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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 Taskforce Members,

### **AFA Submission – Consultation: ASIC’s Power to Ban Senior Officials in the Financial Sector**

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for 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 required to be 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 wealth.

### **Introduction**

The AFA supports measures that will have the effect of preventing the wrong people from continuing to operate in the financial services sector. Those operating a financial services business in a compliant manner should have the confidence that other participants are operating at similar standards and are therefore not adversely impacted by the inappropriate actions of others. We believe that ASIC should have broader powers to ban people from managing financial services businesses where they have been the subject of a banning order. Such powers need to be used appropriately and subject to the provisions of natural justice so that people have access to a hearing and an appeal.

In addition to the proposals in this consultation paper, we also recommend that ASIC should have the ability to sanction people in the financial services and credit industries, with these sanctions being

recorded on a public register for seven years. This will enable ASIC to take action against individuals that is of a more moderate nature, rather than being limited to banning or enforceable undertaking actions. This information would also be available to new employers/licensees and useful in the consideration of recruitment/appointment decisions.

## **Response to Questions Raised in the Consultation Paper**

### **Position 1 – Banning from Management of a Financial Services Business**

**Once an administrative banning power is triggered, ASIC should be able to ban a person from performing a specific function, or any function, in a financial services or credit business.**

- 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?**

The AFA supports this proposal. We believe that if someone has been appropriately assessed as unsuitable to provide financial services, then there is every probability that they are not suitable to manage a financial services business. We believe that it is appropriate that ASIC would be required to provide reasonable notice of intention to take such action and that the person had the ability to attend a hearing and present their case (including with an option of legal representation) as to why this was not a fair outcome. They should also have the right of appeal.

Importantly such a provision comes back to the definition of what managing a financial services firm may involve. We believe that it is better to rely upon the existing definitions of officer and senior manager in the Corporations Act and Credit Act as discussed below.

In considering this ability to ban a person from managing a financial services business, we need to give some consideration to their ability to continue to earn an income and provide for themselves and their family and would therefore suggest that it might be feasible in most cases for them to continue in a limited role where their ability to cause consumer detriment was significantly restricted. For this reason and to better ensure that the banning action suited the circumstances, we would suggest that it was appropriate for ASIC to have the power to ban someone from a specific function if appropriate or to completely ban someone from performing any function.

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

The AFA supports these increased powers applying to both the AFSL regime and also the Credit regime. We see both regimes as very important, with the capacity to cause significant harm to consumers and would therefore recommend that these provisions should apply equally to both regimes.

## Position 2 – Triggering the Power to Ban from Management:

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?**

To the extent that the ‘fit and proper person’ test is a higher standard, the AFA supports changing the requirement in section 920A to the ‘fit and proper person’ test.

We are also supportive of standardising the requirement across the AFSL and Credit regimes.

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

We note that the definitions of officer and senior manager are quite broad in their interpretation and would therefore suggest that it is appropriate for the purposes of extending the banning powers to rely upon these terms.

We would expect that ASIC would provide further detail on the application of the terms officer and senior manager in the regulatory guidance and therefore providing further detail in the legislation should not be necessary.

**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)?**

Yes, we believe that it is appropriate for ASIC to have the ability to ban people for repeated cases of phoenixing activity. It would be important that the person involved is given reasonable notice and the opportunity to present their case as to why they should not be banned and could also appeal against the ban to the Administrative Appeals Tribunal. This right of notice and a hearing is set out in Section 206F of the Corporations Act. The AFA believes that this measure, in the context of phoenixing activity, is appropriate as it will assist in minimising the risk of unpaid determinations. We believe that such a measure, along with other options, should remove the need for the Government to consider the introduction of a Compensation Scheme of Last Resort.

Whilst we would be concerned about a history of repeated avoidance of paying claims under either a Court or an EDR judgement, a career might span 40 to 50 years and therefore there are grounds for an argument that there should be a maximum time limit for repeat occurrences. In our opinion a repeat within a 20 year period should be sufficient grounds for this provision to apply.

The AFA believes that it is appropriate to cap the term of a banning for phoenixing activity and would suggest that the 5 year cap set out in section 206F of the Corporations Act is an appropriate reference point

**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?**

Sections 180 to 183 cover acting with care and diligence, acting in good faith, the use of position and the use of information. These are all important responsibilities and obligations for anyone acting as a director or an officer of a company and should apply in both a general sense and more specifically to people operating in the financial services sector. We believe that it is appropriate for ASIC to have the power to ban people based upon a proven breach of these obligations.

The key issue with respect to section 180 is defining the standard of what would be expected of a reasonable person. In a number of cases this will come down to a judgement call and where this is the case, then there would be a need for careful consideration of the circumstances before it was appropriate to ban someone from operating in the financial services sector.

**Concluding Remarks**

The AFA is committed to supporting legislative measures that ensure that only suitable people can operate in the financial services industry and the financial advice sector in particular and is therefore welcoming of measures that will enable unsuitable people to be removed from the sector.

The AFA welcomes further consultation with the Taskforce should it require clarification of anything in this submission. If required, please contact us on (02) 9267 4003.

Yours faithfully



**Philip Kewin**  
Chief Executive Officer  
Association of Financial Advisers Ltd