



Australian Government

ASIC Enforcement Review

Position and Consultation Paper 8
ASIC's Directions Powers
8 November 2017

© Commonwealth of Australia 2017

ISBN 978-1-925504-71-2

This publication is available for your use under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.



Use of Treasury material under a **Creative Commons Attribution 3.0 Australia** licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

Treasury material used ‘as supplied’

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics — then Treasury prefers the following attribution:

Source: The Australian Government the Treasury.

Derivative material

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

Based on The Australian Government the Treasury data.

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the It’s an Honour website (see www.itsanhonour.gov.au).

Other uses

Enquiries regarding this licence and any other use of this document are welcome at:

Manager
Communications
The Treasury
Langton Crescent
Parkes ACT 2600
Email: medialiaison@treasury.gov.au

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
1. BACKGROUND.....	3
1.1. Current Licensee obligations.....	3
2. EXISTING ASIC POWERS.....	5
2.1. Cancellation of licence	5
2.2. Additional conditions	6
2.3. Directions to provide a statement containing information	7
2.4. Enforceable undertakings	7
2.5. Civil remedies.....	8
3. RELEVANT POWERS FOR COMPARISON	11
3.1. Directions – financial market infrastructure.....	11
3.2. Other jurisdictions.....	12
4. CURRENT ISSUES	15
4.1. Risk of delayed powers	15
4.2. Ambiguity of additional conditions.....	17
4.3. Limitations of negotiation.....	18
5. SOLUTIONS	21
ANNEXURE A — DIRECTIONS POWERS IN OTHER JURISDICTIONS	27
ANNEXURE B — ASIC ENFORCEMENT REVIEW TASKFORCE TERMS OF REFERENCE	38

EXECUTIVE SUMMARY

1. A person who carries on a financial services business in Australia must hold an Australian financial services (AFS) licence, subject to certain exemptions, including where the person provides a financial service as a representative of an AFS licensee.¹ Similarly, a person must not engage in a credit activity unless the person holds an Australian credit licence, or engages in the activity as a credit representative or as an employee or director of a credit licensee or related body corporate.²
2. When it grants a licence, ASIC can require that a licensee put in place internal systems or restricts its activities in appropriate ways. However after a licence is granted, imposing such requirements or restrictions is slow and difficult.
3. The Taskforce has reviewed ASIC's existing powers to modify an AFS or credit licensee's ongoing systems and conduct after the relevant licence has been granted. These powers include to:
 - a. vary, suspend or cancel the licence if ASIC can establish the licensee has breached the law, and the breach justifies this action;
 - b. apply to the court for an injunction; or
 - c. negotiate an enforceable undertaking with the licensee.
4. ASIC's existing powers to require licensees' to adopt internal systems or to restrict their activities have three shortcomings. First the resources and procedural requirements necessary to impose additional conditions, or to suspend or cancel a licence can result in delay between concerns arising and ASIC achieving a protective outcome. This can leave financial consumers at risk in the interim period as surveillance and hearings take place.
5. Secondly, applying to a court for an injunction involves significant time, resources and costs in investigating and preparing a case to the required standard to commence court proceedings. In urgent matters, involving a licensee, there is utility in providing ASIC with an efficient and quick mechanism to require a licensee to put in place or modify internal systems or restrict its activities in appropriate ways to address risks to consumers.
6. Thirdly, enforceable undertakings must be agreed to by a licensee and are generally negotiated as an alternative to ASIC exercising its administrative powers or initiating court proceedings. This requires acknowledgment by the licensee of ASIC's concerns. The outcome also depends on the strength of the evidence available to support ASIC's concerns and the nature of the alternative remedies that could be pursued by ASIC.

1 Corporations Act s.911A.

2 Credit Act s.29. A 'credit activity' is defined in s.6(1).

7. Particular difficulties arise where a licensee has taken some steps to rectify identified compliance concerns but ASIC remains concerned that those steps are not sufficient to ensure that there will not be further breaches by the licensee of its obligations or additional measures are required to ensure that the impact on clients or former clients is identified and, where necessary, remediated. For example a licensee may make appropriate amendments to its systems and processes to address how a breach occurred but has not established an appropriate remediation program to assess whether compensation is payable to consumers affected by the breach.
8. The Taskforce considers that, to the extent practicable, ASIC should be able to require compliance with AFS or credit licence obligations in real time, and that the regulator should be given powers to direct licensees to take or refrain from taking actions where appropriate for this purpose.
9. The Taskforce has developed preliminary positions on a set of reforms aimed at filling a gap in the existing licensing regimes. These positions are:
 - Position 1:** ASIC should have the power to direct financial services or credit licensees in the conduct of their business where necessary to address or prevent compliance failures.
 - Position 2:** The directions power should be triggered where a licensee has, is or will contravene AFS or credit licensing requirements (including relevant laws).
 - Position 3:** ASIC should be able to apply to a court to enforce the direction and take administrative action if an AFS or credit licensee does not comply with a direction.
10. The background and detailed reasons for the Taskforce's adoption of the positions set out above are described below.
11. The Taskforce has analysed some comparative regimes in other countries. This analysis is set out in Annexure A.

1. BACKGROUND

1.1. Current Licensee obligations

1. Part 7.6 of the *Corporations Act 2001* (Corporations Act) establishes the licensing regime for providers of financial services. With certain exceptions, a person who carries on a financial services business in Australia must hold an AFS licence.³ The Corporations Act imposes a number of general obligations on AFS licensees, which include that they:
 - a. do all things necessary to ensure that the financial services covered by their licence are provided efficiently, honestly and fairly;
 - b. comply with the conditions on the licence;
 - c. comply with the financial services laws;
 - d. maintain the competence to provide financial services; and
 - e. have adequate resources and risk management systems.⁴
2. Similarly, Chapter 2 of the *National Consumer Credit Protection Act 2009* (Credit Act) governs the licensing of persons who engage in credit activities. With certain exceptions, a person must not engage in a credit activity unless the person holds an Australian credit licence.⁵ The Credit Act imposes a number of general conduct obligations on credit licensees, including that they:
 - a. do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly;
 - b. comply with the conditions on the licence;
 - c. comply with the credit legislation;
 - d. maintain the competence to engage in the credit activities authorised by the licence;

3 Corporations Act section 911A.

4 Section 912A(1)(a), (b), (c), (d), (e) and (h). A 'financial services law' is defined in section 761A to include provisions of relevant parts of the Corporations Act, for example, Chapters 5C (managed investment schemes), 6 (takeovers) and 6D (fundraising), and the consumer protection provisions in Part 2 Division 2 of the *Australian Securities and Investments Commission Act 2001*, in addition to any other Commonwealth, State or Territory legislation in so far as it covers conduct relating to the provision of financial services. The requirement to have adequate resources and risk management systems does not apply to a body regulated by the Australian Prudential Regulation Authority (APRA), with limited exceptions: section 912A(4) and (5).

5 The exceptions are that the person engages in the credit activity as a credit representative or as an employee or director of a credit licensee or related body corporate: Credit Act section 29. A 'credit activity' is defined in section 6(1).

- e. have adequate arrangements and systems in place to ensure compliance with the general credit obligations; and
 - f. have adequate resources and risk management systems.⁶
3. The Corporations Act also imposes a number of specific obligations on AFS licensees. The specific obligations require licensees to reasonably assist ASIC with surveillance, and act in clients' best interest, among other things.⁷ Any failure to comply with these specific obligations is also treated as a breach of the general obligations.
 4. Similarly Chapters 2 and 3 of the Credit Act impose a number of specific obligations on licensees, including to reasonably assist ASIC with surveillance, and comply with responsible lending obligations and the National Credit Code at Schedule 1 of the Credit Act imposes specific obligations in relation to making and enforcing credit contracts.⁸
 5. If ASIC believes that the applicant is likely to contravene the general obligations, ASIC can reject an application for an AFS licence or credit licence.⁹
 6. When granting a licence, ASIC may impose conditions on the licence, including one that specifies the particular financial services or class of financial services an AFS licensee is authorised to provide.¹⁰ The Corporations Regulations and Credit Regulations respectively prescribe AFS and credit licence conditions which cannot be varied or revoked by ASIC. Further, standard conditions that usually apply to AFS licences when granted by ASIC are set out in ASIC Pro Forma 209. After granting a licence ASIC can vary, suspend or cancel the licence in certain circumstances.

