

02 August 2017

Ms Kate Mills
Principal Adviser
ASIC Enforcement Review
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email ASICenforcementreview@treasury.gov.au

Dear Ms Mills

Strengthening ASIC's licensing powers

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide this submission to the ASIC Enforcement Review Taskforce's (**the Taskforce**) consultation paper on strengthening ASIC's licensing powers (**consultation paper**).

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and the community, to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

Introductory comments

The ABA has reviewed the Taskforce's positions and has provided specific comments on:

- Position 1 – supporting the position and proposing that any history of unpaid EDR determinations should be expressly considered in assessing fitness and propriety of controllers.
- Position 3 and Position 5 – supporting those positions and advocating for alignment between the Australian Financial Services Licence (**AFS Licence**) and Australian Credit Licence (**Credit Licence**) regimes.
- Position 7 – supporting the introduction of an express obligation for applicants to confirm that there have been no material changes to information given in the application before the licence is granted.

Position 1 – ASIC refusal of licence applications (unpaid EDR determinations)

The ABA supports the Taskforce's position that ASIC should be able to refuse a license application (or for existing Licensees take licensing action) if it is not satisfied controllers are fit and proper¹ and proposes that the fit and proper assessment should expressly consider whether the controller has a history of past unpaid EDR determinations. This express consideration should include whether the controller has previously been a controller or responsible manager of an AFS Licensee, or a controller

¹ The ABA supports the application of the fit and proper assessment to AFS Licence applications, consistent with Position 3.



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or director / senior manager of a Credit Licensee that has not complied with a determination of an approved EDR body.

The ABA also believes that the fit and proper test for responsible managers of AFS Licensees and directors and senior managers of Credit Licensees should also include this express consideration.

Unpaid External Dispute Resolution determinations remain an issue for consumers. The Financial Ombudsman's Service² reports that since 1 July 2010, there have been 35 FSPs who are unwilling or unable to comply with 143 determinations, affecting 203 consumers. As a result of this non-compliance, \$13,014,641.86 has not been returned to affected consumers. This figure does not include any interest awarded on the base award by the Ombudsman, nor does it include any adjustments for inflation over time.

Suspension / cancellation of licence

The ABA suggests that 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 should apply equally to suspensions or cancellations resulting from ASIC no longer being satisfied that the controllers are fit and proper – the same as apply in the case of suspension / cancellation of a licence where ASIC is no longer satisfied that the licensee, or the licensee's representatives, are of good fame or character.

Positions 3 and 5 – Alignment between AFSL and ACL regimes

The ABA broadly supports the Taskforce's Position 3 to align the assessment requirements for AFS Licence applications with the enhanced Credit Licence requirements. The ABA does not consider that there are sufficient differences between the nature of financial and credit services to justify different licensing assessments.

The ABA's view however is that 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. Clarification should also be provided in the drafting as to whether the assessment would also be made of nominated responsible officers who are not officers of the applicant for the purposes of the Corporations Act.

The ABA supports the Taskforce's Position 5 to align consequences for making false or misleading statements in documents provided to ASIC in the AFS and Credit contexts.

Position 7 – Express obligation to confirm no material changes

The ABA supports introducing an express obligation for applicants to confirm that there have been no material changes to information given in the application before the licence is granted. We suggest that the position in question 19 is more efficient, i.e. applicants should have an express obligation to confirm that there have been no material changes in circumstances that would render information in the application / variation false or materially misleading. We suggest that express confirmation should require the application to specify that there have been no changes to the way the applicant will meet its financial requirements, and no changes to applicant's eligibility and expectation of obtaining professional indemnity insurance.

² <https://fos.org.au/fos-circular-28-home/fos-news/unpaid-determinations-update/>



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We would be pleased to discuss our submission with the Taskforce. Please contact me at ccupitt@bankers.asn.au or on 02 8298 0416 if you would like to arrange a meeting, or require further information.

Regards

A handwritten signature in black ink, appearing to read 'Christine Cupitt', is positioned above the typed name.

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