



ASIC

Australian Securities & Investments Commission

**ASIC Enforcement Review
Position and Consultation
Paper 6—ASIC’s power to
ban senior officials in the
financial sector**

**Submission by the Australian
Securities and Investments
Commission**

October 2017

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Overview

1 We support the Australian Government's commitment to ensuring that the Australian Securities and Investments Commission (ASIC) has the powers and regulatory tools we need to proactively address misconduct in the financial services and credit sectors.

2 As Australia's corporate, markets, financial services and consumer credit regulator, we strive to ensure that Australia's financial markets are fair and transparent and supported by confident and informed investors and consumers. In order to effectively carry out our role, we need a broad and effective enforcement toolkit.

3 We will continue to provide advice and support to the Australian Government and Treasury on the current ASIC Enforcement Review.

Note: See the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Media Release No. 95, [ASIC Enforcement Review Taskforce](#), 19 October 2016.

4 We welcome the release of the ASIC Enforcement Review Taskforce (Taskforce) [Position and Consultation Paper 6 ASIC's power to ban senior officials in the financial sector](#) (position paper) on 6 September 2017.

5 In this submission we provide observations from our regulatory experience to help the Government consider the key implementation issues for the positions put forward in the paper.

Management accountability

6 We view the proposals in the position paper in the context of efforts by governments—both in Australia and overseas—to create greater accountability for those in important management roles in banks and financial services and credit firms.

7 In Australia, the Government has introduced the Banking Executive Accountability Regime (BEAR) for this purpose. However, the BEAR is limited to issues that are of a prudential and systemic nature. In the United Kingdom, the Senior Manager Regime (SMR) has been put in place to create greater accountability for management in the banking industry and covers market conduct as well as prudential stability issues. We have previously spoken publicly on the need to extend some of the measures in the BEAR to cover conduct matters, consistent with the broad approach in the United Kingdom.

8 We strongly support greater accountability for poor conduct by senior executives in banking and throughout financial services. There is a strong

community demand for such accountability that is not met by the current regulatory regime.

- 9 We emphasise the importance of a regulatory toolkit that also allows us to take appropriate actions against senior executives, including compliance managers (in larger licensees), for misconduct. Effective regulation depends on achieving enforcement outcomes that act as a genuine deterrent to misconduct, including at the top of organisations.
- 10 We support a power to ban individuals from managing financial services and credit firms. We consider the ability to ban those involved in managing a financial services business will enable ASIC to focus regulatory attention on those who make decisions about the relative importance given to compliance and about what standards of conduct are tolerated thus setting the compliance culture within a financial services business. This power will provide a strong incentive for those individuals to create good compliance cultures.
- 11 There are limitations in ASIC's current banning powers, specifically regarding the scope of the powers and the threshold for enlivening ASIC's banning powers.
- 12 The Taskforce makes some proposals to address some of the limitations outlined in the paper. We consider that these proposals are an improvement on ASIC's banning powers; however, they may fall short in creating greater accountability for individuals in management positions.
- 13 The Taskforce proposals do not create new duties or a specific set of expectations for those in important management roles, nor do they enable ASIC to ban an individual who falls seriously short of meeting those expectations or complying with those duties.
- 14 Neither do the proposals address the sometimes amorphous allocation of management responsibility in very large institutions. In their current form, the proposals are likely to be more effective in regulating small entities (where there is less doubt about where responsibility lies) and of less assistance in holding to account management in very large institutions (such as the major banks).
- 15 Therefore, we consider that beyond the current Taskforce proposals, there needs to be:
- (a) a duty for individuals to take reasonable steps within their role as a manager to achieve compliance in the activities they manage;
 - (b) potential banning for serious failures to meet that duty (particularly where there are significant losses to consumers); and

- (c) a requirement that very large entities map key responsibilities, so that accountability is not undermined by ambiguity about who bears management responsibility.

16 These additional steps would advance our capacity to hold managers to account if they fail to take reasonable steps to ensure the people they manage comply with the law, especially when that failure results in serious and/or widespread detriment to consumers.

