adverse effect on the licensee's ability to comply with its licensing obligations.
4. This could be achieved by a two tier assessment process similar to the one set out in section 913B(3)(b), such that where ASIC is not satisfied that the controllers are fit and proper, ASIC must also assess whether the applicant's ability to provide the financial services covered by the licence would nevertheless not be significantly impaired.

2. What would be the impact of this position on licence applicants?

5. The applicant will be required to provide ASIC with sufficient information about its controllers to enable ASIC to determine whether the controllers are fit and proper. This additional administrative process will increase the regulatory burden on licence applicants,

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

thereby increasing costs and potentially delaying the licensing process.

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:*

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?*

6. The administrative burden we have mentioned above also will apply to licensees undergoing a change of control.

7. In recognition of the fact that many licensees are part of a corporate group, an exception should apply where there is a change of control within the same corporate group (to accommodate group consolidations and corporate restructures).

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?*

8. A power which enables ASIC to suspend or cancel a licence based on the appropriateness of the licensee's controller must require ASIC to establish that:

(a) the controller has, or is likely to have, an adverse effect on the licensee's ability to comply with its licensing obligations;

(b) the licensee's ability to provide the financial services covered by the licence is significantly impaired by the controller;

(c) the licensee is no longer able to provide the financial services covered by the licence competently; and

(d) the licensee is no longer able to comply with its licensing obligations.

9. The current hearing and appeals process (eg s 915C(4) *Corporations Act*) and the special procedures for APRA-regulated bodies under section 915I of the *Corporations Act* , in our view, also

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

should apply to suspensions or cancellations resulting from ASIC no longer being satisfied that the controllers are fit and proper.

5. *Should a change of control require pre-approval by ASIC?*

10. A pre-approval process on a change of control will create an additional administrative burden, increased transactional risk and the potential for significant delay. This is likely to have an adverse impact on transactions in the market and in some cases may preclude them.

11. However, we note that even if pre-approval is not a requirement, the practical effect of ASIC being able to suspend or cancel a licence if it is no longer satisfied that the controllers are fit and proper will need to be accounted for commercially in any transactions involving a change of control. The uncertainty, complexity and risk surrounding this aspect may be less desirable to the transacting parties than seeking pre-approval in the first place.

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.

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?*

12. Yes; however consideration should be given to an exception in the context of corporate restructures as outlined in our response to question 3 above.

7. *Would it be appropriate for the obligation to require notification within 10 business days of the change of control taking effect?*

13. In our view, the time period should be within 10 days of the licensee becoming aware of, **or ought reasonably to have become aware of**, control passing. This will ensure that penalties are only imposed for deliberate non-compliance with the

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

notification obligation. By way of contrast, if the time period is within 10 days of the **change taking effect** as opposed to becoming aware of, licensees "will be required to have in place systems and procedures to ensure they can comply with the notification requirement" (see paragraph 34 of the Paper). This will create further undesirable administrative burdens and costs for the licensee.

8. *Would it be appropriate to introduce penalties for failure to notify ASIC of a change in licensee control?*

14. We note that a financial penalty, for example, is likely to be preferable to a licensee than the suspension or cancellation of its licence (which is currently the only recourse available to ASIC for a failure to notify ASIC of a change in licensee control). Accordingly, the introduction of a penalty regime should provide ASIC with greater flexibility in the area.

9. *If so, what penalties should apply? Should the penalty be criminal, civil penalty or both?*

15. The appropriate penalty should be determined according to the seriousness and consequences of the misconduct (if any) in line with ASIC INFO 151 *ASIC's approach to enforcement*.

Position 3: Align the assessment requirements for AFS licence applications with the enhanced credit licence requirements.

10. *Should the assessment requirements for AFS and credit licence applications be uniform? Or are there factors relevant to each sector that justify differences?*

16. We support a consistent application of relevant rules and consistency as such is desirable.

11. *If so, should the Corporations Act be amended to reflect the provisions of the Credit Act with respect to licence applications? In particular should:*

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

- 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*

17. We note that a responsible officer is defined in section 9 of the *Corporations Act* to be an officer of the licensee 'who would perform duties in connection with the holding of the licence'. We have no objection to the proposal to assess all directors, secretaries and senior managers (including those who may not perform duties in connection with the holding of the licence). However, any such assessment should take into account that person's role in the business. This is because their role may not require the same specific skills and knowledge of the day-to-day operations of the business as someone who performs duties in connection with the holding of the licence. This is particularly important if the test is to be changed to a 'fit and proper test' as proposed.

18. In this regard, we seek clarification sought as to whether the proposal is to assess **only** the applicant's directors, secretaries and senior managers or **also** any of its nominated responsible officers who are not officers of the applicant for the purposes of the *Corporations Act*.

19. The requirement to consider whether an applicant's ability to provide financial services nevertheless would not be significantly impaired after forming a reasonable belief that individuals are

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

not of good fame and character (or fit and proper) should not be removed. This additional step in the assessment process becomes even more important if the test is extended to directors, secretaries and senior managers who do not perform duties in connection with the holding of the licence, as they are unlikely to impair significantly the applicant's ability to provide financial services.

12. What will be the impact on AFS licence applicants?

20. There will be higher compliance burdens for AFSL applicants.

Position 4: ASIC to be empowered to cancel or suspend a licence if the licensee fails to commence business within six months.

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?

21. This appears to be an appropriate base starting point. However, it is important that there be an ability to apply for an extension of time within which to commence business.

14. If so, should licensees be given an opportunity to seek an extension of time?

15. Is six months an appropriate initial time frame?

22. Our response to each of these questions is yes.

Position 5: Align consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts.

16. Should the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts be aligned?

17. Should the same penalties, including a combination of criminal and civil penalties, apply?

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

23. No comment as such. However, as a matter of general principle there is merit in consistency between penalty provisions administered by the same regulator, if the policy objectives of the differing items of legislation are aligned.

Position 6: Making a materially false or misleading statement in a licence application should be a specific basis for refusing to grant the licence.

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?

24. This should only be the case where there has been a deliberate or reckless attempt to mislead ASIC in a material particular. This is consistent with the current wording regarding false or materially misleading statements in the Credit Act being knowingly or recklessly made and the alignment of that wording with the wording in the Corporations Act proposed by Position 5.
25. In addition, we recommend that the current hearing and appeals process (eg s915C(4) *Corporations Act*) should apply if ASIC refuses to grant a licence on this basis.

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.

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?

26. This is a preferable approach to that outlined in question 20 which does not appear to be overly efficient or practicable. The express obligation under this approach is preferable as the applicant / officer would have clearly provided a false confirmation if

ASIC Enforcement Review: Consultation: Position and Consultation Paper 3: Strengthening ASIC's Licensing Powers: FSC Submission 2 August 2017

the confirmation was not truthful. In addition, this approach would be more appropriate in Case Study 9 on page 29 of the Paper as the new controller would not necessarily be aware of the disclosures made to ASIC by the relevant officer. ASIC's position to take action against the officer providing the false disclosure would also be stronger under this scenario.

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?

27. This approach is unlikely to be practicable-given that it will be necessary for both the licensee and for ASIC who will have to collate and review these updates on an ongoing basis.

Should you have any questions, please contact the writer on 02-9299 3022.

Yours Faithfully



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