

SUBMISSION

Submission to Treasury — ASIC Directions Power

28 February 2020

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The Manager
Consumer and Corporations Policy Division
Treasury
Langton Crescent
Parkes ACT 2600

Via email: FSRCconsultation@treasury.gov.au

28 February 2020

Dear Sir/Madam

Additional commitment in response to Royal Commission recommendation 7.2 – ASIC directions power

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the exposure draft legislation released on 31 January to provide ASIC with the power to issue directions to financial services licensees.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system, so all Australians can enjoy a comfortable and dignified retirement. We focus on the issues that affect the entire Australian superannuation system and its \$2.9 trillion in retirement savings. Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing almost 90 per cent of the 16 million Australians with superannuation.

If you have any queries or comments in relation to the content of our submission, please contact me on (02) 8079 0808 or by email gmccrea@superannuation.asn.au, or Julia Stannard, Senior Policy Advisor, on (03) 9225 4027 or jstannard@superannuation.asn.au. We acknowledge that the deadlines for this consultation are tight but we would welcome the opportunity to discuss our submission with you if time permits.

Yours sincerely



Glen McCrea
Deputy CEO and Chief Policy Officer

A. General comments

ASFA considers it important that ASIC has at its disposal an adequate suite of regulatory tools and powers to enable it to properly supervise its regulated population and enforce compliance with the financial services law. ASFA agrees that a directions making power should form part of that suite.

However, as with all regulatory tools and powers, it is important that the directions powers are subject to appropriate checks and balances and are not used in circumstances where existing tools and powers are adequate to address the conduct in question. ASFA is concerned that — as currently drafted — the potential impacts from the use of their directions powers could be disproportionate to the conduct that ASIC is seeking to stop or to direct.

In addition to this overriding concern, ASFA has identified some technical issues in relation to the exposure draft legislation. These are outlined below.

B. Specific comments in relation to the exposure draft

B.1 Breadth of the power

The directions powers contained in proposed new Division 7 of Part 7.6 of the *Corporations Act 2001* (“Corporations Act”) are almost completely unfettered. The powers, in proposed new sections 918 and 918F, can be exercised whenever ASIC has “reason to suspect” that a financial services licensee has engaged, is engaging or will engage in conduct that constitutes, or would constitute, a contravention of financial services law.

ASFA has a number of concerns in relation to the manner in which the directions powers are expressed.

Firstly, we note that “reason to suspect” would appear to be quite a low threshold, and one that would be difficult for a financial services licensee to disprove.

Secondly, we are concerned that exercise of the powers is not subject to any threshold as to the severity or frequency of the contravention or any requirement that ASIC has regard to the intent of the licensee. There is no requirement on ASIC to ensure proportionality between the contravention (or potential future contravention) and the actions required of a licensee under the direction.

ASFA is of the view the use of the directions powers should be unnecessary in relation to minor and/or inadvertent contraventions, which should typically be capable of resolution through existing regulatory processes. We are further of the view that the use of the directions power would in many cases be *inappropriate* for minor and/or inadvertent contraventions, as the requirement that ASIC publish the direction may cause reputational damage that is disproportionate to the severity of the contravention.

While ASFA anticipates that ASIC would not seek to use the powers in an inappropriate way, the open-ended nature of the powers is of concern. ASFA recommends that the powers are amended to include additional checks and balances. In particular, there should be a requirement that ASIC, prior to commencing the process for making a direction or interim direction, has regard to the seriousness of the contravention and whether it can be remedied using other enforcement tools.

We note that the draft explanatory memorandum provides only one example of a situation in which ASIC might exercise the directions powers, and we recommend that additional examples be provided to make it clearer to financial firms how ASIC might seek to utilise the new powers (see section B.5 below).

Finally, we note that the definition of “financial services law” is extremely broad. It includes some specific aspects of the Corporations Act and the *Australian Securities and Investments Commission Act 2001*, which clearly fall within ASIC’s regulatory jurisdiction. It also includes (in subsection 761A(d)) “any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services”.