6 Credit Act section 47(1). The term 'credit legislation' is defined in s 5 to include the Credit Act, the consumer protection provisions in Part 2 Division 2 of the ASIC Act and any other Commonwealth, state or territory legislation in so far as it covers conduct relating to credit activities. The requirement to have adequate resources and risk management systems does not apply to an APRA regulated body.

7 Corporations Act sections 912D-F and Corporations Regulations parts 7.7-9.

8 Credit Act sections 51, 53 and 71, and chapter 3.

9 Corporations Act sections 913A and 913B. However, this requirement to give the licensee an opportunity to be heard or make submissions does not apply to ASIC imposing conditions when a licence is granted. Credit Act sections 36 and 37.

10 Corporations Act section 914A(1), (6) and (7) and Corporations Regulations 7.6.04; Credit Act sections 36 and 37.

2. EXISTING ASIC POWERS

1. ASIC's current powers to regulate and modify the conduct of AFS and credit licensees are:
 - a. to vary, suspend or cancel the licence if ASIC can establish the licensee has breached the law, and the breach justifies this action;
 - b. to apply to the court for an injunction;
 - c. to direct the licensee to provide information; or
 - d. to negotiate an enforceable undertaking with the licensee (with their co-operation).

2.1. Cancellation of licence

2. ASIC may suspend or cancel an AFS or credit licence including where the licensee has not complied with, or ASIC has reason to believe that the licensee is likely to contravene, the general obligations. However before ASIC can suspend or cancel the licence, the licensee must have an opportunity to appear, or be represented, at a private hearing before ASIC, and be given the opportunity to make submissions on the matter.¹¹
3. ASIC may suspend or cancel an AFS or credit licence without offering a hearing to the licensee, in circumstances where the licensee ceases to carry on the financial services business, becomes insolvent under administration or in cases of conviction for serious fraud.¹²
4. The power to suspend or cancel a licence must be exercised having regard to the purposes of the regulatory regime.¹³ The Credit Act contains no provision setting out the objects of the credit licensing regime. The object of Chapter 7 of the Corporations Act is set out in section 760A as follows:

The main object of this Chapter is to promote:

- a. *confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and*
- b. *fairness, honesty and professionalism by those who provide financial services; and*
- c. *fair, orderly and transparent markets for financial products; and*

11 Corporations Act section 915C. Credit Act section 55.

12 Corporations Act section 915B. The precise circumstances depend on whether the licensee is an individual, partnership, body corporate or trustee. Credit Act section 54.

13 Re *Sovereign Capital and Australian Securities and Investments Commission* [2008] AATA 901 at [81].

2.3. Directions to provide a statement containing information

9. Currently, ASIC has the power to direct an AFS or credit licensee to give to ASIC a written statement containing specified information about the financial services or credit activities conducted by the licensee. ASIC may also direct the licensee to obtain an audit report on such a statement before it is given to ASIC.²⁰
10. These powers may be exercised by ASIC during a surveillance of a licensee's business, to ensure compliance with the financial services or credit laws, and during an investigation into suspected contraventions of the law. Examples of the types of information licensees might be directed to provide include:
 - a. the business conducted by representatives authorised by the licensee, including websites operated by each representative, remuneration structures and any restrictions on authorisations;
 - b. fees charged by the licensee and its representatives;
 - c. products and services on the licensee's approved products list (from which products are selected by representatives in providing advice to clients);
 - d. arrangements for reviewing risk management procedures and professional indemnity insurance; and
 - e. staff resources allocated to reviewing advice provided by representatives, complaints handling, product research and appointment and training of representatives.
11. A credit licensee might be directed to provide an audit report, for example, on a statement it is directed to provide detailing the methodology adopted in identifying clients who have made excess payments under credit contracts, steps taken to contact those clients, refunds and compensatory interest paid and steps taken to ensure excess payments are not made in future.
12. These powers are useful in obtaining information from licensees about how they are conducting their businesses and providing services to ensure compliance with financial services laws, which may also provide evidence of contraventions of those laws.

2.4. Enforceable undertakings

13. ASIC may accept an enforceable undertaking as an alternative to taking other action, including the exercise of its power to suspend, cancel or vary the conditions of an AFS or credit licence.²¹

²⁰ Corporations Act section 912C. Credit Act s49.

²¹ ASIC Act section 93AA and Credit Act section 322. See also RG 98.38-49 and RG 218.48-50.

14. ASIC only accepts an enforceable undertaking where it is the more effective regulatory outcome, considering:
 - a. the position of consumers and investors whose interests have been or may be harmed by the suspected conduct;
 - b. the effect on the regulated person's future conduct;
 - c. the effect on the regulated population as a whole; and
 - d. the community benefit in regulatory outcomes being achieved as quickly and cost-effectively as possible.²²
15. If ASIC considers that a person has breached a term of an enforceable undertaking, it may apply to the Court for:
 - a. an order directing the person to comply with that term of the undertaking;
 - b. an order directing the person to pay to the Commonwealth the amount of any financial benefit obtained from the breach;
 - c. an order directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
 - d. any other order that the Court considers appropriate.²³
16. An enforceable undertaking requires the cooperation and voluntary participation of the person against whom enforcement action is being considered. The factors relevant to deciding whether an enforceable undertaking is appropriate in the circumstances of the case include whether the person: is prepared to publicly acknowledge ASIC's views about the necessity for protective or corrective action; has cooperated with ASIC; and is likely to comply with the enforceable undertaking.²⁴ ASIC also has guidelines as to when it will not accept an enforceable undertaking, including in cases of deliberate misconduct, fraud, or conduct involving a high level of recklessness.²⁵

2.5. Civil remedies

17. In addition to ASIC's licensing powers, the regulator also has the ability to apply to the court for a range of orders to prevent or restrain a person from engaging in certain conduct following alleged contraventions of the financial services legislation.

²² The four critical considerations set out in RG 100.24.

²³ ASIC Act section 93AA (and 93A) and Credit Act section 322.

²⁴ ASIC RG 100.26.

²⁵ ASIC RG 100.21

18. Under section 1324 of the Corporations Act, the court is given power to grant injunctions on the application of ASIC or any other person whose interests have been affected. This can be an injunction directing a person to refrain from doing any act or thing or requiring them to do an act or thing.²⁶ The court exercises this power under its statutory jurisdiction and not the court's traditional equity jurisdiction. Under this jurisdiction, the court is able to take into account policy considerations and the objectives of the Corporations Act. The court is permitted to grant an injunction based on past events, even where there is no risk of a future breach. The key question for the court is whether the injunction would have some utility or serve some purpose within the contemplation of the Corporations Act.²⁷
19. The court also has wide powers to make orders under section 1101B of the Act to restrain or control the activities of persons involved in the financial services industry. This includes an order to restrain an individual from carrying on a business, in relation to financial products or financial services. The order may be made when the person has persistently or is continuing to contravene Chapter 7 or other laws dealing with financial products or services.
20. Similar powers for ASIC to seek an injunction from the court are also found under the Credit Act.²⁸

26 See subsections 1324(6) and (7) respectively for prohibitory and mandatory injunctions.

27 *ASIC v Mauer-Swisse Securities Ltd* (No 2) (2002) 20 ACLC 1637.

