FBAA
ABN: 22 094 784 040

The Treasury
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Via email: ASICenforcementreview@treasury.gov.au 09 October 2019

The FBAA welcomes the opportunity to make a submission in relation to the ASIC Enforcement Review Taskforce consultation process.

Our submission will respond to proposed changes to Licensing and Banning Orders predominantly confined to the changes as they are proposed to the *National Consumer Credit Protection Act* 2009. We do not provide any commentary relating to the Search Warrants and Access to Telecommunications Intercept Material.

The FBAA supports the majority of the proposed changes. We recognise that the existing NCCP Act framework around licensing and banning had occasion to produce outcomes that were inconsistent with the objectives of a robust licensing regime. At times ASIC appeared to have difficulty removing people from the credit industry who were, or who became, unfit. Alternately ASIC was unable to prevent entry of undesirable people into the licensed regime and had limited ability to reach those influencing the licensee without holding a frontline role. We support stronger measures to uphold the integrity of the licensing regime. The FBAA supports this through its own measures. We conduct our own integrity oversight program under a Code of Practice and our ACCC approved Disciplinary Tribunal and have referred individuals to ASIC where we have become aware of standards of conduct falling below acceptable limits.

We have relatively few comments to make in respect of the proposed amendments and set these out against the relevant headings below.

Licensing

1. Addition of giving effect to an AFCA determination as part of the fit and proper test.

The exposure draft proposes to include a new element to the fit and proper person test which is to require applicants to state whether the person has "ever been linked to a refusal or failure to give effect to a determination made by AFCA". We note the power is limited to determinations relating to a complaint. We hold some concerns with enmeshing a person's adherence to an AFCA determination with an assessment of their integrity which goes to the heart of whether they are fit and proper to remain in the industry. The provisions infer that AFCA gets it right 100% of the time which is clearly not the case.

We acknowledge that there is an expectation that licensees comply with AFCA determinations and expect in most cases that licensees should.

Further, we support a power that enables ASIC to refuse entry or remove a person from the industry where they unreasonably fail to give effect to an AFCA determination.

There are however reasons why a licensee may not comply with an AFCA direction in circumstances where it does not reflect on their integrity. We are concerned that once this proposed provision comes into effect, it will be applied on an absolute or reverse onus basis.

AFCA has unfettered power, with the ability to make binding rulings against licensees under compressed timeframes and based on limited evidence. AFCA is still a new organisation that is settling into the role of Australia's single EDR scheme. We are not yet able to determine whether AFCA has the resources and internal capability to produce 100% consistent and equitable decisions. To disagree with AFCA does not automatically make someone unfit to work in the industry.

For example, a licensee could be subjected to an unfair AFCA determination which carries significant financial implications. The licensee has no rights of appeal. Complying with the determination could bring the licensee's business to an end. Stalling or refusing to pay on such a determination could trigger the unfit provision, having to self-report to ASIC to cancel the licence – bringing about the end of their business. The only solution this licensee has to protect their future livelihood is to immediately give effect to the determination even though it may be wrong and/or manifestly unfair.

Entities hold licences under various structures. Structures such as proprietary limited companies are legitimately used to provide protection to those operating the company where they have acted in good faith. The obligation to comply with 100% of AFCA determinations or risk having the licence cancelled imposes unfair consequences on individuals that seek to rely on the protections afforded them by their structure or who face competing legal priorities.

For example: A licensee could be subject to a significant financial determination by AFCA relating to conduct by a rogue representative. The determination could be in relation to a large amount to one complainant or a large number of small amounts. Meeting the determination could push the company into insolvency. The company directors have obligations to the shareholders and other employees as well as obligations under the Corporations Act and licensing regime. The decision to wind up the company without giving effect to the AFCA determination may be in the best interests of all other parties (excepting the complainant(s)). It would be unreasonable to exclude from the industry all those associated with the winding up of the licensee company where they have made a decision in accordance with one set of legal obligations which has caused them to not give effect to the AFCA determination. We note a proposal exists to establish a fund of last resort to address this outcome in a manner that does not adversely impact a consumer/complainant.

We recognise that ASIC retains discretion and may not exercise its discretion to exclude someone from the industry for a failure to give effect to an AFCA determination however we believe once this comes into effect the power will be wielded vigorously.

2. Commencing activities within 6 months

We support measures that prevent warehousing of licences. We believe that 12 months is a more appropriate timeframe than 6 months for a licensee to commence activities after the issue of a licence.

Under ASIC's service charter, a standard licence application may take between 150 and 240 days for ASIC to process.

This timeframe used to be 28 days. While most licensee applicants do commence activities reasonably quickly after the grant of their licence, 6 months is quite short. The very long approval times for licence applications has the effect of creating business uncertainty. An entity cannot apply for a licence and then actively build its service offering in anticipation of a quick start-up off the back of a licence being promptly issued. We recognise the provisions allow ASIC to extend the time, but the onus will be on the licensee to beseech an extension. A 12-month timeframe is more appropriate.

3. Financial Penalties for failing to notify ASIC of a change of control within 30 days

Section 53A introduces financial penalties for failing to notify ASIC of a change of control of a licensee within 30 days. Currently there is no penalty.

We do not support sizeable financial penalties for contravening this provision unless the failure to notify is deliberate. The offence should not be a strict liability offence. Otherwise it risks becoming an exercise in ASIC issuing automated infringement notices with little chance of changing behaviour (most licensees would never experience a change in control and we submit that those who do would not be in a position to learn from an infringement notice for late notification because the likelihood of them facing a similar situation in the future is even less likely).

Where a change of control occurs for an operating business, there are hundreds of considerations that go into such a change. People involved in the change are thinking about the staff, the due diligence, the service offering, intellectual property rights, responsible managers, office space, equipment leasing, financing and a wide range of other issues at a time which is very stressful and intensive. People should promptly notify ASIC of the change in control, but it is something which is occasionally overlooked. We recognise that licensees should have processes and procedures in place to meet the obligations arising from a change of ownership but even then, it can be overlooked.
Failing to notify ASIC of a change in control within 30 days does not lead to any significant detriment unless control has passed to someone unfit (and the draft legislation assumes ASIC would have the resources to immediately identify an unfit person coming into a licensee and take action to prevent it). The penalty should fit the materiality of the contravention which we submit is nominal here.
We maintain that fewer than five penalty units is more than material enough and the provision should not be one of strict liability.

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Banning

We support the reforms to the banning provisions and make only one comment in relation to thereto.

We reiterate similar considerations in relation to the interaction with banning decisions and adherence with AFCA determinations as we expressed in respect of the licensing provisions.

We note the rapid evolution of the binding nature of EDR determinations. In little more than 12 months, industry has been taken from a position where a failure to give effect to an

EDR determination resulted in the EDR scheme referring them to ASIC, to a position where the EDR scheme can enforce adherence and ASIC can cancel a licence and/or ban persons from the industry for a failure to give effect to a determination.

We are not endorsing for a moment, any suggestion that people should not have to follow fair and reasonable AFCA determinations. We are concerned with the pace of change, that in the span of less than 2 years we have moved from a position of weak enforceability of EDR determinations to a regime where adherence is mandatory under all circumstances lest non-adherence result in banning and licence cancellation against the backdrop of a new, single EDR scheme, the performance of which is not yet well understood.

Yours faithfully

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Managing Director