This latter aspect of the definition is not subject to any explicit qualification that ASIC must have regulatory responsibility in relation to the legislation in question. ASFA is concerned that this has the potential, for dual-regulated entities, to cause confusion as to whether ASIC may issue a direction:

- in relation to a contravention of a provision regulated by APRA; or
- requiring a financial services licensee to cease or to engage in conduct that falls within a legislative provision regulated by APRA.

ASFA is of the view the exposure draft legislation should be amended to clarify the scope of ASIC’s powers in this respect.

We note that, concurrent to its consultation on the directions powers, Treasury is also consulting on amendments to the *Superannuation Industry (Supervision) Act 1993* that will affect the regulatory responsibilities of both APRA and ASIC in relation to superannuation. APRA and ASIC recently issued a joint letter to superannuation trustees, providing some very high level information about how regulatory oversight will operate if the proposed reforms become law. We would urge both regulators to provide more detailed information with respect to this.

Recommendation

Breadth of power

The exposure draft legislation should be amended to clarify the scope of the directions powers and include appropriate checks and balances in relation to their use, to ensure the consequences of a direction are proportionate to the contravention.

ASIC and APRA should provide a detailed description of how each will seek to utilise their enforcement powers and tools, given the proposed expansion of ASIC’s regulatory role in relation to superannuation.

B.2 Dual-regulated entities: consultation with APRA

Proposed section 918C sets out two conditions that apply to the exercise of the directions-making power in sub-section 918(3):

- Subsection 918C(1) requires that ASIC must not make a direction unless it has given the AFS licensee an opportunity to appear, or be represented at, a hearing before ASIC and to make submissions to ASIC. This operates as a true pre-requisite to the use of the power in subsection 918(3).
- Subsection 918C(2) provides that ASIC must not make a direction under subsection 918(3) in relation to a dual-regulated entity unless it has consulted APRA—however, pursuant to subsection 918C(3), the failure to consult will not invalidate a direction.

The exposure draft legislation is silent as to the order in which these conditions are to be satisfied, however, the fact that absence of consultation with APRA will not invalidate a direction suggests it is essentially discretionary. The process flow included as part of the draft explanatory memorandum is not clear, but suggests that any consultation with APRA will occur after, or at the same time as, ASIC gives the licensee the opportunity to make submissions or attend a hearing.

ASFA is of the view that where the AFS licensee is a dual-regulated entity:

- consultation with APRA should be a condition precedent to the exercise of the directions-making power in subsection 918(3) — that is, the failure to consult should invalidate a direction; and
- that consultation should occur prior to the licensee being given the opportunity to appear at a hearing and/or make submissions, as contemplated by subsection 918C(1).

For dual regulated entities, it is important to ensure that ASIC and APRA are liaising closely before any action is taken in relation to the making of a direction, to ensure there is maximum co-ordination of regulatory oversight.

Where ASIC has reason to suspect that any delay in issuing a direction “would be prejudicial to the public interest”, it has the option to make an interim direction under proposed subsection 918F(3), with no requirement to consult with APRA or to provide the AFS licensee the opportunity to appear at a hearing or make submissions. Where that threshold is not met—that is, where the making of the direction is not time critical—we are of the view it is reasonable to expect that ASIC will consult with APRA *before* proceeding.

Further, we consider the exposure draft should be amended to include a positive requirement on ASIC to notify APRA within one business day of making an interim direction in relation to a dual-regulated entity.

Recommendation

Consultation with APRA

Consultation between ASIC and APRA should be a condition precedent to making a direction (other than an interim direction) in relation to a dual-regulated entity. Consultation should occur *prior* to the licensee being given the opportunity to appear at a hearing and/or make submissions in relation to the direction.

ASIC should be required to notify APRA within one business day of making an interim direction in relation to a dual-regulated entity.

B.3 Publication of directions, variations and revocations

Proposed new section 918A requires ASIC to publish on its website a copy of a direction made under proposed sub-section 918(3) “as soon as practicable after making it”. Proposed subsection 918D(4) contains a similar requirement for publication where ASIC varies or revokes a direction. There are no equivalent publication requirements in the exposure draft Bill in relation to the giving, variation or revocation of interim directions.

