



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

26 July 2017

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

Email: ASICenforcementreview@treasury.gov.au

Dear Sir / Madam

Re. Strengthening ASIC's licensing powers

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to the ASIC Enforcement Review on the Position and Consultation Paper 3 – Strengthening ASIC's licensing powers.

Our submission presents our observations based on the considered impact on consumers and our members' businesses, and our broader goal of improving professional conduct in financial planning.

The FPA would welcome the opportunity to discuss with you the issues raised in our submission.

If you have any questions, please contact me directly on heather.mcevoy@fpa.com.au or 02 9220 4500.

Yours sincerely

Heather McEvoy

Policy Manager

Financial Planning Association of Australia¹

¹ The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and super for our members – years ahead of FOFA.
- An independent conduct review panel, Chaired by Graham McDonald, deals with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules required of professional financial planning practices. This is being exported to 24 member countries and 150,000 CFP practitioners of the FPSB.
- We established the Financial Planning Education Council in 2011 as an independent body chartered with raising the standard of financial planning education. The FPEC has built a curriculum with 17 Australian Universities for Bachelor and Master degrees in financial planning. We have built a curriculum with 17 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, as a minimum, an approved undergraduate degree.
- We are the only professional body in Australia licensed to provide the CFP® certification program. CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional designations, such as the Chartered Accountant designation of the Chartered Accountants Australia and New Zealand (CA).
- We are recognised as a professional body by the Tax Practitioners Board



FINANCIAL PLANNING
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STRENGTHENING ASIC'S LICENSING POWERS

Position and Consultation Paper 3

**FPA submission to
ASIC Enforcement Review**

26 July 2017



STRENGTHENING ASIC'S LICENSING POWERS – CP3

Impact of regulatory burden

While the FPA supports the need to increase ASIC's regulatory powers, including greater scrutiny of licence applications, the proposed changes may pose some practical issues and implications, particularly for small businesses.

Small businesses may not have the scale or the experience in dealing with ASIC or the regulatory system, and may be unable to access the information required under the proposals without paying high consulting fees to assist them through the licence application process and compliance requirements. This may result in a disproportionate cost borne by small businesses, creating barrier to entry that will impact on market competition. The proposals may restrict small business' ability to secure an ASF licence possibly because of their lack of experience in dealing with the process, and not for reasons that are related to the integrity or quality of the service they provide clients or their business operations.

Recommendations

ASIC to provide meaningful assistance and service provision to small businesses seeking a licence, to help them navigate to the licence application process and requirements.

A special department for small businesses, including in relation to licence applications and compliance matters, be established within ASIC.

FPA response to consultation paper

Position 1: ASIC should be able to refuse a licence application (or, for existing licensees, take licensing action) if it is not satisfied controllers are fit and proper.

Consultation paper questions	FPA response
1. Should ASIC be able to refuse a licence application if it is not satisfied that the applicant's controllers are fit and proper to control a licensee?	<p>In principle, the FPA supports the intent of this proposal however we have concerns about its practical operations.</p> <p>While the FPA supports the need for controllers to be 'fit and proper', the FPA does not support this proposal if the licensing assessment requirements in the Corporations Act are aligned with the requirements in the Credit Act, in particular the 'fit and proper' test that would then apply to controllers. See response to Position 3 below for more detail.</p> <p>The FPA would support this proposal if an appropriate 'fit and proper' test applied.</p>
2. What would be the impact of this position on licence applicants?	<p>It may not always be possible for the licence applicant to access the necessary information about its controllers, including relating to their prior conduct (eg police check, bankruptcy check, references, statement of personal information declaration), to enable ASIC to properly make this assessment. For example, if it involves a foreign controller; or the entity has legitimate limited access to information about a controller; or the entity is unable to verify information about the controller.</p> <p>The FPA is concerned that this requirement may place unrealistic obligations and penalties on the licensee for matters that may be outside their control.</p>