28 Section 177.

3. RELEVANT POWERS FOR COMPARISON

3.1. Directions – financial market infrastructure

1. ASIC has a power to give directions to market licensees, to protect people dealing in financial products, if ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product.²⁹
2. Similarly ASIC has a power to give directions to a clearing and settlement facility (CS facility) licensee, to protect people dealing in a financial product, or to ensure the fair and effective provision of services by a CS facility licensee.³⁰
3. ASIC also has a power to give directions to a derivative trade repository licensee, to promote compliance by the licensee with its obligations.³¹
4. If ASIC considers that a market, CS facility or derivative trade repository licensee requires directing, ASIC may give written advice to the licensee of that opinion and the reasons for it.³² If, after receiving ASIC's advice and the reasons for it, the licensee does not take action to prevent the dealings, ASIC may give the licensee a written direction with a statement setting out its reasons for making the direction.³³
5. The direction has effect for the period specified in it, up to 21 days, during which period the licensee must comply with the direction and not allow any dealings to take place contrary to it. As soon as practicable after making or varying the direction, ASIC must give a written report to the Minister setting out ASIC's reasons for doing so and give a copy of the report to the licensee.³⁴
6. Failure to comply with the direction is an offence, carrying a penalty of 100 penalty units (currently \$21,000) for each day the offence is committed.³⁵ If a licensee fails to comply with a direction, ASIC may also apply to the Court for an order that the licensee comply with the direction.³⁶

29 Corporations Act section 739(3) and (4).

30 Corporations Act section 823D and 823E.

31 Corporations Act section 904G.

32 Corporations Act section 794D(1); and 823D(1) and (3).

33 Corporations Act 794D(2); and 823D(4) and (7).

34 Corporations Act 794D(5).

35 Corporations Act 794D(3) and Schedule 3.

36 Corporations Act 794D(4) and section 823D(5) and (6).

Use and limitations of these powers

7. ASIC has not used its powers to give directions to market licensees, CS facility licensees or derivative trade repository licensees. However, these powers have been of utility to ASIC in that it has been able to rely on the powers to negotiate with licensees to take action that ASIC could have directed them to take if necessary.
8. Nevertheless, the procedural requirements on the exercise of these powers may impose limitations on their utility, as has been observed in previous Government inquiries. These requirements include that ASIC first advise a licensee that it proposes to give a direction supported by reasons for the proposed direction and, second, allow the licensee a reasonable opportunity to respond before giving the direction.
9. A further constraint on the utility of ASIC's directions power is that it is effective for a maximum period of only 21 days.³⁷

3.2. Other jurisdictions

10. The Taskforce also considered relevant powers in other Acts and in different jurisdictions.
11. In Australia, the Australian Prudential Regulation Authority has a power to give a direction to an ADI in circumstances including where the direction is necessary in the interests of depositors or the ADI is conducting its affairs in an improper or financially unsound way.
12. The kinds of directions which may be given include that the ADI order an audit, appoint or remove a person as a senior manager, or anything else as to the way in which the affairs of the ADI are to be conducted. Further detail on this power is set out in Annexure A.
13. The Taskforce also considered the approaches of a number of overseas jurisdictions. Different powers examined include:
 - a. a power to make orders imposing conditions on a licence or that the licensee submit to a review of its practices and procedures, which power may be exercised in the public interest rather than on finding a specific breach of the legislation (Ontario);
 - b. a power to make a direction order if satisfied that a licensee has breached, or is likely to breach, a provision of the legislation, which order may direct the licensee to comply with the provision and stipulate any reasonable steps the licensee must take in order to comply (New Zealand);

³⁷ See *Council of Financial Regulators: Review of Financial Market Infrastructure Regulation*, Consultation Paper, October 2011 at 7.1 and 7.2; *Financial Sector Assessment Program Update Australia*, IOSCO objectives and principles of securities regulation, Detailed assessment of implementation, November 2012, at page 43; *Financial System Inquiry Final Report*, November 2014, Recommendation 5 at page 79; *Consultation Paper: Resolution Regime for Financial Market Infrastructures*, February 2015, which contained a set of proposals aiming 'to ensure, as appropriate, the timely and effective resolution of a failing FMI in a manner that maintains financial system stability while avoiding the use of public funds to the maximum extent possible'.

- c. a power to give a direction to a licensee, relating to matters such as standards to be maintained by the licensee and competence of its representatives, which power may be exercised if necessary to do so in the public interest or for the protection of investors (Singapore);
- d. a power to impose requirements on a licensee, which may be exercised in circumstances including where it is desirable to advance the statutory objectives of the regulator (United Kingdom).

4. CURRENT ISSUES

1. In November 2014, the FSI found:

*ASIC is limited in its capacity to use the licensing regime to impose conditions on firms to address concerns about internal systems relating to serious or systemic misconduct. At present, these can often only be imposed through enforceable undertakings with the agreement of the licensee.*³⁸

2. The FSI Final Report recommended:

*... ASIC should have more capacity to impose conditions requiring licensees to address concerns about serious or systemic non-compliance with licence obligations (including expert reviews).*³⁹

3. ASIC has identified a number of issues with their existing directions powers. Broadly these are:

- a. the time, resources and procedural burden faced by ASIC to take administrative action against a licensee or seek an injunction from a court can result in a delay in ASIC exercising its existing powers. This can leave financial consumers at risk in the interim period as surveillance and hearings take place. (See case study 2).
- b. enforceable undertakings provide a mechanism for resolving concerns by negotiation with licensees but the outcome: requires acknowledgment by the licensee of ASIC's concerns; the licensee's cooperation; depends on the strength of the evidence available to support ASIC's concerns; and depends on the nature of the alternative remedies that could be pursued by ASIC.

4.1. Risk of delayed powers

4. To use its existing administrative powers, ASIC must allow time to: gather evidence, which can take months of surveillance; and meet the procedural fairness obligations such as providing hearings or advice and adequate time for the licensee to respond, as discussed in section 2.
5. Similarly, applying to a court for an injunction involves significant time, resources and costs in investigating and preparing a case to the required standard to commence court proceedings. In urgent matters, involving a licensee, there may be utility in providing ASIC with an efficient and quick mechanism to require a licensee put in place or modify internal systems or restrict its activities in appropriate ways to address risks to consumers.

³⁸ *Financial System Inquiry Final Report*, November 2014, Recommendation 29 at page 252.

³⁹ *Financial System Inquiry Final Report*, November 2014, Recommendation 29 at page 250. See also *Improving Australia's financial system: Government response to the Financial System Inquiry*, at page 24.

6. ASIC's ability to regulate and modify the conduct of AFS and credit licensees to achieve a protective outcome may be constrained during the delay before these obligations are met. (See case study 2).
7. Additionally, concerns may arise where the licensee has taken steps to rectify previous compliance failures, however ASIC continues to have concerns about whether the licensee is failing, or is likely to fail, to comply with its obligations.
8. A directions power could be of significant utility in ensuring that the risks posed to consumers by a licensee whose conduct is of immediate concern to ASIC are contained while the licensee's conduct is investigated and further regulatory steps are determined.
9. A power to give a direction to AFS licensees would enable ASIC to better ensure financial consumers were not exposed to the additional risks posed by the licensee continuing to appoint authorised representatives (ARs), terminating the appointment of ARs without securing their records and failing to properly monitor and supervise ARs, while ASIC investigates potential serious breaches. A directions power could also have enabled ASIC to direct that the licensee take appropriate steps to implement a program to assess whether clients affected by poor adviser conduct should be compensated.
10. A similar scenario is quite possible in the credit industry, which is characterised by having a number of large credit licensees (aggregators), each having a significant number of credit representatives. Where ASIC has taken banning action against a number of credit representatives of the same licensee this may suggest there is a systemic issue. A directions power would enable ASIC to direct the licensee to undertake an internal review of its systems for supervision of its representatives, if necessary, as an interim measure while ASIC investigates the potential grounds for taking protective action against the licensee.
11. Further, given the dispersed nature of the credit industry, ASIC does not have capacity to investigate all instances of suspected misconduct and take administrative action in each case against the representative and/or their licensee. A directions power could enable ASIC to respond to reports of misconduct (in the first instance at least) by directing a licensee to conduct its own investigation or compliance review. (See case study 2)

CASE STUDY 2

AFS licensee under surveillance transferring business to newly acquired licence

ASIC commenced a surveillance of an AFS licensee's financial planning business due to complaints about the licensee and concerns about the advisers being appointed under the licence. The surveillance ran for approximately 10 months and significant concerns were identified with the advice being provided and a failure to adequately monitor and supervise representatives.