A Background

Key points

We have been concerned for some time that there are gaps in our enforcement toolkit that limit our ability to remove persons operating within the financial services industry, even after they have been banned from providing financial services and engaging in credit activities.

Findings from previous inquiries, including the Financial System Inquiry (FSI), also highlighted these limitations in ASIC's powers.

In this section we outline:

- the fundamental problems with ASIC's current banning powers, including the scope of the banning powers (in particular, the need to extend it to ban individuals from management roles) and the threshold for enlivening ASIC's power to make a banning order (in particular, the appropriate trigger for banning an individual from management); and
- other current efforts to increase management accountability, including the United Kingdom's SMR and the recently introduced BEAR in Australia.

ASIC's banning powers

- 17 While the initial licensing process is important as the point of entry to the financial services industry and credit industry, it is also critical for ASIC to have sufficient powers to remove persons from operating within each industry where warranted.

Shortcomings in existing powers

- 18 The Taskforce outlines the current banning powers available to ASIC on pages 5–10 of the position paper.
- 19 As stated in the position paper, fundamentally, there are two key problems with ASIC's current banning powers:
- (a) The scope of the banning powers and, in particular, the need to extend the scope to individuals in management roles.
 - (b) The threshold for enlivening ASIC's power to make a banning order and, in particular, the appropriate trigger for banning an individual from management.

Scope of banning power

20 Although ASIC has the power to ban an individual from providing financial services or credit activities in certain circumstances, these powers do not allow ASIC to ban individuals from being involved in the management of others who provide financial services.

21 As highlighted in the position paper (including by way of case examples), we have encountered individuals who, once banned from providing financial services or engaging in credit activities, continue or seek to perform other roles, including management roles, in the same organisation or another organisation. In such situations, we have very little regulatory recourse or ability to control those who actually set the compliance culture of the business and make significant decisions that affect consumers.

Threshold for banning

22 The position paper (on page 2) states that the circumstances in which ASIC is empowered to make a banning order are limited because:

the existing provisions may have the result that a director or senior manager of a financial services business, who has been shown to be unfit to fulfil their role – for example by managing or supervising a financial services business that is found to have serious systemic compliance failures over a period of time, or by engaging in ‘phoenixing’ activity (winding up companies leaving unpaid debts before emerging again as an officer of a new entity) – cannot be subject to an ASIC banning order.

23 We note that this is one of the limitations in the current threshold for banning.

24 However, we consider that a key limitation has not been discussed in the position paper in detail. As the law currently focuses on the actual delivery of financial services, the type of conduct that triggers banning predominantly involves staff who engage with consumers and deliver the financial services, rather than the managers who oversee that process.

25 A further difficulty in dealing with management failures and issues relating to accountability in larger licensees is in identifying the individuals responsible for management failings. Often there is ambiguity about who has made particular decisions and who is accountable for managing particular aspects of the business.

Recommendations from previous inquiries

26 We have been concerned for some time that there are gaps in our enforcement toolkit that limit our ability to remove persons from the financial services industry, even after they have been banned from providing financial services or engaging in credit activities.

27 Findings from previous inquiries—including the Senate inquiry into the performance of the Australian Securities and Investments Commission (Senate inquiry) and the FSI—also highlighted these limitations in ASIC's powers, which make it difficult to regulate individuals who do not themselves provide financial services but are still involved in managing a firm.

Senate inquiry

28 The [Senate inquiry's final report](#), published in June 2014, explained the current limitations in the law, including that ASIC has difficulty removing 'managing agents who do not themselves provide a financial service but are integral to the operation of the financial services business': paragraph 24.48. The inquiry therefore recommended that the Government consider the banning provisions in the licensing regimes.

FSI

29 The FSI highlighted past instances where ASIC lacked a broad enforcement toolkit to respond effectively and in a timely way to an emerging risk of significant consumer detriment.

