12 October 2017

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

By email: ASICenforcementreview@treasury.gov.au

ASIC Enforcement Review - Position and Consultation Paper 6
ASIC's power to ban senior officials in the financial sector

Thank you for allowing the Australian Financial Markets Association (AFMA) a short extension to make a submission in relation to the ASIC Enforcement Review - Position and Consultation Paper 6 (the consultation paper).

AFMA is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

AFMA supports the wider objectives of the proposed changes to ASIC's banning powers as outlined in the consultation paper. The comments in this submission are made with the intent of enhancing ASIC's ability to achieve its regulatory objectives.

We note the comments in the consultation paper that the positions reflect the need to address potential shortcomings in ASIC's banning powers which have been considered by the Financial System Inquiry and the Senate report on the *Performance of the Australian Securities and Investments Commission*, and that the ASIC Enforcement Review Taskforce (Taskforce) believes that the positions will enhance the regime and assist in addressing these shortcomings. The Taskforce has also noted that the prudential regime currently administered by APRA has important differences, including considerations around prudential risk, that may have influenced the decision to apply heightened requirements to senior executives of ADIs, but that it considers that ASIC's powers can be adequately enhanced through the measures outlined in the consultation paper.

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The overall regulatory regime applying to the financial services sector in Australia has become more complex, and this will continue with the introduction of the measures announced by the Government as part of the 2017 Budget, the continued development of reforms based on the findings of the Financial System Inquiry and the ongoing work of the Taskforce.

In this context, it is important that the regulatory regime operates in a clear and effective way in the interests of both financial services business and consumers. In order to ensure that the overall regulatory regime is efficient and achieves its objectives, enhancements to any part of the regime should be clear in their application. For example, the various elements of the overall regime should not overlap or create a situation where it is unclear which part of the regime applies in a particular circumstance, or create a situation where a person could be subject to multiple parts of the overall regime in relation to the same event or breach/failure, unless there are particularly compelling reasons why this is needed.

Accordingly, consistent with the intent of the Taskforce as indicated in the consultation paper, the purpose of the enhanced ASIC banning powers and the circumstances in which they are intended to be used should be clearly articulated in the legislation and explanatory memorandum to implement the reforms, to minimise the potential for overlap with other powers.

Responses to consultation paper 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 a financial services business, how should the term 'management' be defined?***

   There are a wide variety of activities and functions within a financial services business that do not constitute a financial service per se that requires an AFSL or an ACL[1], and therefore are not strictly within ASIC's jurisdiction. It is not clear that ASIC should have the power to ban a person from performing *any* function in a financial services business. If interpreted literally, the consultation paper can be read as inferring that ASIC could have the power to ban anyone who is employed by an AFSL or ACL.

   The gap to be addressed, as noted in the consultation paper, is ASIC's power to ban persons from managing financial services businesses because the current circumstances in section 920A do not cover directors or senior managers who may not have breached financial services laws but were nonetheless integral to the operation of the business. To this end the ban should be aimed at addressing the gap that has been identified.

   Management should be defined consistent with the current definition of "officer" and "senior manager" in the Corporations Act. The existing categories of Responsible Manager, and Responsible Person under APRA regulation, may also form part of the basis for a definition of "management" as it pertains to financial services. The New Zealand definition of "senior manager" includes a person who is not a director but occupies a position that allows that person to exercise significant influence over the management or administration of a company – ie. the CEO or CFO.

[1] For example, mail room, administration and certain corporate functions.

2. ***Is it appropriate that these expanded powers to ban also apply in respect of credit businesses?***

   It is appropriate that the banning powers extend to credit businesses to ensure that the regulatory approach is aligned.

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

   The existing good fame and character test in the Corporations Act assesses whether an entity that holds an AFSL is providing financial services efficiently, honestly and fairly. This obligation is goal-oriented and focusses on how a person carries on financial services business, considers past and future conduct and sets an ongoing standard of conduct expected in an AFSL entity.

   Unless legislated otherwise, a fit and proper test refers to a person's past record which can be proven as a fact. In *Kippe v Australian Securities Commission* (1998) 16 ACLC 190 at [220], this past record was held to refer to the enduring moral qualities of a person as an objective assessment which can be proved as a fact with no subjective public element. It does not refer to a person's good standing, fame or repute in the community (the latter being a subjective assessment).

   The efficient, honest and fair requirement considered in line with the good fame and character test provides flexibility and the ability to adequately reflect changing industry standards in relation to conduct.

   However, if the good fame and character test is to be replaced by a fit and proper person test, it should at least be consistent with the fit and proper person test that applies to credit licensees and the criteria set out for responsible persons of ADIs under the existing Prudential Standard APS 520 *Fit and Proper*.

   The fit and proper person test also importantly contains the requirement that an individual should be competent, and is directed to professional qualifications, experience, skills and other relevant considerations to be taken into account as to whether a person can properly perform their professional role.

4. ***Should the positions outlined [in the consultation paper] 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 definition/s be used?***

   Yes, the definitions of 'officer' and 'senior manager' are appropriate and the powers proposed for ASIC should be limited to 'officer' and 'senior manager' as defined in the Corporations Act. This will provide a consistent definition for individuals who have senior responsibilities within organisations.

5. ***Is it appropriate that ASIC have power to ban individuals involved in phoenixing activity and are the positions outlined [in the consultation paper] 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)?***

AFMA is generally supportive of enhanced banning powers for individuals involved in phoenixing activities.

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?***

Breaches of sections 180 to 183 of the Corporations Act are already addressed by civil penalty provisions and accordingly, extending ASIC's banning powers to include breaches of these provisions would possibly create procedural fairness issues.

On application from ASIC, the Court has the power to disqualify a person from managing corporations if a declaration of a contravention has been made and the disqualification is justified. In exercising its discretion the Court takes into account a wide variety of factors in addition to the present and future fitness of the person to manage a corporation, including losses suffered by the corporation, its creditors and customers, the gravity of the misconduct, previous good character, personal hardship and a person's willingness to assist the authorities.

A ban for a breach of section 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. The Court has an important role in objectively determining the reasonableness of actions taken by an individual where ASIC alleges a breach of section 180 resulting from the breach of another law. Banning of a director/officer by a Court effectively disqualifies them from being a director/officer, therefore a Court should continue to assess whether there is a breach of section 180 and the appropriate penalty in that case.

Imposing a banning order in the context of section 920A on narrower considerations raises due process concerns and unequal treatment of persons in a financial services business compared to those in a non-financial services business.

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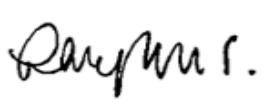
Please contact me on 02 9776 7997 or tlyons@afma.com.au if you would like to discuss any aspect of this submission.

Yours sincerely



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