Australian Banking Association

28 February 2020

The Manager
Consumer and Corporations Policy Division
Treasury
Langton Crescent
Parkes ACT 2600
By email: FSRCconsultations@treasury.gov.au

Dear Mr Brukner

Implementation of ASIC Enforcement Review Taskforce – Directions Power

At the release of the Final Report of the Royal Commission last year, the banking industry committed to learning the lessons, fixing the problems and making things right.

One year on from the Royal Commission the banking industry has tougher rules imposed by the Government and regulators, a back to basics approach to banking which is squarely centred on the customer and a renewed focus on fixing culture.

The banking industry strongly supports the Government acting on the recommendations of the Royal Commission and is committed to working together to see the recommendations of the Royal Commission are effectively implemented.

The ABA's position

The ABA supports strong regulatory powers for industry regulators such as the Australian Securities and Investments Commission (ASIC).

The ABA supports the introduction of the new ASIC directions power, however clear expectations and important changes are needed to give industry confidence and clarity about how and when it will be used.

General powers such as the directions power should not be used to undermine limits on specific powers.

Key points

- ASIC's powers are increasing in a range of areas following the Royal Commission as new powers are added to an already substantial array, that includes Corporations and other Act modification powers, powers to impose license conditions, various rule-making powers, and the product intervention power (PIP).
- The Government should, potentially through its Statement of Expectations to ASIC, make clear that the regulator exercises these powers in a clear and consistent way that will give industry confidence and clarity around how and in what circumstances each of them will be exercised.
- One issue that arises as ASIC's toolkit expands is the need to ensure that express limits on one power are not undermined by the use of a more general one. For example, the ASIC Enforcement Review, in recommending this directions power for ASIC, noted that:

“the directions power contemplated by the Taskforce should not be inconsistent with or undermine the limits to be imposed on the exercise of the proposed PIP”.[1]

ASIC’s policy framework should be clear that general powers such as the directions power are not to be used to undermine limits on specific powers. In relation to the PIP, ASIC shouldn’t, for instance, seek to bypass the requirement for ‘significant consumer detriment’ for the use of that power by instead using a direction on the (potentially lower) threshold of reasonable suspicion of a contravention.

- Against that background we support the new directions power for ASIC and make some **recommendations** which are set out below.

  1. ASIC’s policy framework should be clear that general powers such as the directions power are not to be used to undermine limits on specific powers.
  2. The Bill should make clear that ASIC may not make consecutive interim directions and that, once an interim direction has expired, ASIC must follow the procedural fairness requirements set out in the Bill prior to the making of any additional direction on substantially the same terms.
  3. There should be a limit on the time period (18 months, for example) that ASIC may specify for a licensee to engage in specified conduct (s. 918(4)). Licensees should not be subject to directions orders indefinitely.
  4. For the avoidance of doubt, the Bill should make clear that a licensee does not contravene section 918K where the Administrative Appeals Tribunal (AAT) has made an order staying ASIC’s decision to make the relevant direction.
  5. ASIC’s directions power should be qualified by a note that in the Bill that, for the avoidance of doubt, a direction by ASIC does not compel a licensee to do anything that it is otherwise prevented by a law of the Commonwealth, a State or territory from doing.

Yours faithfully

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About the ABA

The Australian Banking Association advocates for a strong, competitive and innovative banking industry that delivers excellent and equitable outcomes for customers.

We promote and encourage policies that improve banking services for all Australians, through advocacy, research, policy expertise and thought leadership.

[1] ASIC Enforcement Review Taskforce Report, December 2017, p. 104