



***Financial Sector Reform
(Hayne Royal Commission Response -
Stronger Regulators (2020 Measures)) Bill 2020:
FSRC rec 7.2 (ASIC directions)
Exposure Draft (ED) and Explanatory Materials (EM)***

Financial Services Council Submission
28 February 2020



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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Introduction

The FSC welcomes the opportunity to make a submission on the ED and EM in relation to the proposed ASIC directions power.

3. Key Recommendations

Our key recommendations are as follows:

1. Clause 918C, i.e., the failure to consult with APRA in the case of an APRA regulated body, does not invalidate a direction, should be reconsidered or revised. In the case of an APRA regulated entity, it seems to us extremely important that ASIC consult with APRA prior to making the direction. The alternative would be for the power to be exercisable only with the consent of the Minister.
2. Given the breadth of the power, and the other powers available to ASIC, it should be expressly drafted as a power of last resort only.
3. In the case of an exercise of the directions power at least, it should be made clear that ASIC nevertheless has an obligation to provide the licensee with the opportunities of the kind mentioned in the ED, even where the circumstances giving rise to the exercise of the power existed before the commencement of the legislation.
4. There are a number of specific amendments we suggest be made to the ED to provide greater clarity.

Our detailed comments are set out below.

4. Detailed Comments

Background

Recommendation 7.2 was that the outstanding ASIC Enforcement Review recommendations to improve the breach reporting regime should be implemented. The Government made an additional commitment to provide ASIC with a directions power, as the ASIC Enforcement Review Taskforce in 2019 had recommended (in Recommendations 46 to 48). The ED and EM address the ASIC Directions power concept.

The Proposal

1. ASIC may make a direction to an AFS or Australian credit licence holder if:
 - (a) ASIC has reason to suspect that a financial services licensee has engaged, or is engaging, in conduct that constitutes a contravention of a financial services law; or
 - (b) ASIC has reason to suspect that a financial services licensee will engage in conduct that would constitute a contravention of a financial services law.
2. ASIC may make a direction to *address the contravention* and to *prevent a similar or related contravention*;
3. Directions may be given to a licensee to do a prescribed thing in the Act or Regulations. The list of prescribed things is extremely broad and includes a direction to *not accept new clients* or to carry out a specified remediation program;
4. Prior to making a direction, ASIC must give the licensee an opportunity:
 - (a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
 - (b) to make submissions to ASIC on the matter.

We note that a failure to consult with APRA in the case of an APRA regulated body, does not invalidate a direction (Clause 918C).

5. ASIC also may give interim directions on the same grounds under proposed Subdivision B - Interim directions to financial services licensees. This interim direction:
 - (a) does not require ASIC to afford a hearing or receive submissions; and
 - (b) ceases to have effect within 21 days or until a direction is given.

5. Observations

- (i) We note that the EM at paragraph 1.43 indicates that:

a decision by ASIC or a delegate to give a direction, interim direction or an approval of a person nominated by a licensee to do a specified task, is subject to the usual safeguards. This includes administrative review (see Part 9.4A of

the Corporations Act and sections 327 and 328 of the Credit Act), judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.

- (ii) We do have reservations however as the operation of Clause 918C, i.e., the failure to consult with APRA in the case of an APRA regulated body, does not invalidate a direction. There may well be the instances where it is extremely important that ASIC consults with APRA in relation to the APRA regulated body. The exercise of the directions power in this instance could have unintended consequences on the prudential standing and viability of the body. It seems that failure to consult with APRA in such circumstances is likely to constitute a failure to take into account relevant considerations or other administrative law grounds of contention. This seems to result in our view in the body having a right to undertake judicial review of the decision. It would be preferable that the obligation to consult with APRA in this instance was expressed to be an absolute obligation, in terms similar to a licensee having an opportunity to be present at any hearing and to make submissions to ASIC on the matter.
- (iii) There is another important point to note here. Given that APRA has a directions powers in relation to Registrable Superannuation Entity licensees and associated entities under the provisions of the *Superannuation Industry (Supervision) Act 1993*, mandatory consultation would be preferable to reduce unnecessary overlap or avoid potentially contradicting directions on the same issue/or incident.
- (iv) Further, in our view, given the wide range of powers ASIC currently has and is proposed to have under other reforms, we suggest that this power should be considered to be a power of last resort only. We also note that a contravention of a direction or interim direction is a civil penalty provision. Accordingly, we suggest that the ED drafting be amended to reflect this position and it is expressly stated that the power is exercisable only on urgent bases and where no other option is reasonably available to ASIC.
- (v) As we understand that the ED, the current intention is that relevant legislation will commence on the day after the Act receives Royal Assent. However, transitional and application provisions have an effect such that that directions and interim directions can be given to licensees in circumstances where the relevant conditions for making a direction or interim direction were **met before, on or after the commencement day**. We question the fairness of this approach at least insofar as the directions power is concerned. Is it the intention that an entity will still have the opportunity for a hearing and to make submissions in this case? As we have said, in any event this power should be used as a power of last resort and should not be available for perceived transgressions which have occurred prior to its commencement. This does seem to have an element of retrospectivity which generally is not considered to be an appropriate exercise of legislative power.
- (vi) At paragraph 1.19 of the EM, it is stated that:

The Bill provides that the list of directions can be extended by regulations. Any types or kinds of directions that are being regularly made by ASIC, but that are not listed in the Bill, are expected to be prescribed in the regulations to provide transparency to licensees. Any regulations made are subject to disallowance and parliamentary scrutiny. [Schedule 1, items 1 and 2,

paragraph 918(5)(h) of the Corporations Act and paragraph 78B(5)(h) of the Credit Act].

We appreciate and understand the rationale of these arguments. However, it seems to us that this simply serves to emphasise that the directions power is extremely broad and given other powers available to ASIC should be expressly stated to be a power of last resort only along the lines we have indicated above.

(vii) Drafting comments:

- A. Generally, there does not appear to be protection for an AFSL holder acting consistently with an ASIC direction, where that ASIC direction conflicts with a licensee's obligation to comply with other legal requirements. Accordingly, it would be useful if the legislation stated that a direction must not be inconsistent with the Corporations Act or any other law of the Commonwealth. Alternatively, the legislation should provide that a person acting in accordance with a direction will not by that reason be liable under the Corporations Act or any other law on account of acting in accordance with the direction;
- B. Clause 918 (6) contemplates a number of circumstances, including the calculation of loss or damage. It would be useful if the final form Explanatory Memorandum provided some worked examples and additional guidance;
- C. In relation to clause 918C, although ASIC has to provide an opportunity to an entity of the kind described in that clause, there does not appear to be any express positive obligation imposed on ASIC to consider and take into account any submissions made by the entity. We suggest that this be expressed in the final form legislation;
- D. In relation to the power conferred under clause 918E(2), we note that there is no express requirement for ASIC to act reasonably in approving or not approving a nomination. It would be preferable if this were expressed in the final form legislation to ensure that the policy of the provision is expressly reflected in the law;
- E. It would be preferable if directions were subject to a self-executing timeframe; for example, there should be a 12–18 month review period to ensure what we assume to be the policy intent is reflected in the law; and
- F. In relation to clauses 918 (5) and (6), the list of directions that ASIC may provide is not exhaustive. It also would be useful if the directions powers contained thematic classifications; such as the power to approve a nominated person or a remediation plan.

Should you have any questions, please do not hesitate to contact us.

Paul Callaghan
General Counsel