

4 October 2017

Ms Kate Mills  
Principal Adviser  
ASIC Enforcement Review  
Financial System Division  
The Treasury  
Langton Crescent  
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By email [ASICenforcementreview@treasury.gov.au](mailto:ASICenforcementreview@treasury.gov.au)

Dear Ms Mills

## ASIC's power to ban senior officials

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide this submission to the ASIC Enforcement Review Taskforce's (**the Taskforce**) consultation paper on ASIC's power to ban senior officials in the financial sector (**consultation paper**).

With the active participation of 24 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and the community, to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

### Introductory comments

The ABA supports public accountability of senior officials in the financial services sector and the removal of individuals from the sector who fail to meet accepted standards of behaviour and conduct. Such accountability is core to the preservation of strong consumer outcomes and the maintenance of the stability and integrity of financial service providers and the financial system more widely.

The strengthening of ASIC's powers to ban senior officials in the financial sector is being considered in a complex environment, where ASIC's banning powers, the Banking Executive Accountability Regime (**BEAR**), the outcomes of Prudential Standard 510 - Governance and Prudential Standard CPS 520 - Fit and Proper, and self-regulatory initiatives such as the Conduct Background Check and Financial Adviser Reference Checking Protocol are converging.

While these various initiatives are intended to be complementary, their overlapping nature risks a degree of complication for banks needing to assess the same conduct, through multiple lenses. There is potential for a senior manager who has allegedly engaged in inappropriate conduct to be simultaneously subject to BEAR and ASIC's enhanced powers.

If this review process was commencing with a clean sheet of paper we doubt that the complex system which is emerging would be considered a first-best solution.

Ideally there would be a single set of principles and accountability measures for senior executives encompassing all financial service providers. In this regard the ABA notes the UK Senior Manager and Certification Regime will be extended to all sectors of the financial services industry from 2018. In saying this we would not propose that the BEAR be extended "down the line" to non-executive employees.



The ABA believes that, in the absence of a common single regime for ensuring senior executive accountability in the financial services industry, and given the legislative differences in jurisdiction between APRA and ASIC, there should be close coordination between the exercise of the regulatory powers under the BEAR and ASIC banning regime.

Given the reforms are being developed concurrently, we ask that Treasury considers drafting the ASIC banning powers and BEAR to achieve complementarity and to ensure standardisation where possible. This would ensure similar behaviours in the two accountability regimes would lead to similar outcomes.

Also, the ABA notes that in the UK the Prudential Regulatory Authority (**PRA**) and the Financial Conduct Authority (**FCA**) have an informal process of deciding who will take the lead on conduct investigations that are relevant under their respective jurisdictions. In Australia, a similar but more formal approach could be outlined in the statement of expectations for each regulator. It is critical that there be clear delineation of boundaries between the respective regimes.

We note that the Taskforce considered the adoption of a regime similar to that contained in the BEAR which would have involved “imposing a new set of duties or expectations on individuals within the regulatory purview of ASIC”. In the end this approach was not adopted on the grounds that APRA’s regime has important differences, particularly with regard to prudential risk that is unique to ADIs.

Notwithstanding that difference, the ABA believes greater standardisation of senior executive accountability across the whole financial sector is an objective worth pursuing.

## 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.*

The ABA agrees that the power to ban individuals from holding a financial services licence should be broadened to capture broadly specified positions, and/or any involvement in a financial services business.

The ABA also supports the extension of these banning powers to apply to credit businesses.

Together these steps would assist in preventing banned individuals from gaining re-employment in more senior positions that do not directly require a financial services licence and in other areas of financial services.

We require clarification as to whether the ASIC powers will apply to support functions such as risk, compliance and internal audit (second line staff). There is a risk that application to these functions and level of personnel may inhibit the willingness of staff to escalate issues and incidents for fear of being collaterally caught.

## Position 2

*The grounds for ASIC’s power to ban under section 920A of the Corporations Act should include circumstances:*

- 1) *Where ASIC has reason to believe that the person is not:*
  - a fit and proper person to provide a financial service or financial services, or to perform the role of officer or senior manager in a financial services business; and/or
  - adequately trained, or is not competent, to provide a financial service or financial services, or to perform the role of officer or senior manager in a financial services business.



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- 2) *Where a person has been an officer, partner or trustee of a financial services or credit licensee that has been:*
  - the subject of a report by the Australian Financial Complaints Authority regarding a failure to comply with a determination of that authority; or
  - a corporation that was wound up and a liquidator lodged a report under subsection 533(1) of the Corporations Act about the corporation's inability to pay its debts.
- 3) *Where a person has breached their duty under sections 180, 181, 182 or 183 of the Corporations Act.*

The ABA supports Position Two, subject to excluding a ban based on a breach by an individual of a duty under section 180 of the Corporations Act.

The ABA agrees that the “good fame and character” test should be replaced with the “fit and proper persons” test as this latter test embodies a broader range of requirements, retains a character test, and importantly contains the requirement that an individual should be competent.

We also agree that the power should apply to individuals involved in phoenixing activity, and would argue there should be no cap on the banning period to ensure ASIC has the discretion to ensure if appropriate that individuals who engage in this activity are banned for life.

The ABA supports ASIC being able to impose a ban based on a breach by an individual of a duty (directors duties) where an individual acts for an improper purpose (section 181) or misuses their position or information (182 or 183 of the Corporations Act), on the proviso that procedures are put in place to ensure natural justice including a right to a fair hearing.

However, a ban for a breach of s. 180 must be based on the finding of a court through civil proceedings, and not ASIC making an assessment of whether the person has breached the provision. This would preserve the court's important role in objectively determining the reasonableness of actions taken by individuals where ASIC alleges a breach of s. 180 resulting from the breach of another law.

There have been several high-profile cases initiated by ASIC concerning s.180 in recent times. Banning a director/officer has severe consequences for a person's professional reputation and career, and it is appropriate that a court rather than ASIC should continue to assess whether there is a breach of s. 180 and if breached, whether a director/officer should be disqualified.

To ensure the power is applied fairly and proportionately, we believe ASIC should issue guidance that sets out the way it will apply so that individuals are fully informed as to the extent and reach of the tests and standards to which they will be held.

This could include providing further guidance and clarity on the meaning of “competent” and “adequately trained” and also examples of the types of (mis)behaviours that will trigger ASIC's use of its augmented banning powers.

### Additional Issue: AFCA reports

The ABA strongly supports the inclusion in 920A of the ground to ban an officer, partner or trustee who is the subject of a report by the Australian Financial Complaints Authority regarding a failure to comply with a determination of that authority.

However, it is the ABA's view this is an example of a broader principle - that a variety of regulatory and law enforcement bodies decisions/reports might also be equally significant grounds on which to ban an individual from the industry. Instead of pointing specifically to AFCA reports alone, we suggest a general principle be included as a point for consideration by ASIC in determining whether a person is not of good fame or character, or not a fit and proper person, under subsection (1A) of section 920A i.e. the insertion in that subsection of “whether the person was an officer, partner or trustee who had been involved in a financial services or credit licensee that had been the subject of a report or adverse finding or decision by a regulatory or law enforcement body.”



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This approach would also capture the view previously advocated to the taskforce that the fit and proper person test for responsible managers of AFS Licensees and directors and senior managers of Credit Licensees should also include an express consideration of whether the controller has previously been a controller or held a specified position in a Financial Services or credit business that has not complied with a determination of an approved EDR body.

I would be happy to further discuss these issues.

Yours sincerely

A handwritten signature in black ink that reads 'Tony Pearson'. The signature is written in a cursive, flowing style.

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