

26 July 2017

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

By email: [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

Dear Sir/Madam

### **Strengthening ASIC's Licensing Powers**

The Insurance Council of Australia (the Insurance Council) appreciates the opportunity to respond to the ASIC Enforcement Review Taskforce's (the Taskforce) Positions and Consultation Paper 3, *Strengthening ASIC's Licensing Powers* (the Consultation Paper). The Insurance Council is, in-principle, supportive of the positions outlined in the Consultation Paper. However, we submit positions 2 and 3 require further consideration to ensure that the expected benefits are sufficient to merit change.

#### **Position 1**

The Insurance Council is, in-principle, supportive of enabling ASIC to refuse a licence application or take licensing action against existing Australian Financial Services (AFS) licensees (licensees) if it is not satisfied controllers are fit and proper. We submit that, for compliance certainty, the criteria for what constitutes (or does not constitute) 'fit and proper' needs to be unambiguous. This could be achieved through an objective test explicitly incorporated into the legislation or regulations. This will minimise uncertainty for AFS licence applicants and existing licensees in determining whether the person they seek to appoint will meet the statutory requirements.

We note that the *Financial Sector (Shareholdings) Act 1998* restricts shareholdings in financial sector companies, including insurers, to no more than 15 per cent. As such, for the Insurance Council's members, determining control will most often focus on capacity to control the composition of the board/governing body, or capacity to determine decisions around financial and operating policies.

Our response to some of the questions posed regarding Position 1 follows.

Question 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
- 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?

The Insurance Council agrees that notifications to ASIC of a change of control should be accompanied by sufficient information to enable ASIC to assess whether the proposed new controllers are fit and proper to control the Licensee. However, requiring notifications to be accompanied by information about the licensee's ongoing competence is unnecessary. Licensees are required to meet a range of competence obligations as set out in section 912A(1) of the *Corporations Act 2001* (the Corporations Act) and any breach of these obligations is already required to be reported to ASIC (as required under section 912D).

Question 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?

The Insurance Council does not object to ASIC being able to suspend or cancel an AFS licence if it is no longer satisfied that the controllers are fit and proper. Nevertheless, we find it difficult to envisage a scenario where a licensee would be in a position to comply with the requirements under its licence and section 912A of the Corporations Act while being controlled by a person that is not fit and proper. In practice, we suspect that such a power would rarely be exercised. The Insurance Council would be concerned if such a power were to be used as an indirect means of disqualifying people.

Questions 5: Should a change of control require pre-approval by ASIC?

The Insurance Council submits that change of control should not require pre-approval by ASIC. We concur with the observations in the Consultation Paper that any such requirement will impose a regulatory burden on licensees and impose delays to appointment processes. The Consultation Paper also acknowledges that any such requirement will have significant resourcing implications; costs which would ultimately be borne by industry through ASIC's cost recovery arrangements.

## Position 2

The Taskforce proposes to introduce a statutory obligation to notify change of control within 10 days of control passing and impose penalties for failure to notify. This would replace the existing statutory licence condition that requires notification within 10 business days of the licensee becoming aware of the changes. However, if as proposed, licensees will be required to notify ASIC of control changes, as well as obtain and provide information about the controllers to enable ASIC to make a fit and proper assessment, consideration should be given to lengthening this time period. If the Taskforce were minded to recommend the change as proposed, the detail of the notification requirement should be subject to further consultation to ensure no unintended consequences arise. Consideration should be given to an appropriate transition period, as changing the reporting threshold will likely require licensees to make systems and process changes.

## Position 3

The Insurance Council understands the rationale for aligning the assessment requirements for AFS licence applications with the enhanced credit licence assessment requirements. The Taskforce proposes that the AFS licence requirements are amended to be consistent with the credit licence requirements. The Consultation Paper suggests that ASIC's experience of administering the credit licence regime since 2010 is that those assessment requirements

are more robust. Given any changes to the AFS licence requirements will impose costs on industry, we suggest that the proposal requires more detailed analysis to determine whether the expected benefits are sufficient to merit change.

#### **Position 4**

The Insurance Council does not object to ASIC being empowered to cancel or suspend a licence if the licensee fails to commence business within 6 months. We note however that there may, from time to time, be very legitimate reasons as to why a business has failed to commence within 6 months of a licence being granted. There should be legislative flexibility to enable licensees to apply for an extension of time, and for ASIC to grant extensions where it is reasonable for it to do so.

#### **Position 5**

The Insurance Council does not object to aligning the consequences for making false or misleading statements in documents provided to ASIC in the AFS and credit contexts.

#### **Position 6**

The Insurance Council does not object to ASIC being empowered to refuse a licence on the basis that a materially false or misleading statement was made in the licence application, provided:

- the materially false and misleading statement is the actual basis of the licence refusal; and
- the materially false and misleading statement was knowingly made; and
- the applicant is given the opportunity to correct the statement.

#### **Position 7**

The Insurance Council does not object to the introduction of 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. To minimise unnecessary compliance costs, we suggest that an applicant should only be required to provide such a declaration upon specific request by ASIC.

If you have any questions or comments in relation to our submission, please contact John Anning, General Manager Policy, Regulation Directorate, on (02) 9253 5121 or [janning@insurancecouncil.com.au](mailto:janning@insurancecouncil.com.au).

Yours sincerely



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