ASIC engaged with the licensee and commenced negotiations for the imposition of additional licence conditions by consent. The conditions proposed by ASIC were largely uncontested by the licensee.

ASIC then identified that the licensee had acquired another AFS licence during the course of the ASIC surveillance. Because the licence was acquired privately, rather than applied for through the licensing process, it did not immediately come to the attention of the surveillance team and when it did, some representatives had already been moved across to the alternate AFS licence.

ASIC also received intelligence that the licensee had started to receive the first of a large number of complaints through the Financial Ombudsman Service. ASIC was concerned that the licensee was moving its assets and its financial services business to a new AFS licence and leaving a 'shell' behind, so as to avoid its responsibilities under the current licence.

A direction in this case to cease the transfer of the licensee's business to a new licence would be an effective consumer protection mechanism, while ASIC determined the course of further regulatory action.

4.2. Ambiguity of additional conditions

12. Case study 3 demonstrates how ASIC's imposition of an additional condition requiring the appointment of an independent expert may be challenged on the grounds that:
 - a. ASIC could not impose a condition to the effect that the licensee implement recommendations to be made by an independent expert, because at the time of imposing the condition ASIC could not be satisfied that the condition was for a permissible 'protective' purpose, given that ASIC did not know what the independent expert would recommend;
 - b. such a condition was an improper delegation of ASIC's condition-making power to the expert, as it would in fact be the expert who would impose conditions on the licence in making recommendations to be implemented by the licensee. (See case study 3).

CASE STUDY 3

AFS licensee challenging imposition of licence conditions

An AFS licensee self-reported breaches of certain financial services laws. Having investigated the breaches ASIC imposed additional conditions on the licence, requiring that the licensee appoint an independent expert to review, assess and report on the adequacy of the licensee's procedures for ensuring compliance and, further, that the licensee implement the expert's recommendations for improvement.

The licensee initially challenged ASIC's decision to impose additional conditions, though ultimately the matter resolved by agreement. The grounds on which the licensee sought to challenge ASIC's decision included:

- ASIC could not impose a condition to the effect that the licensee implement recommendations to be made by an independent expert, because at the time of imposing the condition ASIC could not be satisfied that the condition was for a permissible 'protective' purpose, given that ASIC did not know what the independent expert would recommend;
- such a condition was an improper delegation of ASIC's condition-making power to the expert, as it would in fact be the expert who would impose conditions on the licence in making recommendations to be implemented by the licensee.

13. With this lack of certainty as to the circumstances in which it may exercise this power, ASIC generally imposes conditions with the cooperation and consent of the licensee, negotiated in the same way as an enforceable undertaking, which is considered further below.
14. This lack of clarity casts doubt on ASIC's ability to impose forward-looking conditions designed to improve the licensee's future conduct where past misconduct has ceased, to produce a specific or general deterrent effect in the market, or for a purpose that is in the interests of the public or particular consumers, but which may not be perceived as strictly protective. Depending on the circumstances, there may be doubt as to whether imposing licence conditions to require the implementation of particular compliance measures, or a compensation programme, can be said to be 'protective'.

4.3. Limitations of negotiation

15. ASIC has placed significant reliance on enforceable undertakings as an enforcement tool, the terms of which can include the implementation of remediation measures and external compliance reviews.⁴⁰
16. Enforceable undertakings must be offered by a licensee and are generally negotiated as an alternative to ASIC exercising its administrative powers or initiating court proceedings. This requires acknowledgment by the licensee of ASIC's concerns.

⁴⁰ For example see 16-380MR Cash Converters to pay over \$12M following ASIC probe; 13-010 MR ASIC accepts enforceable undertaking from Macquarie Equities Ltd.

17. ASIC's ability to dictate the terms of an enforceable undertaking is dependent on the strength of its position in relation to any potential administrative or court proceedings. Accordingly, the use of enforceable undertakings will never be a complete solution to gaps in ASIC's enforcement powers, because obtaining an enforceable undertaking often depends on having an effective remedy to provide leverage. (See case study 4).
18. Particular difficulties arise where a licensee has taken some steps to rectify identified compliance concerns but ASIC remains concerned that those steps are not sufficient to ensure that there will not be further breaches by the licensee of its obligations or additional measures are required to ensure that the impact on clients or former clients is identified and, where necessary, remediated. For example a licensee may make appropriate amendments to its systems and processes to address how a breach occurred but has not established an appropriate remediation program to assess whether compensation is payable to consumers affected by the breach.
19. A directions power would enhance ASIC's ability to regulate compliance and remediation measures implemented voluntarily by a licensee, in circumstances where concerns arise as to the effectiveness of these measures.

CASE STUDY 4

AFS Licensee Suspending Authorisation of Representative and Reviewing Accounts

ASIC received a complaint alleging that an AR of an AFS licensee had misappropriated substantial funds from a client's account and put these to his own use. The complaint further raised a concern that the AR may seek to transfer funds from other client accounts (to which he had access as their adviser) to cover the shortfall in the first client's account.

ASIC commenced an investigation into the alleged conduct and advised the AR that it intended to inform the AR's licensee of the allegations and ASIC's investigation, pursuant to s916G of the Corporations Act. The AR informed the licensee himself, in response to which the licensee advised ASIC that it had suspended the AR from dealing with clients. ASIC requested that the licensee conduct a review of payments out of the AR's clients' accounts to identify any other potentially misappropriated funds, which the licensee in this case agreed to do.

However, without the licensee's agreement, there is no clear basis upon which ASIC could have required the licensee to undertake this review. In circumstances of this nature, a directions power could enable ASIC to direct the licensee to take urgent action that may be necessary to protect clients' interests.

5. SOLUTIONS

Position 1: ASIC should have the power to direct financial services or credit licensees in the conduct of their business where necessary to address or prevent compliance failures

1. The Taskforce adopts as its preliminary position that ASIC should be able to give a direction to a financial services or credit licensee in the conduct of their financial services or credit business where necessary to address or prevent compliance failures. The legislation should set out the types of directions that ASIC can make. This would include directing an AFS or credit licensee to:
 - a. cease appointing authorised representatives;
 - b. cease accepting new clients;
 - c. conduct a review or audit of an authorised representative's records;
 - d. engage properly qualified compliance staff;
 - e. cease transferring business to another licence;
 - f. cease making specific representations about financial products or services;
 - g. appoint a person nominated by ASIC to review and report on compliance processes;
 - h. establish a programme to assess claims for restitution or compensation to customers.
2. The legislation could also provide for additional matters to be included by regulation to enable the legislation to be updated to take into account new circumstances and risks.
3. The power for ASIC to give directions would not replace or reduce the existing utility of enforceable undertakings and other negotiated agreements between ASIC and licensees. The power would instead support the effectiveness of negotiated outcomes while clarifying the scope of ASIC's powers for licensees and consumers. For example, even in cases where it is not exercised, the power may assist ASIC in reaching an agreement with licensees where ASIC has identified issues at an early stage of an investigation.
4. The Taskforce considered, as an alternative approach, that the kinds of direction could be broadly defined in the legislation. For example, ASIC can give a direction to a market licensee to suspend dealings in financial products, a class of financial products or some other direction relating to those dealings. This would allow ASIC flexibility to use the powers to respond to new and unexpected circumstances not foreseen by the legislature. This approach was not adopted by the Taskforce as listing specific kinds of directions in the legislation would make ASIC's regulatory responses clearer, and foster greater consumer confidence in the AFS and credit licencing regimes. Further, the Taskforce considers a regulation-making power would provide sufficient flexibility for unforeseen kinds of direction. The Taskforce seeks views from the public on its preliminary position and on this alternative approach.