30 The FSI recommended that, in addition to the power to ban persons from providing financial services, ASIC should also be provided with an enhanced power to ban individuals involved in financial services misconduct from managing a financial services firm. The [FSI's final report](#), published December 2014, stated that, '[a]n enhanced banning power should improve professional behaviour, management accountability and the culture of firms': page 220.

31 We also consider that the current regime provides limited incentives for improved culture to drive better internal controls and practices.

Effective enforcement toolkit

32 The community expects ASIC to take strong action against corporate wrongdoers. Effective enforcement is therefore critical for ASIC in pursuing our strategic objectives of promoting investor and consumer trust and confidence and ensuring fair and efficient markets.

33 It is important that we have a range of regulatory and enforcement sanctions and remedies available to us. This includes punitive, protective, preservative, corrective or compensatory actions, and the ability to resolve matters through negotiation or by issuing infringement notices: see [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151).

- 34 Gaps in our toolkit prevent ASIC from making an optimal enforcement response, because the appropriate remedy is not available. This can risk undermining confidence in the financial regulatory system.
- 35 We consider that having an adequate banning power for breach of management duties is central to effective enforcement. We consider this will also deter other contraventions and promote greater compliance, resulting in a more resilient financial system.
- 36 In recent years there have been a number of cases involving widespread and systemic misconduct and/or breaches of the law in a firm to the detriment of large numbers of consumers. In many cases we have been able to ban individuals who have provided the financial services. However, relatively rarely have we been able to take action against managers. One example is Storm Financial, where we brought action against Emmanuel and Julie Cassimatis as a breach of directors' duties (i.e. for breaching an obligation owed to the company) because, despite the nature of their conduct and the significant loss experienced by consumers, there was not a breach of an obligation owed directly to the consumers they were dealing with.
- Note: See *Australian Securities and Investments Commission v Cassimatis* (No 8) [2016] FCA 1023 for further details of the case.
- 37 In all such cases we should be in a position to investigate whether the problem has been caused or perpetuated by management failures and, where appropriate, take action to ban the managers involved.

Other current efforts to increase management accountability

United Kingdom—SMR

- 38 The position paper on pages 19–29 summarises approaches by overseas regulators to addressing some of the issues identified in the paper, including the approach in the United Kingdom.
- 39 In dealing with problems relating to individual management accountability, the *Financial Services (Banking Reform) Act 2013* (UK) introduced new accountability rules for the UK banking industry, which are intended to allow:
- (a) senior managers to be held accountable for misconduct that falls within their area of responsibility; and
 - (b) individuals at all levels to be held to appropriate standards of conduct.
- 40 This regime is regulated by the Financial Conduct Authority (FCA) and Prudential Regulation Authority and applies to banks and other financial

institutions. It will extend to all firms authorised under the *Financial Services and Markets Act 2000* (UK) from 2018.

- 41 The accountability rules include the SMR, the Certification Regime (which applies to staff who could pose a significant risk of harm to the firm or any of its customers) and Conduct Rules (which apply to a broader range of staff).
- 42 The SMR is targeted at customer interests, fair treatment of customers and market conduct, as well as prudential stability issues. The FCA can take disciplinary action against individuals and senior managers who breach the conduct rules and ‘duty of responsibility’.
- 43 The regime involves, among other aspects, liability for senior managers where there is misconduct in their area of responsibility and where they did not take reasonable steps to prevent the misconduct.
- 44 The SMR also requires that the allocation of responsibilities within firms should be clear and documented, to help regulators identify those who may be responsible when regulatory breaches occur and then take action—firms are required to submit a ‘Statement of Responsibilities’.
- 45 The UK regulators are conducting ongoing reviews to refine the regime’s requirements and we are currently monitoring developments and feedback. As we observe how the SMR develops and gain insights into that regime, we can then consider how we could adopt a similar regime in the future, or at least some of its key features, to effectively increase management accountability within licensees.

Australia—BEAR

- 46 In the 2017–18 Budget, the Australian Government announced the BEAR and said that it will legislate to introduce this new regime.

Note: See the Hon Kelly O’Dwyer MP, Minister for Revenue and Financial Services, Media Release No. 59, [Banking Executive Accountability Regime](#), 13 July 2017.