	However we do note that both the controller and the licensee share a common interest in ensuring the continuation or approval of the licence which could overcome this issue.
3. When notifying ASIC of a change of control should licensees be required to provide ASIC with sufficient information to enable ASIC to assess whether:	
a. The proposed new controllers are fit and proper to control a licensee? and/or	<p>While the FPA supports in principle the requirement to ensure controllers meet an appropriate 'fit and proper' test, the 10 day period proposed under position 2 may be insufficient for many licensees to gather the required information about the controller to meet the test.</p> <p>There should be a mechanism to extend the 10 day period should the licensee also be required to provide information about the new controller in relation to the 'fit and proper' test.</p> <p>Alternatively, two separate timeframes should apply – 10 days for notification of change of control; and a longer period for the provision of information regarding the fit and proper test.</p> <p>An appropriate 'fit and proper' test should apply. See response to Position 3 below.</p>
b. The licensee remains competent to provide the financial services covered by the licence and able to comply with its obligations under the new controller?	<p>The FPA supports this position.</p> <p>However an appropriate timeframe should be considered.</p> <p>It would be unlikely that a new controller would make significant or material changes to a licensee within the first 10 days of taking control. Therefore it is unlikely that the competency of a licensee would change within 10 days of a change in control taking effect. It may be more meaningful to ensure the licensee remains competent to provide the financial services covered by the licence under the new controller, three to six months after the change in control takes effect.</p>
4. Should ASIC be able to take action to suspend or cancel an AFS or credit licence (after offering a private hearing) if it is no longer satisfied that the controllers of the licensee are fit and proper to control the licensee?	<p>In principle, the FPA supports this proposal.</p> <p>While the FPA supports the need for controllers to be 'fit and proper', the FPA does not support this proposal if the licensing assessment requirements in the Corporations Act are aligned with the requirements in the Credit Act, in particular the 'fit and proper' test that would then apply to controllers. See response to Position 3 below for more detail.</p> <p>The FPA would support this proposal if an appropriate 'fit and proper' test applied that did not include competency.</p>
5. Should a change of control require pre-approval by ASIC?	The FPA opposes this proposal.

Position 2: Introduce a statutory obligation to notify change of control within 10 business days of control passing and impose penalties for failure to notify.

Consultation Paper questions	FPA response
6. Would it be appropriate for the requirement to notify ASIC of licensee changes in control to be a statutory obligation rather than a statutory licence condition?	<p>The FPA supports this position.</p> <p>Appropriate transitional arrangements should apply.</p>



<p>7. Would it be appropriate for the obligation to require notification within 10 business days of the change of control taking effect?</p>	<p>The FPA supports the proposal to require notification of the change of control within 10 business days of it taking effect. However, appropriate longer timeframes should apply for the licensee to provide information about the new controller in relation to an appropriate 'fit and proper' test; and for the licensee to provide sufficient information to show that the licensee is still competent to provide financial services under its licence.</p>
<p>8. Would it be appropriate to introduce penalties for failure to notify ASIC of a change in licensee control?</p>	<p>The FPA supports this proposal. However penalties must be commensurate with the reason for the offence and serve to protect consumers, including clients of the licensee. Cancelling a licence would have significant impacts on clients, employees and authorised representatives who run their own business, for what may have been an administrative error.</p>
<p>9. If so, what penalties should apply? Should the penalty be criminal, civil penalty or both?</p>	<p>The FPA opposes an overly punitive approach. The regime must acknowledge that an individual may act in good faith to gather the appropriate information for ASIC but is unable to meet the deadline for reasons outside of their control. Criminal sanctions are opposed in breaches of the law unless misconduct, dishonesty, or fraud can be proven and an appropriate defence applies. Civil penalties with a certain number of penalty points and possibly a fine commensurate with the reason for the offense, should apply in relation to the proposed requirement to notify ASIC of a change of controller within 10 business days, with access to the appeals process. However, separate appropriate penalties should apply for</p> <ul style="list-style-type: none"> • the licensee to provide information about the new controller in relation to an appropriate 'fit and proper' test with appropriate timeframes, and • for the licensee to provide sufficient information to show that the licensee is still competent to provide financial services under its licence within an appropriate timeframe.

Position 3: Align the assessment requirements for AFS licence applications with the enhanced credit licence requirements. (As per the following changes)

Table 1 of the Consultation Paper summarises the proposed amendments necessary to align the Corporations Act licensing requirements with the Credit Act requirements:

Corporations Act – AFS licence applications	Credit Act – Credit licence applications	Proposed amendments to s913B of the Corporations Act
<p>1. ASIC looks at the:</p> <ul style="list-style-type: none"> • natural person applicant; • responsible officers of a body corporate applicant; • natural person partners of partnership applicants; and 	<p>ASIC looks at the:</p> <ul style="list-style-type: none"> • natural person applicant; • directors, secretaries and senior managers of a body corporate applicant; • natural person partners of partnership applicants; and 	<p>Amend subsection 913B(3)(a)(i) from “responsible officer” to “director or secretary and senior manager” of body corporate applicants.</p>