QUESTIONS

1. Should ASIC be able to give a direction to a financial services or credit licensee requiring them to take or refrain from taking specified action in the conduct of their business where necessary to address or prevent compliance failures?
2. Should the directions ASIC can make be prescribed in the legislation (with an ability to extend the list by regulation)? If so, is the above list appropriate?
3. Alternatively, should a directions power be drafted broadly to allow for a wider variety of directions?

Position 2: The directions power should be triggered where a licensee has, is or will contravene financial services or credit licensing requirements (including relevant laws)

5. The Taskforce adopts as its preliminary position that the power to make a direction should be triggered where ASIC has reason to believe that an AFS or credit licensee:
 - a. has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes, or would constitute a contravention of financial services laws or the credit legislation;⁴¹ or
 - b. has refused or failed, is or is proposing to refuse or fail to do an act or thing that the legislation requires a financial services or credit licensee to do.
6. The Taskforce considers that this would provide sufficient flexibility to enable ASIC to address a range of concerns about a licensee's business practices at an early enough stage to afford sufficient protection for financial consumers. At the same time the legislation will broadly define the circumstances in which the power to make a direction will be enlivened providing clarity for licensees.
7. Another option would be to identify public interest considerations or objectives as a basis on which a direction could be made by ASIC. ASIC could be given a power to make a direction 'in the public interest'⁴² for purposes aligned to its objectives as set out in section 1 of the ASIC Act. Relevantly this might include to:
 - a. maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;

41 As defined in s761A of the Corporations Act and s5 of the Credit Act respectively.

42 See for example the power to give directions to market and CS facility licensees, APRA's directions power and those in Ontario and Singapore.

- b. promote the confident and informed participation of investors and consumers in the financial system;
 - c. administer laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
 - d. take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.⁴³
8. Framing the power in this way would shift the focus from a requirement to establish specific breaches of the legislation or licence conditions before taking any action, to broad public interest considerations. While this may maximise ASIC's flexibility it may be at the expense of clarity for licensees, which could create uncertainty and ultimately impact on a licensee's perception as to the appropriateness of a direction made and preparedness to comply. Accordingly, the Taskforce has instead adopted the approach outlined in preliminary position 2.
9. In considering whether a power to give a direction to AFS and credit licensees is appropriate the Taskforce noted the product intervention power (PIP) that is currently being developed. While the PIP has not been finalised, the Taskforce understands that it will be designed to address risks of, or actual incidences of, significant consumer detriment associated with a newly issued financial product, its features or method of distribution and could involve requiring licensees and product issuers to: amend product marketing and disclosure materials; impose consumer warnings and labelling changes; restrict how a product is distributed; and ban products. The directions power contemplated by the Taskforce is not intended to be inconsistent with or undermine the limits to be imposed on the exercise of the proposed PIP.

QUESTIONS

4. Should the directions power be triggered if ASIC has reason to believe that a licensee:
- a. has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes, or would constitute a contravention of a law relevant to the provision of services by the licensee?
 - b. has refused or failed, is or is proposing to refuse or fail to do an act or thing that the legislation requires a financial services or credit licensee to do?
5. Alternatively, should broad public interest considerations or objectives provide the basis for ASIC making a direction? If so, are the objectives outlined above appropriate?

43 ASIC Act subsections 1(2)(a) (b),(d) and (g).

Position 3: ASIC should be able to apply to a court to enforce the direction and take administrative action if an AFS or credit licensee does not comply with a direction

10. The Taskforce adopts as its preliminary position that ASIC should be able to apply to a court to obtain an order requiring an AFS or credit licensee to comply with the direction and/or take administrative action if a licensee does not comply with a direction made by ASIC. There should be incentives to encourage licensees to comply with an ASIC direction to ensure that the directions power provides an efficient and flexible mechanism to secure greater compliance by licensees. At the same time the legislation should set out the process to be adopted by ASIC when making a direction to ensure there are adequate procedural protections for licensees.
11. An appropriate process for the exercise of a directions power would be as follows:
 - a. before making a direction ASIC to provide the licensee with notice setting out: its intention to make a direction, reasons and a reasonable period of time for the licensee to respond. A 'reasonable' period of time for a response will depend on the circumstances of the case and should take into account the need for urgent action in some cases;
 - b. if any response received from the licensee does not adequately address ASIC's concerns ASIC may make a direction;
 - c. when making the direction ASIC should set out its reasons for making the direction and a time frame for complying with the direction that is reasonable in the circumstances.
12. This provides an efficient process that strikes an appropriate balance between the need to afford procedural fairness to the licensee and for sufficient flexibility to address a range of circumstances including matters where urgent action is required.
13. If a licensee does not comply with an ASIC direction, ASIC can apply to a court for an order requiring the licensee to comply with the direction. In addition, a failure to comply could be a breach of a financial services law or credit legislation. This would enliven ASIC's administrative powers to take licensing action, including suspending, cancelling or imposing conditions on the licence and/or to make a banning order. ASIC's exercise of these administrative powers would be subject to the requirement to offer the licensee a hearing and make submissions and to the considerations discussed above including the need to exercise them for a protective purpose and to further the objectives of the legislative scheme.
14. The Taskforce considered, as an alternative approach that a failure to comply could also be a criminal offence as is the case for a market infrastructure licensee that fails to comply with an ASIC direction. The Taskforce's preliminary view is that a criminal prosecution may be a disproportionate response to a failure to comply with an ASIC direction. However, it proposes to seek stakeholder views as to the appropriateness of this.
15. Further, the Taskforce considers that if an AFS or credit licensee's failure to comply with a direction was a criminal offence the following procedural requirements would be appropriate:

- a. before making a direction the affected licensee should be given an opportunity to appear, or be represented at a hearing and to make submissions on the matter, as ASIC is required to do before exercising its powers to suspend, cancel or vary conditions on a licence; and
 - b. in urgent matters ASIC could make an interim direction without providing a hearing, but would be required to provide a hearing within a certain time frame.⁴⁴
16. The Taskforce seeks views from the public on its preliminary position and on this alternative approach. It also seeks views on whether it would be appropriate to provide for a civil penalty remedy as an alternative to criminal prosecution.
17. In either case, failure to comply with a court order requiring compliance with an ASIC direction should give rise to more serious sanctions to secure compliance and deter non-compliance in the future.
18. A licensee that breaches a court order requiring compliance with an ASIC direction would be in contempt of court and liable to further sanctions. The Taskforce considers that these circumstances could also:
- a. provide a ground for an automatic suspension or cancellation of the licence; and
 - b. automatic disqualification of the directors of the licensee from managing corporations. Similar to automatic disqualification arising from a criminal conviction under section 206B, the maximum period of disqualification should be 5 years. This would be subject to a court's power to grant leave to a person to manage corporations in section 206G of the Corporations Act.

44 As in the case of ASIC stop orders, see Corporations Act section 739(4).

QUESTIONS

6. Should ASIC be able to apply to a court to seek an order requiring a licensee to comply with the direction?
7. If so, should there be sanctions, in addition to those relating to contempt, for a licensee and/or its directors if the licensee breaches the court order?
8. Should failure to comply with an ASIC direction be a:
 - a. criminal offence?
 - b. civil penalty provision?
 - c. breach of a financial services law or credit legislation and therefore a basis for administrative action?
9. Should ASIC be required to give written notice to a licensee before making a direction setting out: its intention to make a direction, reasons and a period of time for the licensee to respond that is reasonable in the circumstances?
10. Alternatively, should ASIC be required to offer the affected licensee an opportunity to appear, or be represented at a hearing and to make submissions on the matter before making a direction? If so, should ASIC also be able to make an interim direction without providing a hearing and be required to provide a hearing within a certain time frame?

