

09 October 2019

By email: ASICenforcementreview@treasury.gov.au

Manager
Regulator Powers Reform Unit
Financial Services Reform Taskforce
Treasury
Langton Cres
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Dear Madam/Sir

ASIC Enforcement Review Taskforce – exposure draft legislation

Thank you for the opportunity to provide this submission to exposure draft legislation implementing certain aspects of the ASIC Enforcement Review Taskforce (ERT) Final Report.

Consumer Action Law Centre (**Consumer Action**) and Financial Rights Legal Centre (Financial Rights) generally supports the exposure draft legislation but makes comment in this submission on the following:

- ASIC's power to ban individuals;
- Strengthening ASIC's licensing powers;
- ASIC's investigative tools – telephone interception and search warrants.

We note that the exposure draft released does not include recommendations of the ERT relating to breach reporting, a directions power for ASIC or strengthening of penalties. These are all key recommendations of the ERT that need to be legislated effectively.

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

About Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

ASIC's power to ban individuals

Consumer Action generally supports the provisions of the exposure draft of **Financial Regulator Reform (No. 1) Bill 2019: Banning orders** (the **Banning Orders Bill**).

We strongly support the broadening of the types of banning orders that can be made under clauses 17 and 37. This ensures that the banning orders are effective at preventing a person from not only controlling a licensee but performing particular management or other positions within a licensee.

We particularly support the flexibility provided to ASIC by proposed sections 920B(1)(d) and (e) of the *Corporations Act (Corporations Act)* and proposed sections 81(2)(d) and (e) of the *National Consumer Credit Protection Act (NCCPA)*. This recognises that there can be potential harm caused to consumers from a banned person working inside any level of a financial services or credit business. We similarly support the proposed change to the meaning of 'control' – this recognises that there may be people who, while not directly providing financial services or credit activities, or performing specific functions in such a business, may be in a position to influence or direct the licensee's activities. It is appropriate that such people are caught by the banning order provisions.

We also support the change to the grounds for banning orders, particularly replacing the 'good fame and character' test in the Corporations Act to 'fit and proper person', thus aligning it with the NCCPA, and also the ground relating to adequate training and competency.

While we welcome the new ground of banning relating to the failure of a licensee to comply with AFCA determinations (clauses 10 and 30 of the Banning Orders Bill), we consider that ASIC should have the power to consider making a banning order if there has been a failure to comply with one AFCA determination, and not limit this to two determinations. Failure to comply with an AFCA determination can cause substantial consumer harm to the relevant individual and, if the determination remains uncompensated, goes against the stated policy position that wrongdoing in financial services should be compensated.¹ Furthermore, we consider that ASIC's banning power should be better linked to the requirements for AFCA to refer serious contraventions of the law as well as systemic issues to regulators.²

We particularly support clause 13 of the Banning Orders Bill which introduces a new banning ground relating to officers who have been involved in two or more failed companies. Consumer Action is aware of some businesses that fraudulently use the corporations law to deliberately liquidate one company in order to start a new company with virtually the same name and/or purpose. This affects consumers where they may have legal rights or debts

¹ Licensees have existing obligations to maintain adequate compensation arrangements: National Consumer Credit Protection Act 2009 (Cth) s 48; Corporations Act 2001 (Cth) s 912B.

² Section 1052E, Corporations Act 2001 (Cth)

against the first company. We recognise that it is very difficult to prove illegal phoenixing generally, and thus it is appropriate that officers involved in two or more failed companies to be restricted in accessing a financial services or credit licence.

Strengthening ASIC's licensing powers

Consumer Action generally supports the provisions of the exposure draft of **Financial Regulator Reform (No. 1) Bill 2019: Licensing** (the **Licensing Bill**).

We particularly support the power for ASIC to refuse to grant a licence not only on the basis of information about the applicant (and its officers), but also any controller of the applicant. The obligation on licensees to inform ASIC about an actual change in their control within 30 business days is also important to ensure that this new requirement works in practice.

As with the changes to the ground for banning orders, we welcome the introduction of a 'fit and proper person' test for licensing in proposed section 913BA of the Corporations Act and proposed section 37A of the NCCPA. We particularly welcome proposed sections 913BB(e) and 37B which allows ASIC to have regard to whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA.

Over the coming years, we expect that more businesses will be required to be licensed due to other changes resulting from the Financial Services Royal Commission. For example, businesses that offer funeral expenses products.³ It is important that ASIC has regard to its prior treatment of customers through the AFCA scheme. We also recommend that ASIC be empowered to have regard to any referrals because of serious contraventions of the law or systemic breaches made by AFCA pursuant to section 1052E of the Corporations Act.

We also welcome the requirement for ASIC to have regard to a range of banning and disqualification orders in considering the 'fit and proper person' test. However, these orders seem to be limited to those made under ASIC legislation. There is a range of other legislation that provides for a court to disqualify a person from managing a corporation, for example, section 86E of the *Competition and Consumer Act 2010* (Cth). We consider that ASIC should have regard to any such disqualification order.

ASIC investigatory tools

Consumer Action generally supports the provisions of the exposure drafts of both the **Financial Regulator Reform (No. 1) Bill 2019: Access to Telecommunications Interception Information** (the **TI Bill**) and the **Financial Regulator Reform (No. 1) Bill 2019: ASIC Search Warrant Powers Bill** (the **Search Warrant Powers Bill**). ASIC is an important law enforcement authority and it needs to have the tools relevant to enforcing the law and protecting consumers from harm.

With respect to the TI Bill, we consider that exposure draft unduly limits ASIC's ability to obtain telecommunications interception information. In line with the recommendations of the ERT, the TI Bill does not designate ASIC as an 'interception agency' under the *Telecommunications (Interception and Access) Act 1979* (Cth) (the **TIA Act**). Instead, ASIC can only receive information from another interception agency if the material appears to relate to a matter than can be investigated by ASIC.

As noted in the explanatory materials for the TI Bill, ASIC is the relevant agency to investigate serious offences such as insider trading, market manipulation and financial services fraud. The approach taken by the TI Bill will thus limit ASIC to receiving information to where another agency has an existing investigation or is willing and has

³ Treasury, Removal of the exemption for funeral expenses policies: <http://treasury.gov.au/consultation/c2019-23114>

capacity to commence its own investigation. This requirement for cooperation between agencies is likely to slow down and complicate investigations. Given the important role has in investigating serious misconduct in the corporate and financial sector, we consider it is appropriate for ASIC to be granted interception agency status under the TIA Act.

Please contact Alix Pearce Director Policy and Campaigns at Consumer Action Law Centre on 03 8554 6912 or at alix@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



Gerard Brody | CEO

CONSUMER ACTION LAW CENTRE



Karen Cox | CEO

FINANCIAL RIGHTS LEGAL CENTRE