

30 November 2017

Ms Kate Mills  
ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
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By email: [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

Dear Ms Mills

**ASIC's Directions Powers**

The Westpac Group, which includes our Westpac, St.George, BankSA, Bank of Melbourne, RAMS and BT Financial Group businesses (**Westpac**), welcomes the opportunity to provide a response to Treasury's ASIC Enforcement Review Position and Consultation Paper 8: *ASIC's Directions Powers (Consultation Paper)*. We also acknowledge the additional time granted to provide this submission.

As we have emphasised in previous submissions to the ASIC Enforcement Review Taskforce, Westpac is generally supportive of the series of positions being proposed by the Taskforce and believes the initiatives contained in the Australian Bankers' Association's *Better Banking Program*, including building a stronger Australian Securities & Investments Commission (**ASIC**), are aligned to the Taskforce's policy reform proposals.

Specifically, Westpac generally supports each of the positions set out in ASIC Enforcement Review Position and Consultation Paper 1 in relation to self-reporting of contraventions by financial services and credit licensees. Westpac is also generally supportive of the proposal in Positions Paper 7 to strengthen penalties for corporate misconduct.

The Consultation Paper notes ASIC's existing enforcement mechanisms, including the power to vary, suspend or cancel licences, apply to the court for an injunction, as well as take administrative action in the form of issuing infringement notices and accepting enforceable undertakings. We also note that ASIC's enforcement toolkit is expected to be further enhanced by the introduction of the product intervention power and broader banning powers.

In light of ASIC's existing powers and proposed other additional powers, Westpac considers that the proposed power for ASIC set out in the Consultation Paper (namely, to direct financial services or credit licensees in the conduct of their business), is not required. Our commentary on the three positions detailed in the Consultation Paper is set out in Appendix 1 for Treasury's consideration.

Westpac would welcome the opportunity to discuss our views in more detail with Treasury. Please contact me on 0402 898 702 or by email at [michaeljohnston@westpac.com.au](mailto:michaeljohnston@westpac.com.au) if you would like any further information.

Yours sincerely



**Michael Johnston**

Deputy Head of Government Affairs  
Westpac Group

## Appendix 1

### Position 1

Westpac acknowledges the need to promote public confidence in the financial system. We also agree that ASIC, as a regulator of Australia's financial system, requires sufficient enforcement powers to be able to maintain fair, orderly and transparent markets within that system.

ASIC has access to a broad range of enforcement powers to fulfil its objectives. These include the ability for ASIC to vary, suspend or cancel licences, issue stop orders and apply to the court for an injunction, as well as take administrative action in the form of issuing infringement notices and accepting enforceable undertakings. ASIC's enforcement toolkit is also expected to be further enhanced by the introduction of the product intervention power and broader banning powers. ASIC's 2016-17 Annual Report further indicates that the focus of ASIC's wealth management project will shift from surveillance to enforcement in relation to financial advisers.

In Westpac's view, the proposed directions power is:

- not necessary given ASIC's extensive range of enforcement powers; and
- inappropriate for a regulator, placing ASIC in the position of investigator and immediate judge, without the right of appeal.

Specifically, we consider that the combination of ASIC's existing broad powers, the new product intervention power and the enhanced banning powers will provide ASIC with the necessary enforcement powers to achieve its objectives without the need for an additional directions power.

The Consultation Paper notes that ASIC's ability to vary, suspend or cancel a licence is hampered by the procedural fairness requirements that accompany the power, such as providing hearings or advice, and allowing licensees reasonable time to respond before taking further action. While we acknowledge that administrative speed and efficiency are important considerations, Westpac considers that it is essential to safeguard these procedural fairness requirements for licensees given the gravity associated with varying, suspending or cancelling a licence. In our view, administrative efficiency should not be pursued at the expense of due process, which is a real risk if the proposed directions power is introduced in its current form.

If, nonetheless, the directions power is adopted, Westpac considers that the ability for ASIC to take steps to actively impact the conduct of a financial services or credit licensee is a significant power that should be reserved for only the most serious cases, with clear and understandable limits imposed.