ANNEXURE A — DIRECTIONS POWERS IN OTHER JURISDICTIONS

1. A review of a number of overseas jurisdictions indicates the following alternative approaches:
 - 1.1. a power to make orders imposing conditions on a licence or that the licensee submit to a review of its practices and procedures, which power may be exercised in the public interest rather than on finding a specific breach of the legislation (Ontario);
 - 1.2. a power to make a direction order if satisfied that a licensee has breached, or is likely to breach, a provision of the legislation, which order may direct the licensee to comply with the provision and stipulate any reasonable steps the licensee must take in order to comply (New Zealand);
 - 1.3. a power to give a direction to a licensee, relating to matters such as standards to be maintained by the licensee and competence of its representatives, which power may be exercised if necessary to do so in the public interest or for the protection of investors (Singapore);
 - 1.4. a power to impose requirements on a licensee, which may be exercised in circumstances including where it is desirable to advance the statutory objectives of the regulator (United Kingdom).
2. In Australia, APRA has a power to give a direction to an ADI in circumstances including where the direction is necessary in the interests of depositors or the ADI is conducting its affairs in an improper or financially unsound way. The kinds of directions which may be given include that the ADI order an audit, appoint or remove a person as a senior manager, or anything else as to the way in which the affairs of the ADI are to be conducted.
3. The following paragraphs consider these alternative approaches in further detail.

Australian Prudential Regulation Authority

4. APRA may give a written direction to an authorised deposit-taking institution (ADI) in certain circumstances, which include:
 - 4.1. the ADI has contravened a provision of the *Banking Act 1959* (**Banking Act**) or a prudential requirement regulation or standard;
 - 4.2. the ADI is likely to contravene a provision of the Banking Act or a prudential requirement regulation or standard and such contravention is likely to give rise to a prudential risk;
 - 4.3. the direction is necessary in the interests of depositors of the ADI;
 - 4.4. the ADI is, or is about to become, unable to meet its liabilities, or there has been, or might be, a material deterioration in the ADI's financial condition;

- 4.5. failure to issue a direction would materially prejudice the interests of depositors;
 - 4.6. the ADI is conducting its affairs in an improper or financially unsound way;
 - 4.7. the ADI is conducting its affairs in a way that may cause or promote instability in the Australian financial system.⁴⁵
5. The kinds of directions which may be given by APRA include directions to:
- 5.1. comply with a provision of the Banking Act or a prudential requirement regulation or standard;
 - 5.2. order an audit of the affairs of the ADI, or remove any auditor and appoint another auditor for such terms as APRA directs;
 - 5.3. remove a director or senior manager of the ADI from office, or ensure that a director or senior manager does not take part in the management or conduct of the business of the ADI except as permitted by APRA;
 - 5.4. appoint a person as director or senior manager for such term as APRA directs;
 - 5.5. not accept certain deposits or payments, or not borrow, pay or repay certain amounts;
 - 5.6. do anything else as to the way in which the affairs of the ADI are to be conducted or not conducted.⁴⁶
6. APRA may, but is not required to, publish notice in the Gazette of a direction given to an ADI.⁴⁷ If an ADI contravenes a direction it is guilty of an offence and an officer of an ADI, whose duties include ensuring that the ADI complies with the direction, also commits an offence if that person fails to take reasonable steps to ensure that the ADI complies with the direction.⁴⁸
7. An ADI may seek a review in the first instance by APRA itself, then by the AAT, of a direction made on one of the grounds referred to in sub-paragraphs 4.1–4.3 above.⁴⁹

45 Banking Act, section 11CA(1).

46 Section 11CA(2).

47 Section 11CE.

48 Section 11CG, the penalty for an individual is \$9,000 and for a body corporate \$45,000 (a separate offence is committed on each day for which the circumstances giving rise to the offence continue).

49 Section 11CA(5A) and Part VI.

Canada (Ontario) – Ontario Securities Commission

8. The Ontario Securities Commission (OSC) administers and enforces compliance with the Securities Act and the Commodity Futures Act. This includes regulating firms and individuals who are in the business of advising or trading in securities or commodity futures, and firms that manage investment funds in Ontario.⁵⁰
9. The OSC's enforcement powers include the ability to lay quasi-criminal charges, pursue civil proceedings and take administrative action.⁵¹ As to administrative action, if in the OSC's opinion it is in the public interest to do so, the OSC may make orders including that:
 - 9.1. a registration or recognition granted to a person or company be suspended or restricted for a specified period, or terminated, or that terms and conditions be imposed on the registration or recognition;
 - 9.2. a market participant submit to a review of its practices and procedures and institute such changes as may be ordered by the OSC—a 'market participant' includes a range of regulated entities, including a 'registrant' which is a person or company required to be registered under the Securities Act;
 - 9.3. a person or company be reprimanded;
 - 9.4. a person resign one or more positions held as, or is prohibited from acting as, a director or officer of an issuer, registrant or investment funds manager;
 - 9.5. a person or company who has not complied with Ontario securities law is required to pay an administrative penalty up to \$1 million and/or disgorge to the Commission any amounts obtained as a result of the non-compliance.⁵²
10. Because these orders may be made in the public interest, it is not necessary that the OSC find that there has been a specific breach of Ontario securities law before making an order, except in the case of imposing an administrative penalty or disgorgement. However, an order may not be made without a hearing, which is convened by an administrative tribunal of the Commission, generally in public.⁵³ A right of appeal lies from a decision of the Commission to the Divisional Court.⁵⁴

50 http://www.osc.gov.on.ca/en/About_our_role_index.htm; http://www.osc.gov.on.ca/en/Dealers_index.htm.

51 http://www.osc.gov.on.ca/en/Proceedings_before-court_index.htm; Securities Act, Part XXII.

52 Securities Act section 127(1).

53 http://www.osc.gov.on.ca/en/Proceedings_before-commission_index.htm;
http://www.osc.gov.on.ca/documents/en/Proceedings/osc_20140107_guide-enf-proceedings.pdf; section 127(4).

54 Section 9.

11. Proceedings before the Commission may be settled by agreement between the respondent and the OSC, the terms of which may include that the respondent is to return funds to investors. However, the mechanism by which the OSC may generally seek remediation is application to the Superior Court of Justice for a declaration that a person has not complied with Ontario securities law. Upon making such a declaration, the Court may make a range of remedial orders, including compensation or restitution.⁵⁵
12. A settlement before the Commission may also include the terms of an order that the respondent submit to a review of its practices and procedures, including the appointment of an external expert to undertake the review and report on the outcome.

Hong Kong – Securities and Futures Commission

13. The Securities and Futures Commission (SFC) regulates Hong Kong's securities and futures markets, deriving its investigative, remedial and disciplinary powers from the Securities and Futures Ordinance (Ordinance). Entities regulated by the SFC include brokers, investment advisers and fund managers dealing in or advising on securities, futures contracts and leveraged foreign exchange trading, also financial institutions but in relation to their securities business only.⁵⁶
14. The SFC may grant licences under the Ordinance to a corporation, which becomes a 'licensed corporation' and to an individual, as a 'licensed representative' of a licensed corporation. The SFC may also approve an individual as a 'responsible officer' of a licensed corporation. The SFC may register a financial institution, as a 'registered institution'.⁵⁷
15. In addition to its power to take disciplinary action by suspending or revoking a licence,⁵⁸ the SFC has general powers of intervention, by way of restriction notices, which enable it to:
 - 15.1. prohibit a licensed corporation from carrying on business in a specified manner, or require it to carry on business in a specified manner;
 - 15.2. prohibit a licensed corporation from dealing with any property held on behalf of clients or otherwise controlled by it, or require it to deal with such property in a specified manner;
 - 15.3. require a licensed corporation to maintain property desirable to ensure that it will be able to meet its liabilities.⁵⁹

55 Section 128.

56 <http://www.sfc.hk/web/EN/about-the-sfc/our-role/>; <http://www.sfc.hk/web/EN/about-the-sfc/our-role/who-we-regulate.html>.

