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Manager
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By email only: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

Consultation on Exposure Drafts – ASIC Legislation

Thank you for the opportunity to provide a submission on the exposure drafts of legislation arising out of recommendations from the ASIC Enforcement Review Taskforce Report (**the Taskforce**).

The Australian Institute of Company Directors (**AICD**) has a membership of more than 44,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

In this submission we only intend to make comments on matters contained within the *Financial Regulator Reform (No. 1) Bill 2019: Banning orders* and the *Financial Regulator Reform (No. 1) Bill 2019: (Penalties)*. In summary our key comments are:

- the training requirement included in the Banning Order Bill as applying too officers is too vague;
- the requirement to take "reasonable steps" in s.1308 of the *Corporations Act 2001* and s.225 of the *National Consumer Credit Protection Act 2009* (**Credit Act**) be retained and not replaced with a requirement to take "all reasonable steps"; and
- the safe harbour provisions proposed to be deleted by the Bill be retained in the Corporations Act and inserted into the Credit Act.

1. Training requirement for Officers

As a starting point, the AICD welcomes the Australian Government's aim of ensuring financial sector regulators have appropriate power to remove individuals whose actions have been contrary to the public interest and [to] prevent their continued involvement in the sector. Appropriate banning powers play an important role in protecting financial investors and consumers, and in supporting the integrity of the financial sector. However, given the severe consequences that a ban can have on a recipient's professional reputation and livelihood, an administrative ban is only appropriate when necessary to protect investors or consumers, proportionate to the misconduct, and subject to procedural fairness and a right of appeal.

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The AICD has previously raised concerns about the proposal to extend ASIC's power to ban a person who is 'not adequately trained or is not competent' to perform functions as an officer of an entity that carries on a financial services business. An officer includes a director of an entity.

We continue to have reservations about the merits and practicality of this proposal.

The proposal does not adequately reflect the differences in executive and non-executive roles and the absence of a training framework applicable specifically to officers. It is unclear how ASIC might apply the training threshold to officers and by what standard it might assess whether a person is adequately trained. Such tests have more direct applicability to those carrying out technical and professional roles in financial services where there are frameworks for training and education standards against which ASIC may make an evaluation.

Any assessment by ASIC will be necessarily subjective and may lack consistency. It is assumed that criteria will depend on the nature of the financial services business, although this is not clear in the legislation. It is also unclear how standards for qualifications and proficiencies could be set or assessed by the regulator. The power to ban a director is a significant one, and we remain concerned that these thresholds will be too vague and subjective.

In our view, the new 'fit and proper person' test also substantially achieves the policy objective of the proposed training banning trigger for officers.

In the event that our argument is unsuccessful, and the Bill is proceeded with in its current form, further guidance should be included in explanatory materials on what is meant by this clause. We recommend such guidance make it clear that this power will only be invoked when no reasonable person could believe that a person was adequately trained or competent to be an officer of an entity that carries on a financial services business, which will also depend on the nature of the financial services business in question.

2. "All reasonable steps" in s.1308 of the Corporations Act and s. 225 Credit Act

We note that these amendments within the Penalties Bill arose out of a recommendation from the Taskforce that the legislation be amended so that:

> *"Recklessness as to whether a statement is false or misleading or contains a material omission is prohibited;*
>
> *A person making a statement or authorising the making of a statement is required to take reasonable steps to ensure that a document submitted to ASIC does not contain a false or misleading statement or a material omission which renders a document materially misleading;*
>
> *Authorising a statement in an AFS licence application that is false or misleading or contains a material omission is prohibited."*

The Bill implements this recommendation by amending s.1308(4) of the Corporations Act and converting it into a strict liability offence whereby a person will commit an offence if:

- a document is required under or for the purposes of the Corporations Act, or is lodged with or submitted to ASIC; and

- the person makes a statement in the document, omits a matter or thing from the document, or authorises the statement or omission; and
- the document is materially false or misleading because of the statement or omission; and
- the person did not take all reasonable steps to ensure that the document was not materially false or misleading because of the statement or omission.

Similar amendments are proposed to s.225 of the Credit Act.

The first three dot points are not dissimilar to the provision currently contained within the legislation and we have no comment to make on them.

However, we note the change from requiring a person to take "reasonable steps" to "all reasonable steps". One of the justifications for amendment of this clause was to align the terms of the Corporations Act and the Credit Act, however the "all reasonable steps" test does not appear in the current wording of the Credit Act. The use of the phrase "all reasonable steps" also does not reflect the wording in the Taskforce recommendation extracted above.

The "all reasonable steps" test appears easier for the prosecution to prove as it only requires them to establish that one reasonable step was not taken such that all reasonable steps were not taken. On the face of it that is a lower bar. The implications of a lower bar are not explored in the Explanatory Memorandum and no justification has been put forward. We do not believe there are any sound public policy reasons to lower the bar in this instance, especially given it carries with it a criminal penalty.

The AICD submits that the Bill be amended so as to remove the word "all" from proposed sub-sections 1308(3) and (5) of the Corporations Act and sub-sections 225(2) and (4) of the Credit Act.

3. Deletion of sub-sections 1308(12) and (13) of the Corporations Act

We note that the Penalties Bill removes sub-sections 1308(10) to (13) of the Corporations Act which are safe-harbour defences a person may rely on in order to demonstrate that they have taken reasonable steps to ensure that a document was not false or misleading.

The Explanatory Memorandum to the Bill justifies their removal on the following basis:

> *"Their removal enables the Court to take into account all facts and circumstances in determining whether a person has taken all reasonable steps, and reduces the incentive for persons to comply with the letter, rather than the sprit, of the law. The removal of these defences also ensures greater consistency between the provisions of the Corporations Act and the equivalent provisions of the Credit Act, which do not contain equivalent defences."*

Importantly, we note that these safe-harbour provisions were not the subject of comment in the Taskforce's report.

The AICD opposes the deletion of sub-sections 1308(12) and (13) of the Act. With respect, the reasoning provided in the Explanatory Memorandum is unpersuasive. The Taskforce found no evidence that the provisions reduced the incentive for people to comply with the law and no practical example has ben advanced as to how this might occur. These are

necessary safe harbour provisions that protect directors and others who reasonably rely on others.

In order to achieve the desired consistency with the Credit Act, the safe harbour provisions set out in sub-sections (12) and (13) should be inserted by this Bill into s.225 of the Credit Act.

4. Next steps

We hope our comments will be of assistance. If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or David McElrea, Policy Adviser at dmcelrea@aicd.com.au.

Yours sincerely

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