

17 November 2017

ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
Parkes ACT 2600

### **ASIC Enforcement Review – ASIC’s Directions Powers**

Thank you for the opportunity to make this brief submission on the Consultation Paper – ASIC’s Directions Powers.

NIBA is the industry association for insurance brokers across Australia. The association has around 350 member firms, employing around 4,000 insurance brokers in all States and Territories, in the cities, towns and regions of Australia.

#### **About Insurance Brokers**

Insurance brokers work with their clients to assist them –

- understand and manage their risks, including the risk of loss of or damage to property as a result of adverse weather or other climate related events;
- obtain appropriate insurance cover for their risks and their property; and
- pursue claims under their policies when an insured event occurs, in which case the insurance broker becomes the advocate for the client during the assessment and resolution of the claim.

Insurance brokers act primarily for and on behalf of their client, and they owe legal duties to their clients for the nature and quality of the work they perform on their behalf. When acting for and on behalf of the client, insurance brokers do not SELL insurance policies – they PURCHASE insurance policies on behalf of their clients from the markets available to them.

## Submission

NIBA is concerned that chapter 2 of the Consultation Paper appears to overlook a key role and responsibility of ASIC in the operation of its statutory role as regulator of financial services markets and advice – the power to prosecute AFS licence holders for a breach of the law.

The recently retired Chairman of ASIC has been reported in the media as being of the view that nothing works like strong deterrence. Deterrence, and ultimately compliance with legislative and regulatory obligations, only becomes effective if ASIC exercises its power to prosecute for breaches of the regulatory framework, and the regulated population of AFS licence holders can see that the threat of prosecution is real.

The Consultation Paper appears to be suggesting that existing legal remedies available to ASIC are too burdensome, in that they require ASIC to establish allegations of breach to an appropriate level of proof. It would appear that the proposals to give ASIC greater powers to issue directions are designed to give ASIC increased regulatory power without having to formally demonstrate or prove that a breach has occurred.

NIBA strongly supports the taking of appropriate regulatory action where a breach of the regulatory framework has occurred. But we do expect that any regulatory action will be based on clear evidence of breach, sufficient to form the basis of a potential prosecution for failure to comply with the Act and any relevant regulations.

ASIC has issued Information Sheet 151 “ASIC’s approach to enforcement”<sup>1</sup>, which sets out the regulatory powers and tools that are available to ASIC, and how decisions are made in relation to the exercise of those powers. As the Information Sheet demonstrates, ASIC’s existing powers are extensive, and provide a wide variety of enforcement options from infringement notices to serious criminal prosecutions and civil injunctions.

At this time, it is not clear to us that greater powers of intervention and direction are required. The Consultation Paper does not critically review the powers and remedies currently available to ASIC as set out in the Information Sheet.

In addition to the matters set out in the Information Sheet on ASIC’s approach to enforcement, we believe consideration should be given to the nature of regulatory activity and powers that would operate most effectively to deal with unlawful conduct and to provide sufficient deterrence for conduct of that

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[http://download.asic.gov.au/media/1339118/INFO\\_151\\_ASIC\\_approach\\_to\\_enforcement\\_20130916.pdf](http://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf)

nature in the future. We are concerned that greater powers of direction and intervention might provide relatively easy enforcement by ASIC against individual firms, but it would not necessarily send strong deterrence messages to the wider financial services sector.

We would be pleased to discuss this matter further with the ASIC Enforcement Review panel.

Yours sincerely,

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