57 The Ordinance, sections 116 to 121 and 126.

58 Sections 194 and 196.

59 Sections 204, 205 and 206.

16. These powers may be exercised on a number of grounds, which include that it appears to the SFC that the imposition of the prohibition or requirement is desirable in the interest of the investing public or in the public interest.⁶⁰ The SFC is not required to provide an opportunity to be heard before exercising the powers, but a right of appeal lies to the Securities and Futures Appeals Tribunal.
17. The powers have generally been exercised for the purpose of preserving assets of a licensed corporation and its clients.⁶¹ The SFC does not have a power which allows it to direct a regulated entity to undertake such measures as client remediation or external review of its compliance regime. However, the SFC has entered agreements with regulated entities which give effect to such measures, as part of resolving disciplinary action against them.⁶²

New Zealand – financial Markets Authority

18. The Financial Markets Authority (FMA) is New Zealand’s financial conduct regulator, responsible for ensuring public confidence in financial markets. With the commencement of the Financial Markets Conduct Act 2013 (FMC Act), the FMA has ‘an extended range of regulatory tools available to achieve better outcomes for investors, financial markets professionals and businesses’.⁶³
19. The FMA may make a direction order if it is satisfied that a person has contravened, or is likely to contravene, specified provisions of the FMC Act, including those relating to fair dealing, disclosure, governance, markets, licensing and financial reporting. A direction order may:
 - 19.1. direct the person to comply with the provision contravened or likely to be contravened by the person;
 - 19.2. stipulate any reasonable steps the person must take in order to comply with the provision or to avoid or mitigate any actual or potential adverse effects of a contravention, including:
 - 19.2.1. disclosing information;
 - 19.2.2. publishing corrective statements;
 - 19.2.3. complying with a prohibition or restriction on the making of any statement or the distribution of any document;

60 Section 207.

61 See for example <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=15PR1>, <https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR19>, <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=11PR137>.

62 See for example, <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=16PR85>, <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/enforcement-news/doc?refNo=16PR83>. Only the Court can make an order for compensation: see section 213 of the Ordinance.

63 <https://fma.govt.nz/fmas-role/what-we-do/our-role/>.

- 19.3. require the person to report to the FMA within a specified time, as to how and when the order has been or will be implemented.⁶⁴
20. The FMA may only make a direction order against a person if it gives the person:
 - 20.1. written notice that it may make an order and of the reasons it is considering doing so at least 5 days before making the order;
 - 20.2. an opportunity to make written submissions and to be heard on the matter within the notice period.⁶⁵
21. A right of appeal lies from a decision of the FMA to make a direction order, to the High Court on a question of law only.⁶⁶ The FMA may, but is not required to, publish notice of a directions order on its website.⁶⁷ The FMA has published one direction order to date.⁶⁸
22. Other provisions of the FMC Act confer powers on the FMA to make orders and give directions. For example, the FMA may in certain circumstances require a licensee to submit an action plan, specifying proposed steps to remedy or avoid contravention of a market services licensee obligation, mitigate the adverse effects of a material change in circumstances, or correct false or misleading information.⁶⁹

Singapore – monetary authority of Singapore

23. The Monetary Authority of Singapore (MAS) has a range of functions, which in addition to acting as central bank include supervision of financial services and financial stability surveillance.⁷⁰ MAS has regulatory functions under the Securities and Futures Act, relating to institutions in the securities, futures and derivatives industry, and the Financial Advisers Act, relating to financial advisers and their representatives.
24. Both Acts confer upon MAS a power to give written directions to regulated entities under those Acts. For example, MAS may give a written direction to the holder of a capital markets services licence, if MAS thinks it necessary or expedient to do so in the interests of the public or a section of the public or for the protection of investors.⁷¹

64 FMC Act sections 468 and 469.

65 Section 475, but section 476 allows the FMA to shorten the notice period in urgent cases.

66 Sections 532 and 538.

67 Section 477(1)(c).

68 Direction order made to Cambrian Corporation Limited on 16 May 2016, concerning misleading marketing materials, <https://fma.govt.nz/news/enforcement-and-court-decisions/orders/direction-order-relating-to-cambrian-corporation-limited/>.

69 Sections 414 to 419.

70 <http://www.mas.gov.sg/About-MAS/Overview.aspx>.

71 Securities and Futures Act section 101(1). A 'capital markets services licence' is granted by MAS to a person to carry on business in any regulated activity, which includes dealing in securities, trading in futures contracts, leveraged foreign exchange trading and fund management: section 2 and the Second Schedule. See also sections 46, 46ZK, 81R, 81SV, 81ZL, 127, 129E, 282AA and 293 for directions that may be given to other regulated entities.

25. The written direction may be made in respect of such matters as:
 - 25.1. the standards to be maintained by the person in the conduct of their business;
 - 25.2. the type and frequency of financial returns and other information to be submitted to MAS;
 - 25.3. the qualifications, experience and training of representatives.⁷²
26. Similarly, MAS may give a written direction to any licensed financial adviser and any representative or supervisor of a financial adviser, if MAS thinks it necessary or expedient to do so in the interests of the public or a section of the public or for the protection of investors. A 'supervisor' of a financial adviser means any person who:
 - 26.1. is in the direct employment of, is acting for, or has an arrangement with the financial adviser; and
 - 26.2. is responsible, whether directly or indirectly, for the supervision or management of the conduct and performance of any representative of the financial adviser or another supervisor.⁷³
27. The written direction may be made in respect of such matters as:
 - 27.1. the standards to be maintained by a financial adviser or representative in the conduct of their business;
 - 27.2. the standards to be maintained by a supervisor of a financial adviser in the conduct of their functions and duties;
 - 27.3. the type and frequency of financial returns and other information to be submitted to MAS;
 - 27.4. the qualifications, experience, expertise or training of representatives, supervisors or officers (including the chief executive officer and any director) of the financial adviser.⁷⁴
28. Where a person has contravened, is contravening or is likely to contravene any provision of the Financial Advisers Act, the direction may require the person to (among other things):
 - 28.1. comply with or cease contravention of the provision;
 - 28.2. take such action as necessary to enable the person to conduct their business in accordance with sound principles;
 - 28.3. remove any of its directors (for a corporation) or any person considered by MAS to be unfit;

⁷² Section 101(2), without limiting the matters in respect of which a direction may be made.

⁷³ Financial Advisers Act, sections 2 and 58.

⁷⁴ Section 58(2)(a), without limiting the matters in respect of which a direction may be made.

- 28.4. take action as to the disposition or recovery of assets or recovery of sums improperly paid;
- 28.5. make good any default.⁷⁵

United Kingdom – Financial Conduct Authority

- 29. In the United Kingdom, the Financial Conduct Authority (FCA) is the conduct regulator for financial services and consumer credit firms and financial markets, under the Financial Services and Markets Act 2000 (UK) (FSM Act).⁷⁶
- 30. The FCA may give to a firm, which is then referred to as an 'authorised person', permission to carry on a regulated activity, but in giving or varying such permission must ensure that the firm will satisfy the 'threshold conditions' in relation to the regulated activities for which it will have permission. These include conditions relating to the effective supervision, appropriate resources, suitability and business model of the firm.⁷⁷
- 31. The FCA has power to vary or cancel an authorised person's permission and a power to impose requirements on an authorised person on its own initiative, referred to as its 'own-initiative powers'. The circumstances in which these powers may be exercised include:
 - 31.1. the person is failing or likely to fail to satisfy the 'threshold conditions';
 - 31.2. it is desirable to exercise the power in order to advance one or more of the FCA's 'operational objectives', these being the consumer protection objective, integrity objective and competition objective.⁷⁸
- 32. Where the FCA has concerns about a firm, in the vast majority of cases the FCA will seek to agree with the firm those steps the firm must take to address the FCA's concerns. However, in appropriate cases, the FCA will exercise its own-initiative powers to vary a firm's permission or impose a requirement on the firm. In urgent cases, it may do so with immediate effect or to take effect on a specified date.⁷⁹

75 Section 58(2)(b).

76 <https://www.fca.org.uk/about/the-fca>, <https://www.fca.org.uk/about/how-we-authorise>.