Accordingly, any directions that ASIC could make should be prescribed by the legislation, drafted narrowly to reflect the limited circumstances in which they would operate, and not be open to extension by way of regulation. When compared to a principles-based approach to regulation, Westpac believes that this approach would provide greater certainty for licensees regarding the circumstances in which ASIC's powers could be exercised.

Further, in light of the broad range of enforcement mechanisms currently available (and those expected to be available) to ASIC outlined above, Westpac considers that any directions power would need to be carefully limited to avoid duplication with these enforcement powers, which could otherwise lead to a lack of efficiency, transparency or consistency in ASIC's regulatory enforcement activity.

Westpac also has concerns regarding the proposed list of directions ASIC could potentially make. For example, the proposed direction to a licensee to cease accepting new clients effectively represents intervention into commerce and should be very carefully considered by the Taskforce given its potential to cause significant commercial harm to a licensee.

In terms of practical application, Westpac considers that the legislation would also need to prescribe who at ASIC can issue directions to licensees. Such an approach would be consistent with current practice,

whereby only certain ASIC officers imbued with appropriate delegations can issue infringement notices and make banning orders. In Westpac's view, this would help to minimise the risk of directions being issued without due consideration, as well as provide greater certainty for licensees and ensure greater coherency across ASIC's enforcement activity.

## Position 2

We note that the Consultation Paper proposes that the directions power should be triggered where ASIC has "reason to believe" that a licensee has, is or will contravene financial services laws or the credit legislation.

As a preliminary observation, Westpac considers that there is a disconnect between the trigger for the directions power (i.e. where ASIC has "reason to believe" a licensee has, is or will contravene their statutory obligations) and the nature of the directions envisaged in the Consultation Paper (a number of which do not directly link to requiring compliance by the licensee). In this regard, we have concerns that once the proposed threshold is triggered, ASIC's directions powers could be applied to impact a broad range of aspects of a licensee's business, not just addressing compliance concerns.

Westpac's primary concern with this test, however, is that the directions power may apply where ASIC has reason to believe the requirements will be (but have not yet been) contravened. While we understand the basis for this approach (i.e. early intervention), we note that many of licensee obligations that may be breached are very broad, such as the general obligations under section 912A, and are open to differing interpretations. We also reiterate our comments above that the ability for the regulator to actively intervene in the conduct of a financial services or credit licensee is a significant power that should be reserved for only the most serious cases.

Accordingly, Westpac recommends that if a directions power is introduced, the Taskforce give further consideration as to whether this power should be intended to be used as a last resort measure. Specifically, we recommend that the threshold for issuing a direction should be only be triggered where:

- there has been a contravention (rather than it applying prospectively); and
- ASIC has reason to believe the licensee is not taking reasonable steps to remedy the contravention within a reasonable timeframe.

Ultimately, it will be important to ensure that there is sufficient clarity as to how the provisions will apply to licensees and how they will be interpreted by ASIC and the courts.

## Position 3

The Taskforce has suggested in Position 3 that ASIC should be able to apply to a court to obtain an order requiring a licensee to comply with the direction and / or take administrative action if a licensee does not comply with a direction.

If a directions power is introduced, Westpac would be supportive of ASIC having the power to apply to a court if a licensee does not comply with a direction and for certain sanctions to be available for failing to comply. However, we do not believe that failure to comply with an ASIC direction should be a criminal offence – in our view, this would be disproportionate to the contravention.

Westpac would also be supportive of the proposed directions power including a requirement for ASIC to provide written notice to a licensee before making a direction, as outlined in the Consultation Paper. To promote procedural fairness, the process should also include a reasonable opportunity for the licensee to either respond to, or challenge, ASIC's claim of the existence of the breach. At a minimum, there should be an avenue for the licensee to seek a merits review of an ASIC direction in the Administrative Appeals

Tribunal. This would be consistent with the approach currently in place for ASIC disqualification and banning orders.<sup>1</sup> It also reflects the position with respect to APRA's directions power.<sup>2</sup>

We also recommend the Taskforce consider the inclusion of a safe harbour for conduct done, or not done, in reasonable compliance with a direction.

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<sup>1</sup> See section 1317B of the *Corporations Act 2001* (Cth).

<sup>2</sup> See, e.g. section 11CA(5A) and Part VI of the *Banking Act 1959* (Cth).