	<ul style="list-style-type: none"> natural person trustees of trust applicants.² 	<ul style="list-style-type: none"> natural person trustees of trust applicants.³ 	
2.	ASIC has regard to whether the above persons are of “good fame or character”. ⁴	ASIC has regard to whether the above persons are “fit and proper” to engage in credit activities. ⁵	Change the test of “good fame or character” to the “fit and proper” test.
If Position 1 is adopted the above will be extended to ‘controllers’ for AFS and credit licence applications.			
3.	Where ASIC has reason to believe that individuals associated with the AFS licence applicant are not of good fame and character it must also consider whether the applicant’s ability to provide financial services will nevertheless not be significantly impaired. ⁶	No requirement to consider whether the applicant’s ability to engage in credit activities would nevertheless not be significantly impaired after forming a reasonable belief that individuals are not fit and proper to engage in credit activities.	Remove the requirement to consider whether an AFS licence applicant’s ability to provide financial services would nevertheless not be significantly impaired after forming a reasonable belief that individuals are not of good fame and character (or fit and proper if the test is amended).
4.	ASIC has no express power to request an audit report. There is a ‘catch-all’ power to request any additional information in relation to matters that can be taken into account in deciding whether to grant the licence. ⁷	ASIC can expressly request an audit report as well as any additional information in relation to any matters that ASIC may have regard to in deciding whether to grant the licence. ⁸	Include an express power for ASIC to require an audit report as well as any additional information in relation to any matters that ASIC may have regard to in deciding whether to grant the licence.
5.	No deemed withdrawal mechanism for failure to comply with ASIC’s request for additional information.	Deemed withdrawal where the applicant does not lodge the additional information requested by ASIC, including an audit report. ⁹	Include a deemed withdrawal where there is a failure to provide additional information requested by ASIC.

The FPA notes that to be a fit and proper person to engage in credit activities means that the person:

- is competent to operate a credit business (as demonstrated by the person’s knowledge, skills and experience);
- has the attributes of good character, diligence, honesty, integrity and judgement;
- is not disqualified by law from performing their role in your credit business; and
- either has no conflict of interest in performing their role in your credit business, or any conflict that exists will not create a material risk that the person will fail to properly perform their role in your credit business.

Under the Tax Agent Services Act 2009, the criteria for determining whether an individual is a fit and proper person, the Tax Practitioners Board must have regard to:

2 Corporations Act ss.913B(2) and (3).
3 Credit Act ss.37(1)(g) and (h).
4 Corporations Act ss.913B(2) and (3).
5 Credit Act s.37(1)(c).
6 Corporations Act ss.913B(3)(a) and (b).
7 Corporations Act s.913B(1)(ca).
8 Credit Act s.37(4).
9 Credit Act s.38(5).



- a) whether the individual is of good fame, integrity and character; and
- b) without limiting paragraph (a):
 - i. whether an event described below has occurred during the previous 5 years;
 - a. you are convicted of a serious taxation offence
 - b. you are convicted of an offence involving fraud or dishonesty
 - c. you are penalised for being a promoter of a tax exploitation scheme
 - d. you are penalised for implementing a scheme that has been promoted on the basis of conformity with a product ruling in a way that is materially different from that described in the product ruling
 - e. you become an undischarged bankrupt or go into external administration
 - f. you are sentenced to a term of imprisonment, and
 - ii. whether the individual had the status of an undischarged bankrupt at any time during the previous 5 years; and
 - iii. whether the individual served a term of imprisonment, in whole or in part, at any time during the previous 5 years.

An individual must be fit and proper in order to obtain original registration as a tax practitioner and for the purposes of renewing registration or maintaining continued registration under the TASA. For a company or partnership practitioner, the 'fit and proper person' requirement applies to each individual director (in the case of a company) or each individual partner and director of any company partner (in the case of a partnership), regardless of whether those individuals are registered with the TPB.

Consultation Paper question	FPA response
10. Should the assessment requirements for AFS and credit licence applications be uniform? Or are there factors relevant to each sector that justify differences?	<p>No. While uniformity may deliver some efficiency benefits for ASIC and larger licensees, some of the Credit Act requirements are not appropriate to apply to the Corporations Act licensing regime.</p> <p>Many AFSL holders are also required to meet the requirements of the Tax Agents Services Act (TASA), particularly if they are licensed to provide personal financial advice. Aligning the Corporations Act and Credit Acts would create greater disparity with the TASA and increase the regulatory burden in meeting the requirements of multiple regimes.</p> <p>The FPA would suggest it would be more appropriate to align the Corporations Act and TASA requirements.</p> <p>If a licensee meets the 'fit and proper' test for another Regulator such as the TPB, or a professional body, this should be deemed as meeting the test for ASIC's purposes. The introduction of a Certificate of Good Standing granted by a professional body should be considered.</p>
11. If so, should the Corporations Act be amended to reflect the provisions of the Credit Act with respect to licence applications? In particular should:	<p>No.</p>
a. directors, secretaries and senior managers, rather than only responsible officers be assessed for AFS licence applications?	<p>The FPA supports this proposal</p> <p>Table 1 states: Amend subsection 913B(3)(a)(i) from "responsible officer" to "director or secretary and senior manager" of body corporate applicants.</p> <p>The role and responsibilities of a responsible officer are very unique, stringent, and far exceed those of a secretary, director or senior manager. It is unclear by the suggested amendment</p>