- 47 The BEAR legislation introduces the concept of an ‘accountable person’ and imposes obligations on these persons to behave with honesty and integrity, and to take reasonable steps to prevent matters arising that would affect the reputation of the authorised deposit-taking institution (ADI). The BEAR also provides APRA with new and stronger enforcement powers, including the ability to seek substantial civil penalties.
- 48 As stated at paragraph 7, the BEAR in its current form only addresses prudential stability issues and poor conduct or behaviour that is of a systemic and prudential nature.

- 49 There may be instances where misconduct involves significant consumer losses, egregious behaviour and serious failures of management, but does not meet the 'systemic and prudential' test necessary to trigger the BEAR. It follows that the BEAR does not fully address community concerns about accountability for management failures on conduct compliance issues. This is in contrast to the SMR, which involves both the conduct and prudential regulator and will extend to all financial services firms.

B Response to Position 1

Key points

We support the Taskforce's proposals in Position 1:

We agree that the proposed power to ban a person from managing a financial services business should be broadly cast and also include a more specific element—that is, ASIC should have the power to ban a person from performing any function or a specific function in a financial services business, including managing a financial services business.

We also agree that any expanded powers should also apply to credit licensees.

The Taskforce states that other types of management roles, including compliance officers, would be captured by the proposed banning power—we consider this is an appropriate measure to ensure the banning power extends to all relevant individuals (particularly in large licensees).

Power to ban a person from performing a specific function or any function

50 Position 1 proposes that in addition to, or instead of, a power to ban a person from providing financial services, ASIC should have the power to ban a person from:

- (a) performing a specific function in a financial services business, including managing a financial services business; and
- (b) performing any function in a financial services business.

51 The Taskforce also proposes that ASIC should have equivalent powers to regulate credit licensees.

52 We support Position 1. We also consider it appropriate that any expanded powers coming out of this process should also apply to credit licensees. The policy principles underlying the power to ban under the *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act) are broadly the same—s920A of the Corporations Act provides for bannings in similar circumstances to those set out in s80 of the National Credit Act.

Power should be broadly cast

53 We consider that ASIC's power to ban should be broadly cast and also include a more specific element, as proposed by the Taskforce. That is, ASIC should have the power to ban a person from performing *any* function

in a financial services business and a *specific* function, including management or control of a licensee.

54 The nature of the banning would be commensurate with the conduct involved and would be based on the circumstances that trigger the power to make the banning order.

55 Having a broadly cast power to ban a person from performing any function in a financial services business would be particularly important in cases where individuals take on other, less-defined roles, which enable them to be influential in the business despite their title or stated role suggesting they have a minor or junior role. In these instances, we may have difficulty in gathering evidence that they are acting in such a way (particularly if those who are ostensibly in control of the business are close associates of the banned person).

Scope of the provision

56 The position paper states that other types of management roles, including compliance officers, would also be captured by the proposed banning power. We consider this to be an appropriate measure to ensure the power to ban extends to all relevant individuals (particularly in larger licensees).

57 Consistent with this, the scope of the proposals in Position 2 should also be made broader, to cover individuals who are not captured by the definitions of 'officer' or 'senior manager' in the Corporations Act, but who are still responsible for conduct that may significantly affect many consumers: see paragraphs 76–79.

C Response to Position 2

Key points

While the proposals put forward by the Taskforce about the threshold for enlivening ASIC's banning powers are an improvement on the current threshold, the proposals may fall short in creating greater accountability for individuals in management positions.

Therefore, we consider that beyond the Taskforce's proposals, there needs to be:

- a duty for individuals to take reasonable steps within their role as a manager to achieve compliance in the activities they manage;
- potential banning for serious failures to meet that duty (particularly where there are losses to consumers); and
- a requirement that very large entities map key responsibilities, so that accountability is not undermined by ambiguity about who bears management responsibility.

In this section we outline our further observations on the specific proposals the Taskforce makes under Position 2.

