

4 October 2017  
ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email:

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Dear Colleagues

**ASIC Enforcement Review: Position and Consultation Paper 6  
ASIC's power to ban senior officials in the financial sector, 6  
September 2017 (Paper)**

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic. For convenience, we will adopt the positions and questions set out in the Paper. However, we will first make some general comments.

**General comments**

1. We recognise that improving senior executive accountability is crucial for customers to have trust and confidence in financial services businesses.<sup>1</sup> We are concerned, however, to ensure that the proposed positions set out in the Paper do not have unintended consequences and that there is regulatory consistency with other proposed reforms such as the Government's proposed Banking Executive Accountability Regime (BEAR).
2. We are also concerned to see that an change in the current position as proposed by the paper is amenable to review and judicial oversight.

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<sup>1</sup>In our submission, we use that expression in the sense that it is used in the Paper.

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3. At this stage, we are not convinced that the banning powers should be extended in the manner proposed to breaches of duty under sections 180,181,182 or 183 of the Corporations Act (**Act**).

**Position 1: Once the administrative banning power is enlivened ASIC should be able to ban a person from:**

- performing a specific function in a financial services business, including being a senior manager or controller of a financial services business; and/or
- performing any function in a financial services business.

**QUESTIONS**

1. *Is it appropriate that ASIC's power to ban individuals be broadly cast? If not, how should the power be framed? If limited to a ban from managing financial services business how should the term 'management' be defined?*
2. *Is it appropriate that these expanded powers to ban also apply in respect of credit businesses?*

4. We note that the Taskforce suggests at paragraph 6 that ASIC should be given flexibility. Thus, it is said that *the power to ban should be cast so that ASIC can ban a person from fulfilling specified positions, such as senior manager or manager, or, in some cases, it may be justifiable to ban a person from any involvement in a financial services business;*
5. We also note that these very broad powers are to either *be in addition to or instead of a power to ban a person from providing financial services*. In the context of financial services, the power would be a banning power from performing a specified function (including managing a financial services business) and performing any function in a financial services business (paragraph 3 at page 31 of the Paper);
6. We appreciate that the power to make a banning order would arise only when the power to make a banning order under Section 920A of the Act is attracted. Nevertheless, the potential scope of the power is extremely broad. In our view, it would be preferable if these powers were strictly circumscribed in the sense that there was an identification of the relevant functions involved.
7. We also are of the view that the power could extend to persons involved in "management" of the business or a specified part of the business. "Management" for these purposes should have its ordinary meaning and could be expanded to include specific circumstances such as occurs in the definition of "managerial or executive office" as in sections 9 and 200AA of the Act. Reference also should be made here to the definition of "officer" in section 9 of the Act. In particular paragraph (b) focuses upon the ability of the person to make decisions which in a real and substantial sense might impact upon the business or the financial standing of a corporation. These concepts could be picked up and replicated in any relevant definition of "management".

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8. In summary, although we appreciate the practical importance of ASIC having flexibility, we do feel that there ought to be some parameters placed around the concepts of "function" and "management";
9. We do not support the proposal to extend the *existing ground based on lack of training or competence...to cover directors, officers and senior managers* (paragraph 7 at page 3 of the Paper). Training for directors and senior managers can be very varied, is often specific to each organisation, and is not generally regulated. It would therefore be very difficult to ban a person for lack of training when no definitive benchmark exists. Additionally, we submit that competence in the sense of a senior manager is a very subjective concept, and is often dependent upon the scale of the business, the scope of the position, and the organisational structure of the company. Assuming the 'good fame and character' test in section 920A of the Corporations Act is replaced by a 'fit and proper person' test, we consider that much of the mischief ASIC is intending to capture as a result of a person not having adequate training or not being competent to be a director, officer or senior manager, would be caught by this ground.
10. We note the comment at paragraph 7 on page 32 of the Paper that the relevant person would retain the right to have ASIC's decision reviewed by the Administrative Appeals Tribunal.
11. For consistency, we agree that the final position adopted in respect of financial services businesses should also apply in the credit context, taking into account any specific circumstances, however, that differentiate the two sectors in a practical sense.

**Position 2: The threshold for the exercise of ASIC's power to ban senior officials in the financial sector should be expanded**

3. *Should the 'good fame and character' test in section 920A of the Corporations Act be replaced by a 'fit and proper person' test?*

12. We take no issue with this proposal, save to say that there ought to be consistency of approach with respect to banning under the Corporations Act and the National Consumer Credit Protection Act.

4. *Should the positions outlined above, so far as they relate to senior officials, adopt the current definitions of 'officer' and 'senior manager' in the Corporations Act? Or should some other definitions be used?*

13. See our comments in paragraph 7 above. We have no further comments to make.

5. *Is it appropriate that ASIC have power to ban individuals involved in phoenixing activity and are the positions outlined above appropriately cast? Should this ground be limited to phoenixing activity within a certain period and should the banning period for phoenixing activity be capped (as it is for director disqualifications under section 206F of the Corporations Act)?*

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13. We note the Government is proposing a range of measures it is intending to take to discourage people from engaging in "phoenixing", and is currently consulting on those measures. ASIC's consideration of these activities ought to be done as part of this process.

6. *Should ASIC be able to impose a ban based on a breach by an individual of a duty under sections 181, 182 or 183 of the Corporations Act? What would be the implications of allowing ASIC to ban based on a breach of section 180?*

14. We do not support the extension of the ban referred to in Position 1 to breaches of sections 180, 181, 182 or 183 of the Act. Breaches of these sections already attract a pecuniary penalty and a disqualification order where certain conditions are met, and no evidence has been adduced that these penalties are not operating effectively.

Should you have any questions in relation to the contents of this submission, we would welcome the opportunity to discuss it with you.

**Yours Faithfully**



**Paul Callaghan**

**General Counsel**



**Melinda Toomey  
Senior Policy Manager**