	<p>in Table 1 whether the role of responsible officer would remain or cease to exist.</p>
<p>b. individuals be assessed against a 'fit and proper' rather than a test of 'good fame or character' for AFS licence applications?</p>	<p>The FPA opposes the Credit Act requirement of competence (as demonstrated by the person's knowledge, skills and experience) in the concept of fitness in 'fitness and propriety', to replace the Corporations Act 'good fame and character' requirements.</p> <p>'Fitness' relates to the character rather than competence of an individual. Generally it is about the individual possessing the moral virtues to undertake the role as a professional.</p> <p>The focus of a 'fit and proper' test should be to ensure individuals in the roles of controller, director, secretary, senior manager and responsible officer, are free from misconduct.</p> <p>The roles of controller, director, secretary, senior manager and responsible officer, also vary significantly depending on the entity's business model and services. The appropriate education, experience, skills and knowledge that makes up a person's competency can therefore vary for each entity and for each role. The competency tests that apply to both the entity and individuals in various roles under the Corporations Act licensing regime is more appropriate as it recognises and applies to the diversity of roles within financial services.</p> <p>The FPA would support the alignment of the Corporations Act with the TPB's 'fit and proper' test, which is robust, appropriate and does not include competency requirements as indicated above.</p>
<p>c. the requirement to consider whether an AFS licence applicant's ability to provide financial services would nevertheless not be significantly impaired after forming a reasonable belief that individuals are not of good fame and character (or fit and proper) be removed?</p>	<p>No. The FPA opposes the proposal to remove s913B(3)(a) and (b) of the Corporations Act.</p> <p>While the FPA agrees there should be appropriate consequences for bad behaviour and breaches of the law, however consequences must be appropriate, and considered in context including the broader implications of those consequences. This proposal changes the ability of the licensee and those operating under the licence to do business and service clients, potentially based on the ability of one individual (responsible officer, secretary, senior director, controller) to meet the 'fit and proper' test, where that individual could be removed or replaced.</p> <p>For example, if a licensee is not able to continue to trade or provide services to its clients, it will be forced into administration. This will create significant flow on consequences for clients, PI arrangements, claims at EDR, and authorised representatives reliant on the licensee to be able to run their own business to earn a living and employ people.</p> <p>Under this proposal a change in the responsible officer could result in the cancelling of a license application or result in ASIC action against an existing licensee. The impact this would have on clients and the right to operate the business, because of one (potentially) replaceable individual, is disproportionate, is not in clients' best interest, and is not in line with natural justice as it does not permit the licensee the opportunity to address the problem.</p> <p>Should this proposal be implemented in order to make the cancelling of a licence a real threat for those deliberately doing the wrong thing, the following options should be considered:</p> <ul style="list-style-type: none"> • Introduce a special form of administration particularly for financial advice licensees that enables the licensee to



