



11 October 2019

Manager
Regulator Powers Reform Unit, Financial Services Reform Taskforce
Treasury
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By email: ASICenforcementreview@TREASURY.GOV.AU

Dear Sir / Madam

ASIC Enforcement Review Taskforce

Thank you for the opportunity to provide feedback on this tranche of draft legislation to implement certain recommendations of the ASIC Enforcement Review Taskforce (ASICERT) relating to Search Warrants, Access to Telecommunications Intercept Material, Licensing and Banning Orders.

The ABA supports stronger powers for ASIC and a strengthening of the regulatory framework for financial services and corporations laws generally as recommended by the ASICERT. In relation to the specific proposals in the draft legislation, there are a couple of matters that we would like to comment on. Our comments are set out below.

Banning orders

We note that the draft Bill includes additional grounds for banning organisations that were not recommended in the ASICERT Report, including a power which would allow ASIC to ban a licensee if it is satisfied that it could make a banning order against one or more of its officers (for whatever reason). The ABA considers that this proposed expansion of ASIC's power to ban a licensee should be reconsidered given:

- no such banning order is required to have been made or upheld in respect of any of the entity's officers – the power arises merely where ASIC is satisfied that it could make such an order;
- there is no requirement that the alleged conduct or circumstances which led to ASIC's satisfaction of the banning order against the individual officer would need to be properly attributed to or be associated with the business of the licensee entity. For example, an officer's alleged conduct giving rise to ASIC's satisfaction of a banning order (e.g. a conviction) may be entirely unrelated to their employment with the licensee and the licensee may have no knowledge of, or association with, the alleged conduct; and
- there may be no impact from the alleged conduct or circumstances on the ability of the entity to continue to provide financial or credit services in accordance with its legal obligations and the terms of its licence.
- A proposed power such as this may be appropriate in respect of smaller organisations where key individuals are in effect synonymous with the licensed entity itself. However, we submit that such a power is not appropriate in the context of larger organisations, and accordingly its scope should be limited.

The ABA is generally supportive of the proposal to expand the existing ground for banning in s920A(da) of the Act so that it applies where ASIC has reason to believe that a person is not adequately trained or competent to perform functions as an officer of a financial services or credit business, or to control an entity that carries on a financial services or credit business. However, we recommend that the legislation (or at least ASIC guidance) clarify what the terms 'adequately trained' and 'competent' mean



for these purposes. While these terms are already used in section 920A(da), we consider that clarification of these concepts would be helpful, given the proposal that this ground apply to a broader category of individuals, and that there are potentially serious consequences for individuals that are banned on this ground.

Another area of concern relates to the question of how ASIC's banning powers will interact with the disqualification powers under the Banking Executive Accountability Regime (BEAR). Under the BEAR, APRA has power to disqualify senior executives from acting as Accountable Persons. In our submission, it should ideally be clear in the legislation that only one regulator may impose a ban or disqualification in respect of the same conduct. In addition, there should be a means by which APRA and ASIC can determine which of them will take enforcement action in particular situations.

It is also unclear whether these powers will require further amendment when ASIC becomes the co-regulator of BEAR (expected, as we understand, by December 2020).

Licensing

We note that it is proposed that ASIC may suspend or cancel an Australian Financial Services License (AFSL) if the licensee does not provide the financial service within 6 months of the licence being granted, or if the licensee ceases to carry on a financial services business.

It is unclear whether ASIC would also be applying this approach to licence variations and whether there will be a positive obligation on licensees to notify ASIC where they haven't commenced the financial service they have been authorised to provide.

In addition, it would be helpful if more clarity was provided around what would be considered to be a "material change in any information provided to ASIC in, or in connection with, the application" in the relevant parts of the Bill.

We note that proposed section 913B(3)(b) indicates an applicant may need to provide to ASIC an audit report prepared by a suitably qualified person specified in the notice. It would be useful to have clarity, in the Bill, on who would be considered to be a "suitably qualified person".

Should you wish to discuss any of these matters further, please let me know.

Yours faithfully

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