We also consider that the definition of 'senior official' in the position paper should be extended to include those individuals who carry out management functions but may not fall within the concept of management as defined in the Corporations Act.

Duty for individuals and mapping of responsibilities

- 58 The Taskforce indicates in the position paper that ASIC needs powers specifically aimed at the individuals who manage or oversee the conduct of a financial services business that exhibits systemic non-compliance with financial services laws or other regulatory requirements.
- 59 In addressing this concern, the Taskforce puts forward a number of proposals about the threshold for enlivening ASIC's banning powers under s920A of the Corporations Act. These proposals would also be extended to credit licensees.
- 60 We consider that while these proposals are an improvement on ASIC's current banning powers, especially for addressing misconduct in smaller licensees, the proposals fall short in providing management accountability (particularly within larger licensees).
- 61 The Taskforce proposals do not create new duties or a specific set of expectations for those in important management roles, nor do they enable

ASIC to ban an individual who falls seriously short of meeting those expectations or complying with those duties.

- 62 Specifically, the proposals do not require that the trigger for banning be management's failure to take reasonable steps to ensure compliance with the law by the people they are managing; and in very large entities to map key responsibilities to identify senior manager responsibility.
- 63 We therefore consider that, to be effective in providing accountability, beyond the current proposals, there needs to be:
- (a) a duty for individuals to take reasonable steps within their role as a manager to achieve compliance in the activities they manage;
 - (b) potential banning for serious failures to meet that duty (particularly where there are losses to consumers); and
 - (c) a requirement that very large entities map key responsibilities, so that accountability is not undermined by ambiguity in who bears management responsibility.
- 64 This approach would have some similarity with the 'duty of responsibility' introduced in the SMR. Under the duty of responsibility, senior managers are required to take steps that are reasonable for a person in their position to take, to prevent a regulatory breach from occurring (or continuing). Similarly, with its prudential focus, the BEAR imposes obligations on accountable persons to take reasonable steps to prevent matters arising that would affect the reputation of the ADI.
- 65 Decisions about whether to take banning action would depend on the circumstances of each matter and the nature and seriousness of the conduct involved (as per ASIC's approach to taking administrative action).
- 66 Further, without any mapping of management responsibilities, which is required by both the SMR and the BEAR, difficulties with establishing individual manager responsibility within large and at times ambiguous management structures will remain. Thus, the current proposals would provide greater management accountability for smaller entities with simple management structures, but less effective in achieving this for larger entities like the major banks.

ASIC's comments on the Taskforce's proposals

- 67 Below we outline further observations on the specific proposals the Taskforce makes under Position 2.

Competence and capacity to perform a senior role

- 68 The position paper proposes that the banning power would be triggered when ASIC has reason to believe that the person is not:
- (a) 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
 - (b) adequately trained or competent to provide a financial service or financial services, or to perform the role of officer or senior manager in a financial services business.
- 69 As stated above, this is an improvement on the existing good fame and character test and broadens the threshold for enlivening ASIC's current banning powers.
- 70 However, establishing that a person is not 'fit and proper' requires focusing on objective matters, such as experience, skills, training and background. The test does not consider how the person has actually performed the role and whether there have been serious failures to take reasonable steps to achieve compliance with the law.
- 71 In most licensees, particularly in larger licensees, people in management roles have high levels of experience, training and skills for their roles. In the absence of a positive obligation to take reasonable steps to ensure compliance, this level of experience, training and skills means they may satisfy a fit and proper test despite serious compliance failures in their area of responsibility. This would be the case even when these compliance failures have resulted in significant consumer detriment and the management involved has not taken reasonable steps to prevent that happening.
- 72 It is, at best, uncertain how extensive a history of poor outcomes and failures to take reasonable steps on compliance issues would be necessary to outweigh objectively high levels of experience, training and skills in the application of the fit and proper test.