ASFA is of the view that copies of interim directions should **not** be published, on the basis the financial services licensee is not provided with an opportunity to respond, via a hearing or submission, before the direction is given. We accept there may be time-critical cases where it will be appropriate for ASIC to give an interim direction. However, we consider it important that the AFS licensee is afforded an appropriate level of procedural fairness prior to the publication of that direction and that there are appropriate safeguards in place to minimise the risk of reputational damage.

As a result, we agree with the absence, in relation to interim directions, of provisions comparable to section 918A or subsection 918D(4). However, we note that paragraph 1.35 of the draft explanatory memorandum states (our emphasis):

“After giving a direction to a licensee, ASIC must publish a copy of that direction on their website as soon as practicable. **ASIC does not need to publish a copy of an interim direction** on their website.”

Similarly, paragraph 1.41 of the draft explanatory memorandum states (our emphasis):

“After varying or revoking a direction, ASIC must publish a copy of that variation or revocation on their website as soon as practicable. **ASIC does not need to publish a copy of a variation or revocation of an interim direction** on their website.”

ASFA is concerned that the emphasised words imply that publication of an interim direction (or its variation or revocation) is a matter of discretion for ASIC.

We recommend that this wording be rephrased, in the version of the explanatory memorandum that accompanies the introduction of the Bill into Parliament, to make it clear that copies of interim directions, or variations or revocations of interim directions, will **not** be published on the ASIC website.

However, in the event that the intention is to permit ASIC to publish copies of interim directions, we would consider it critical to ensure that ASIC is required to publish any subsequent variation or revocation of those directions.

Recommendation

Publication of directions, variations and revocations

The wording of the explanatory memorandum should be re-phrased to make it clear that the requirement for ASIC to publish copies of directions, and variations/revocations of directions, does not apply to interim directions.

B.4 Effective time of a direction Vs time for licensee to comply

Proposed sections 918B and 918G state that a direction, or interim direction, “takes effect when it is given to the financial service licensee in respect of which it was made”. Proposed section 918K, a civil penalty provision, states that a financial services licensee must not engage in conduct in contravention of a direction.

ASFA is concerned that—depending on the nature of the conduct that is the subject of the direction—immediate compliance with a direction may simply not be possible. This is particularly so if, for example, the direction requires a licensee to undertake a process such as a review or audit. Despite this, proposed new Division 7 contains no requirement on ASIC to give a financial services licensee time to comply with a direction.

In ASFA’s view, the exposure draft legislation should be amended to require ASIC to state, in a direction made under proposed subsection 918(3) or an interim direction made under 918F(3), a timeframe within which the licensee must comply. This timeframe should be reasonable, having regard to the terms of the direction—that is, taking into account the conduct that ASIC is directing the licensee to engage in or to cease. There should also be scope for ASIC to vary the direction to grant an extension of time for compliance, where this is considered appropriate—for example, if it is determined that completion of a process required by the direction is more time-consuming than anticipated.

The civil penalty provision for failure to comply with a direction, section 918K, should only be triggered where the licensee has not complied with the direction within the timeframe specified in the direction (or any variation thereof).

Recommendation

A direction must give the licensee time to comply

The exposure draft legislation should be amended to require ASIC to specify in a direction or interim direction a reasonable timeframe within which the financial services licensee must comply.

B.5 Need for regulatory guidance

While proposed subsections 918(2) and 918F(5) provide examples of the types of conduct in relation to which a direction may be made, these are non-exhaustive lists and it is specifically stated that the scope of the directions powers is not limited to these examples. We note that the draft explanatory memorandum provides only one example of a situation in which ASIC might seek to exercise the directions powers.

In order to provide certainty to financial services licensees, ASFA is of the view there should be a requirement for ASIC to promptly issue detailed regulatory guidance setting out the way it intends to administer the directions powers. This should clearly address matters including:

- how ASIC will satisfy itself that there is “reason to suspect” a contravention has occurred/is occurring/will occur
- the circumstances in which ASIC would typically resolve to use the directions powers rather than other regulatory tools and powers.

Recommendation

Need for regulatory guidance

ASIC should promptly issue regulatory guidance on its proposed use of the directions powers. This should outline the factors ASIC will consider when determining whether to use the directions powers rather than utilising other regulatory powers and tools, and include detailed examples.