77 <https://www.fca.org.uk/firms/authorisation/apply-authorisation>, FCA Handbook High Level Standards COND 2 Threshold Conditions.

78 FCA Handbook Enforcement Guide EG 8.1.1, sections 55J and 55L of the FSM Act. In addition, the FCA has an asset requirement power, to prevent a firm from dealing with its assets (section 55P) and a power to refer its concerns to a 3rd party skilled person to identify specific risks and concerns and make recommendations about actions required to address those (section 166).

79 EG 8.2 and 8.3.

33. A variation may have the effect of removing part of a firm's permission whereas the imposition of a requirement will operate in parallel with the firm's permission. Examples of a requirement may be a restriction on the firm's dealings with customers or appointment of a compliance consultant. Where agreement is reached between the firm and the FCA as to the requirement to be imposed, the firm enters a voluntary requirement.⁸⁰
34. Where agreement is not reached, a decision by the FCA to exercise its own-initiative powers is made by the Regulatory Decisions Committee (RDC), an FCA Board Committee operationally separate from the rest of the FCA. The RDC issues a supervisory notice to the firm concerned, which may state that the variation or requirement is to take effect immediately or on a specified date, but provides an opportunity to the firm to make written representations and attend a representation meeting. Alternatively, the firm may refer the notice to the Upper Tribunal, which has the power to suspend the effect of a notice.⁸¹

United States – Securities and Exchange Commission

35. The US Securities and Exchange Commission (SEC) oversees the key participants in the securities industry, including securities exchanges, securities brokers and dealers, investment advisers and mutual funds. Enforcement action by the SEC includes administrative proceedings, in which a variety of sanctions can be imposed, including cease and desist orders, suspension or revocation of broker-dealer and investment adviser registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement.⁸²
36. Administrative proceedings are initiated by the SEC's Division of Enforcement. Generally, the order initiating Proceedings directs that a hearing be held before an administrative law judge (ALJ), who is independent of the Commission. The ALJ issues an initial decision, including any recommended sanction. Either the person who is the subject of the proceeding or the Division of Enforcement may appeal to the Commission, which may also determine on its own initiative to review an initial decision. The Commission's decision may be appealed to a United States Court of Appeals.⁸³
37. The SEC can exercise direction over the conduct of a securities industry participant through administrative proceedings by imposing a placement of limitations on the person. The statutory mechanism by which this power is exercised depends on the type of industry participant.

80 See the FCA's press releases in relation to an agreement by Wonga, the UK's biggest payday lender, to pay redress for unfair debt collection practices — <https://www.fca.org.uk/news/press-releases/wonga-pay-redress-unfair-debt-collection-practices> — and implement changes to its business practices — <https://www.fca.org.uk/news/press-releases/wonga-make-major-changes-affordability-criteria-following-discussions-fca>.

81 <https://www.fca.org.uk/about/committees/regulatory-decisions-committee-rdc>, FCA Handbook Decision Procedure and Penalties Manual, DEPP 3 The nature and procedure of the RDC.

82 <https://www.sec.gov/about/whatwedo.shtml>.

83 <https://www.sec.gov/alj>.

38. Registration and regulation of brokers and dealers is governed under section 15 of the Securities Exchange Act of 1934 (Exchange Act). Section 15(b)(4) requires the SEC to 'censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of any broker or dealer', if it finds that this is in the public interest and that the broker or dealer, or any person associated with them, has (among other things):
 - 38.1. made a materially false or misleading statement to the SEC or other regulatory agency;
 - 38.2. committed a relevant felony or misdemeanour (which generally includes offences of dishonesty or arising in the course of a securities business);
 - 38.3. been enjoined by court order from acting in a capacity in the securities industry;
 - 38.4. wilfully violated or is unable to comply with a provision of the Exchange Act or certain other Acts relating to the securities industry;
 - 38.5. failed reasonably to supervise another person who has committed such a violation, except where:
 - 38.5.1. there were established procedures that could reasonably be expected to prevent such a violation;
 - 38.5.2. the person has reasonably discharged their obligations under those procedures, without reasonable cause to believe they were not being complied with.
 - 38.6. been barred or suspended by the SEC from associating with a broker or dealer or related industry participant.
39. Section 203(e) of the Investment Advisers Act of 1940 (Advisers Act), which governs the registration and regulation of investment advisers, is in similar terms.
40. The SEC may also direct industry participants to take corrective action in Cease-And-Desist proceedings under the Exchange Act, the Advisers Act and the Securities Act of 1933 (Securities Act). Section 21C of the Exchange Act allows the SEC, if it finds that any person is violating, or is about to violate, any provision of the Act (or rule or regulation thereunder), to make an order requiring the person to cease and desist from committing the violation. Such an order may also require the person to take steps to effect compliance with the provision and 'require future compliance or steps to effect future compliance, either permanently or for such period of time as the Commission may specify'.
41. Sections 203(k) of the Advisers Act and 8A of the Securities Act are in similar terms. Each of these provisions also allows the SEC to make temporary orders in the case of conduct that 'is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest'.

42. Accordingly, the SEC can require an industry participant to take specific corrective action, relying on its powers to either:
 - 42.1. 'place limitations on the activities, functions, or operations of' a person under sections 15(b)(4) of the Exchange Act and 203(e) of the Advisers Act;
 - 42.2. require steps to effect compliance or future compliance under sections 21C of the Exchange Act, 203(k) of the Advisers Act and 8A of the Securities Act.
43. Such action may include appointment of an independent compliance consultant to review internal controls. Typically, a placement of limitations would be used to require this kind of action.
44. A settlement of administrative proceedings may include undertakings as to remedial action, which are included in the order made by the SEC.⁸⁴

⁸⁴ For example, see Release No 34-79454, <https://www.sec.gov/litigation/admin/2016/34-79454.pdf>.

ANNEXURE B — ASIC ENFORCEMENT REVIEW

TASKFORCE TERMS OF REFERENCE

The Taskforce will review the enforcement regime of the Australian Securities and Investments Commission (ASIC), to assess the suitability of the existing regulatory tools available to it to perform its functions adequately.

The review will include an examination of legislation dealing with corporations, financial services, credit and insurance as to:

- The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
- The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally;
- The adequacy of existing penalties for serious contraventions, including disgorgement of profits;
- The adequacy of enforcement related financial services and credit licensing powers;
- The adequacy of ASIC's power to ban offenders from occupying company offices following the commission of, or involvement in, serious contraventions where appropriate;
- The adequacy of ASIC's information gathering powers and whether there is a need to amend legislation to enable ASIC to utilise the fruits of telephone interception warrants or to grant the equivalent of Federal Crimes Act search warrant powers under ASIC's enabling legislation for market misconduct or other serious offences;
- The adequacy of ASIC's powers in respect of licensing of financial services and credit providers, including the threshold for granting or refusing to grant a licence, the circumstances in which ASIC may vary, suspend, or cancel licenses; and its coercive powers (including whether there is a need for ASIC to have a power to direct licensees to take, or refrain from taking, particular action);
- The adequacy of the frameworks for notifying ASIC of breaches of law, including the triggers for the obligation to notify; the time in which notification is required to be made; and whether the obligation to notify breaches should be expanded to a general obligation (currently confined under the Corporations Act to auditors, liquidators, and licensees, and noting that obligations to report offences exist under other Federal or State statutes); and
- Any other matters, which arise during the course of the Taskforce's review of the above, which appear necessary to address any deficiencies in ASIC's regulatory toolset.

Upon completion of the Review, the Taskforce will identify any gaps in ASIC's powers and make recommendations to the Government which it considers necessary to strengthen any of ASIC's regulatory tools and as to the policy options available that:

- address gaps or deficiencies identified in a way that allows more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- do not impose undue regulatory burden on business, and promote engagement and cooperation between ASIC and its regulated population;
- promote a competitive and stable financial system that contributes to Australia's productivity growth; and
- relate to other matters that fall within this Terms of Reference.

Further information on the ASIC Enforcement Review taskforce is available at our website: <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>.