

ASIC'S DIRECTIONS POWERS

RESPONSE TO CONSULTATION PAPER

17 November 2017

INTRODUCTION

1. ANZ thanks the Treasury for the opportunity to comment on the three positions concerning a power being granted to the Australian Securities and Investments Commission (**ASIC**) to issue directions to Australian financial service or Australian credit licensees.
2. We support a stronger, better funded ASIC. Initiatives such as a user-pays funding model for ASIC together with improved breach reporting help underpin the Commission's role in overseeing the quality of the Australian financial system.
3. The proposed directions power could conceivably help ASIC pursue graduated engagement with stakeholders concerning their legal obligations. The power may fill the middle ground in enforcement techniques between informal engagement and more serious measures, such as licensing action, court injunctions or enforceable undertakings. In this sense, the proposal could improve Australia's regulatory framework.
4. Our responses below are intended to help define a directions power with a clear intent and ambit. While the power needs to afford ASIC flexibility to respond to diverse situations, it is also important that licensees and consumers understand ASIC's potential role in regulating behaviour.

POSITION 1

5. We agree that ASIC should be able to give a direction to financial services or credit licensees requiring them to take or refrain from specified behaviour where necessary to address or prevent compliance failures.
6. We believe that the list of directions set out on page 21 of the consultation paper is generally appropriate. The Taskforce may like to consider if ASIC may benefit from having powers specifically addressing the financial resources that licensees hold (ie to allow ASIC to direct that licensees hold additional, or better quality, financial resources).
7. While there is the risk that a defined list may delimit the directions ASIC can give, this can be mitigated if regulation can expand it. With this mitigation, the risk is appropriate given that a defined list of directions will provide clarity for stakeholders concerning ASIC's role.

POSITION 2

8. The Taskforce's position on the trigger for the directions power is generally appropriate.
9. Two issues that may benefit from consideration are:
 - Ensuring that the legislation makes clear how ASIC may arrive at a conclusion concerning the actual or likely compliance with the law by the licensee

This will be important for both ASIC and the licensee to be clear when the directions power is enlivened, particularly if the decision to exercise the power were to be challenged under administrative law.

- Predicating the enlivening of the power on a materiality threshold or purposive requirement

If the directions power can be exercised upon any actual or anticipated breach of the law, it would have a very broad scope of operation (ie it would be exercisable for a minor, technical breach of the law).

It may be more consistent with a graduated approach to stakeholder engagement if the power were enlivened, for example, where the breach was 'material' or the exercise of the power were necessary to prevent harm to clients or customers of the licensee (see, for example, the directions power of the Australian Prudential Regulation Authority set out on page 27 of the consultation paper).

POSITION 3

10. It seems appropriate that ASIC should be able to take action against a recalcitrant licensee in respect of a direction. The sanction that applies should be proportionate to the breach of law that enlivened the directions power initially.
11. While it will obviously be important that ASIC can issue directions expeditiously, we agree that procedural fairness should accompany the directions power. Thus, written notice and an opportunity to be appear before ASIC prior to the exercise of the directions power would give the power legitimacy and ensure ASIC has all available material when deciding whether to issue a direction.

ENDS