Breach of directors' duties

- 73 The position paper further proposes that the banning power would be enlivened where a person has breached their duty under s180, 181, 182 or 183 of the Corporations Act. The paper states that these duties extend to directors, other officers and, in the case of s182 and 183, employees.
- 74 We consider that this is also an improvement on the trigger for banning. However, one of the key limitations to this proposal is that it addresses duties owed to the company and does not directly address those owed to consumers. Therefore, the proposal only indirectly addresses community concerns about the treatment of consumers.

75 If the purpose of this proposal is to extend the banning power to capture directors who were not themselves providing financial services but were delinquent in their oversight leading to systemic compliance failures, we consider that the duty of care and diligence in s180 would be the most appropriate duty to include. However, as evidenced in *Australian Securities and Investments Commission v Cassimatis* (No 8) [2016] FCA 1023, establishing a breach of the section raises significant evidentiary issues and the relevant test involves a balance of the risks of harm to the company resulting from the conduct with the potential benefits to the company that might accrue. That sort of calculus around the interests of the company is very different from an approach targeted more directly at the need to take reasonable steps to ensure compliance in the interests of consumers.

Scope of the provisions

76 We consider that the definitions of 'senior officials' in the position paper should be extended to also include those individuals who carry out management functions but may not fall within the concept of management as defined in the Corporations Act.

77 The position paper states that the scope of the proposals in Position 2, so far as they relate to senior roles, would be limited by the current definitions of 'officer' and 'senior manager' in the Corporations Act.

78 We are concerned that this limited scope (and the limitations in the proposals themselves) will likely not capture individuals in larger licensees (e.g. compliance managers) who are responsible for conduct that may significantly affect many consumers, but may not:

- (a) make or participate in making decisions that affect the whole or substantial part of the corporation; or
- (b) have the capacity to significantly affect the corporation's financial standing.

79 Position 1 of the paper states that the power proposed by that particular position would extend to other types of management roles, including compliance officers. We consider that both positions outlined in the paper should adopt this broader and more flexible approach in order to capture relevant individuals.

Note: See paragraphs 56–57 for more information.

Further grounds for banning proposed by the Taskforce

Non-compliance with Australian Financial Complaints Authority determinations

80 The Taskforce proposes that the threshold for banning would be extended to cover circumstances involving officers, partners or trustees who have, on more than one occasion, been involved in a financial services or credit licensee that has been the subject of a report by the Australian Financial Complaints Authority (AFCA) regarding a failure to comply with a determination of that authority.

81 We support this proposal and consider it will enhance accountability and ensure that entities take the decisions of AFCA seriously.

'Phoenixing' related misconduct

82 The Taskforce also proposes a new ground for banning in cases of 'phoenixing' related misconduct that would be similar to the grounds to disqualify a person from managing corporations, currently in s206F of the Corporations Act.

83 The position paper states that the power would be extended to officers, partners or trustees who had, on more than one occasion, been involved in a corporation with a financial services or credit licence that:

- (a) was wound up; and
- (b) as part of that winding up, the liquidator lodged a report under s533(1) of the Corporations Act, about the corporation's inability to pay its debts.

84 We broadly support this proposal and, as we have stated previously in submissions to past inquiries, in our experience the current limitation in ASIC's banning powers facilitates phoenixing of problem financial services businesses. We can cancel the licence of a poor financial services business, only to see the key people establish a new financial services business or move to an existing business. In engaging in such phoenixing activity, the managers may leave a significant number of consumers with uncompensated losses.

Key terms

Term	Meaning in this document
AFCA	Australian Financial Complaints Authority
BEAR	Banking Executive Accountability Regime
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
FCA	Financial Conduct Authority (UK)
FSI	Financial System Inquiry
INFO 151 (for example)	An ASIC information sheet (in this example numbered 151)
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
position paper	Taskforce, Position and Consultation Paper 6 ASIC's power to ban senior officials in the financial sector. 6 September 2017
s180 (for example)	A section of the Corporations Act (in this example numbered 180), unless otherwise specified
Senate inquiry	Senate inquiry into the performance of the Australian Securities and Investments Commission
SMR	FCA's Senior Manager Regime
Taskforce	ASIC Enforcement Review Taskforce