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Manager
Regulator Powers Reform Unit
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email: asicenforcementreview@treasury.gov.au

Dear Treasury,

AFA Submission – ASIC Enforcement Review Taskforce

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting their wealth.

Introduction

In this submission we have focussed our feedback on the Financial Regulator Reform (No. 1) Bill 2019: Banning Orders.

The AFA is supportive of enhancements being made to the ASIC banning regime and a sensible broadening of the criteria under which someone in the financial services industry can be banned. We support the extension of the banning powers to people who are managing financial services entities.

AFA's Comments with Respect to the Recommendations

In regard to the refusal or failure of an entity to give effect to a determination made by AFCA, we raise a concern with the impact on employees and others who lack decision making power and also the fact that two matters could arise at the same or similar times. A specific officer of the entity may have strongly argued in favour of making these payments and been over-ruled by the owner or manager. Two relevant matters could easily occur at roughly the same time. They could be related to the one issue. They could be material matters that put the solvency of the entity at risk. It would seem that this officer would be caught by this provision, even where they had argued in favour of making the payment and then left the entity as a result of concerns with respect to the non-payment. It is unclear what defence this person may have in such a case, however we do not believe that this should constitute grounds for the banning of this person.

Our feedback with respect to subsection 920A(1A) is as follows:

- We note that subsection 920A(1A)(e) refers to where the person has ever been an insolvent under administration. This seems inconsistent with the table in the Exposure Draft Explanatory Materials document on page 6, which refers to “a person that is insolvent under administration”, and page 12 which refers to “whether the person has even been ... an insolvent under administration”. We are concerned that a reference to ever (or even) been insolvent could incorporate insolvencies that occurred many years ago and that were as a result of unfortunate business ventures in another industry. There is no time limit on this and no application with respect to the industry where it occurred.
- We appreciate that the existing subsection 920A(1A)(d) refers to “any other matter ASIC considers relevant”, and that it is proposed that this would remain as the new subsection 920A(1A)(j), however we feel that this is unnecessarily open-ended. Neither has it been explained in the Exposure Draft Explanatory Materials document. It is our view that there should be some limitation placed on this provision to ensure that it where ASIC has reasonable grounds to take other matters into account.

With respect to the proposed new subsection 920A(1C) our concern is that the current state of the financial advice market and particularly the significant decline in the value of financial advice businesses is likely to increase the number of businesses going bankrupt and being put into liquidation. We certainly don't seek to defend phoenix type situations, however we feel that genuine bankruptcy is likely to be a much more common situation for financial advisers and we would not like to see financial advisers in this situation being unable to recommence their careers. We are also concerned that in the situation where a company goes into liquidation, capturing someone who was an officer within 12 months of this occurring, could actually pick up people who were completely unrelated to the reason that the entity went into liquidation. A 12 month period does seem like a long period of time.

Concluding Remarks

The AFA supports greater banning powers for ASIC, however as addressed above, we want to ensure that these changes will treat people fairly.

The AFA welcomes further consultation with Treasury should clarification of anything in this submission be required. Please contact us on 02 9267 4003.

Yours sincerely

Phil Anderson
General Manager Policy and Professionalism
Association of Financial Advisers Ltd