

Manager

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Regulator Powers Reform Unit

Financial Systems Reform Taskforce

The Treasury

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CONSULTATION – ASIC ENFORCEMENT REVIEW TASKFORCE DRAFT LEGISLATION

The Australian Finance Industry Association [AFIA] welcomes the opportunity to comment on the ASIC Enforcement Review Taskforce Report Exposure Draft Legislation relating to Search Warrants, Access to Telecommunications Intercept Material, Licensing and Banning Orders. [the **Legislation**].

AFIA KEY POSITIONS SUMMARY

At a macro level, AFIA supports the policy underpinning the Legislation and the potential it has to empower ASIC to influence behaviour through ensuring it has the necessary tools to take action with providers of finance to redress behaviour that creates difficulties for consumers and ,at the broader level, brings the industry into disrepute. However, to maximise the potential consumer benefits, AFIA encourages the Government to ensure a holistic approach given that there are other statutes, beyond the ASIC Act, may also need revision to ensure a consistent approach and to alleviate compliance uncertainty. AFIA recommends that all definitions adopted in the Legislation should also be adopted in this other legislation.

Further detail on AFIA and our position follows.

AFIA BACKGROUND

By way of background, AFIA is the voice of a diverse Australian finance industry. AFIA supports our Members to ensure a fair, equitable and competitive market for customers through representation, insights and connectivity. AFIA is uniquely placed to respond given our broad and diverse Membership of over 100 financiers operating in the consumer and commercial markets (including small-medium business and agri-finance).

AFIA members:

- include banks (major, regional and mutual/community-owned) and non-banks;

- range from ASX-listed public companies through to small businesses providing finance;
- operate via a range of distribution channels including bricks and mortar premises, intermediaries (finance brokers, dealerships, suppliers) through to online / digital access
- collectively operate across all states and territories in Australia in capital cities through to regional and remote areas: the majority operating across at least one border;
- have customers from all demographics, all age groups (legally able to borrow) in support of Australia's diverse and multi-cultural community with:
 - consumers ranging from high to low-income earners (including some whose main income source may be government welfare); many with substantial assets, others with few; single borrowers through to blended families; covering the whole range of employment scenarios, full-time, part-time, seasonal or casual employment.
 - commercial entities ranging from sole traders and partnerships through to the more complex corporates (e.g. trusts, corporate group) and government-entities some with no employees through to others with hundreds (if not thousands) of employees.
- provide a broad range of products:
 - consumer: from personal unsecured loans, revolving products (including credit cards and interest free products coupled with lines of credit), loans secured by land or personal property; consumer leases of assets (including household/electrical/IT or cars) and buy-now, pay later solutions;
 - commercial: asset or equipment finance (finance/operating lease, secured loan or hire-purchase agreement or novated leases); working capital solutions (online unsecured loans; debtor and invoice finance; insurance premium funding; trade finance; overdrafts; commercial credit cards) together with more sophisticated and complex finance solutions.

AFIA'S INSIGHTS -PROCESS

Our submission focuses on sections in the Legislation where Members had some commentary or where AFIA is seeking greater clarification on their behalf. We note also, while Members have contributed to inform this response, not all members may support specific positions put where these may not reflect their particular organisationally-specific situation. Where this occurs, it is likely that individual member viewpoints will get captured through their own organisationally targeted submission.

AFIA KEY POSITIONS – DETAILED COMMENTARY

To explore our Key Positions in further detail AFIA provides the following insights shaped by operational input from our Members:

Recommendation 1 – Fit and proper person test

The amendments contained in the Legislation as currently drafted propose a number of changes to the Australian financial services licence [AFSL] and the Australian credit licence [ACL] regimes to ensure a broader application of the **'fit and proper person'** test relevant to each. AFIA acknowledges that this concept is not confined to an initial assessment in the initial licensing application phase but is an ongoing and dynamic compliance obligation on a licensee that needs to be continuously assessed and determined remains valid and appropriate.

AFIA recommends:

- Further guidance should be provided to detail the requisite elements that a licensee (either an AFSL or ACL) would need to satisfy to meet the **'fit and proper person'** test on an ongoing basis, given that the potential outcomes for non-compliance are significant and may result in ASIC revoking a person's **'fit and proper'** status and 'banning' them from continuing to provide goods and services in the financial services sector with flow-on implications for the licensee and its ability to continue to meet its customers' demands

For example, for the purposes of Section 920A(1) of the *Financial Regulator Reform (No. 1) Bill 2019: Banning Orders*, further guidance on the timeframe in which a licensee will have to declare to ASIC that their key person may no longer be a **'fit and proper'** person would be useful and provide consistency.

- In addition, AFIA recommends that supplementary guidance should be provided on:
 - the metrics ASIC has determined are key to a **'fit and proper person'** assessment; and
 - the steps ASIC will take when considering invoking a banning order,to shape the design of compliance programs of our members to ensure people with the requisite skills, industry experience and competencies are appointed to key roles and meet ASIC's expectations.

Recommendation 2 – Interception of information by ASIC staff members

The proposed amendment to Section 67 of the *Financial Regulator Reform (No. 1) Bill 3 2019: Access to Telecommunications* allows an ASIC staff member to provide information collected through utilisation of that power to another person where the information relates to a serious offence within the scope of ASIC's investigative or enforcement remit.

AFIA recommends:

- Members' compliance programs (and consequently customers they service) would benefit from:

- o further guidance about the types of “permitted purposes” that an ASIC staff member may communicate information to another person in relation to a serious offence;
- o examples of the types of persons to whom ASIC staff members may communicate this information; and
- o further clarification on whether an ASIC staff member will have to receive permission as a pre-cursor to engaging in this activity.

Recommendation 3 – Interception of information by ASIC staff members

The proposed amendment to the *Financial Regulator Reform (No. 1) Bill 2019: Penalties* removes defences that a person could prove in order to demonstrate that they had taken reasonable steps to ensure that a document was not false or misleading. In contrast, Section 226 of the *Australian Consumer Law* [ACL] allows the court to show leniency where it is established that a person “acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused”.

AFIA recommends:

- The Legislation should be revised to adopt an approach similar to the ACL so that courts have evidence of culpability to facilitate a penalty regime designed to proportionately redress the wrongdoing. This will enable the courts to determine the degree of the seriousness of the breach established by the facts and whether a large penalty is warranted or whether the breach was the outcome of the entity acting honestly and reasonably coupled with the risk of financial harm to the consumer that flowed from their actions being minimal.
- Further, adopting this approach would help to achieve consistency and certainty across the courts and their application of the law.

NEXT STEPS

Should you wish to discuss our feedback further, or require additional information, please contact me at helen@afia.asn.au or Chalisa Parekowhai, Associate Director, Policy at chalisa@afia.asn.au or both via 02 9231 5877.

Kind regards



Helen Gordon
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