	<p>work through the issues identified by ASIC to ensure the protection of consumers.</p> <ul style="list-style-type: none"> • Allow licensees to continue to operate under strict conditions, possibly with oversight from the Court – for example, ASIC seek a Court order recommending a special partial suspension, with no new financial advice to be provided to clients and no new client engagements to be entered into, until the responsible person / controller meets the fit and proper test. Using the Courts for this process would permit an authority other than ASIC, to consider the risks and likely harm to consumers of the licensee continuing to trade versus the consequences of forced administration. This could be similar to the process courts use to deal with Company Administration or personal bankruptcy supervision, for example.
<p>d. ASIC be able to require an audit report from AFS licence applicants?</p>	<p>The FPA oppose this proposal.</p> <p>Consideration must be given to the protection of professional privilege in relation to audit reports. The purpose of an audit is to provide assurance under the model and principle of continuous improvement. It would be counter-productive to the purpose of auditing if there is a risk of the audit report ending up with ASIC and litigation lawyers (in respect to the search warrants powers being applied to these documents). This would undermine the purpose of professional privilege in ensuring the frank and open discussions to continuously improve business compliance.</p> <p>It is also unclear as to the type of audit reports that ASIC would require from AFS licence applicants. For example, s37(4) of the Credit Act refers to audit reports from suitably qualified persons such as statutory audits completed by registered company auditors. However there are also external audit reports such as client file reviews conducted by financial advice providers.</p> <p>The FPA does not support the use of client file reviews completed by licensees to be considered audit reports for the assessment of a licence application by ASIC.</p>
<p>e. a failure to provide additional information requested by ASIC result in a deemed withdrawal of an AFS licence application?</p>	<p>The FPA provide in principle support for this proposal as it applies to deliberate avoidance of an ASIC request for information.</p> <p>However, there may be valid circumstances where the applicant is acting in good faith but is unable to meet the ASIC timeframe to provide the information. Therefore, we recommend this proposal include the following conditions:</p> <ul style="list-style-type: none"> • ASIC requests for information include reasonable set timeframes within which the information must be provided, and an applicant can apply for a reasonable extension of time to provide the information • Relates to certain information requests that are pertinent to the application only • Access to the appeals process • The applicant is permitted to resubmit a license application in the future.
<p>12. What will be the impact on AFS licence applicants?</p>	<p>See sections above</p>



Position 4: ASIC to be empowered to cancel or suspend a licence if the licensee fails to commence business within six months.

Consultation Paper questions	FPA response
13. Should ASIC be able to immediately suspend or cancel an AFS or credit licence if the licensee fails to commence engaging in a financial services or credit business within six months of being granted a licence?	The FPA gives in principle support for this proposal. However, ASIC should be required to ensure appropriate communication with entities of the requirements. Entities should be given a warning in the lead up to the expiry date of the licence, and the ability to apply for extension of time on reasonable grounds. Licensees should have access to the appeals process.
14. If so, should licensees be given an opportunity to seek an extension of time?	Yes
15. Is six months an appropriate initial time frame?	Yes

Position 5: Align consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts. (this includes licence applications)

Consultation Paper questions	FPA response
16. Should the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts be aligned?	The FPA supports consistent requirements and penalties for false or misleading statements in relation to a licence application, licence variation application and other documents lodged with ASIC under the Corporations Act. While the FPA does not support uniformity of the assessment requirements for AFS and credit licence applications, the FPA supports the alignment of the consequences for making false or misleading statements in documents provided to ASIC under the Corporations and Credit acts.
17. Should the same penalties, including a combination of criminal and civil penalties, apply?	Appropriate civil penalties should apply to a person proven to be reckless, taking account of the materiality of the offence. It may be appropriate to apply civil and/or criminal penalties if a person has actual knowledge of the offence. Criminal penalties should apply in proven instances of fraud such as the falsifying documents (as described in paragraph 11 of the Consultation Paper). Individuals and entities must have access to the appeals process.



Position 6: Making a materially false or misleading statement in a licence application should be a specific basis for refusing to grant the licence.

Consultation Paper questions	FPA response
18. Should ASIC be able to refuse to grant an AFS or credit licence if the application or documents accompanying the licence application are false or materially misleading?	<p>Oppose.</p> <p>It may not be a deliberate act on behalf of the applicant. The consequences therefore do not match the behaviour, particularly if the omission or error is corrected, as in the case study provided in Consultation Paper 3 (pg. 26).</p> <p>This may be the first experience in dealing with ASIC and the Corporations Act as a potential licensee, as would likely be the case for small licensees. While the conditions must be strict there should also be recognition of the learning curve.</p> <p>Alternative consequences should be considered, for example:</p> <ul style="list-style-type: none">• Extra information requirements for the licence application to proceed• Probation period for first 6 months after commencement of business, with additional compliance requirements for applicants who's licence application included a materially false or misleading statement, which was then corrected to ASIC's satisfaction. This could be some form of Enforceable Undertaking with a final audit report provided to ASIC at the end of the period.

Position 7: Introduce an express obligation requiring applicants to confirm that there have been no material changes to information given in the application before the licence is granted.

Consultation Paper questions	FPA response
19. Should applicants seeking an AFS or credit licence or to vary an existing licence have an express obligation to confirm, before the licence is granted, that there have been no material changes in the applicant's circumstances that would render statements or information in the application false or materially misleading?	The FPA supports this proposal
20. Alternatively, should applicants be required to notify ASIC of material changes in the applicant's circumstances on an ongoing basis between the time of lodging an application for a licence or licence variation and ASIC making a decision with respect to the application?	The FPA supports this proposal