

4 October 2017

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

ASIC Enforcement Review: ASIC's power to ban senior officials in the financial sector

Thank you for the opportunity to provide this short submission in response to the Position and Consultation Paper in relation to ASIC's power to ban senior officials in the financial sector.

NIBA is committed to high standards of professionalism in insurance broking in Australia. We are proud of the long history of promoting strong educational qualifications, commitments to ongoing professional learning and development, and the long standing Insurance Brokers Code of Practice.

The maintenance of high quality advice and service to clients and the Australian community involves a number of factors, including the capacity of the regulator to ban people who have failed to meet legal and regulatory requirements for operating in this sector of the financial services industry.

For that reason, NIBA generally supports the proposals and suggested positions set out in the Consultation Paper.

We note the comments in Consultation Paper (page 9) to the effect that the Taskforce is minded to include a power to ban where there has been a breach of section 180 of the Corporations Act, but that the Taskforce appears to have reservations in this area.

NIBA notes that section 180 of the Corporations Act contains the so-called "Business Judgment Rule", an important provision which guides and assists Directors and officers who are charged with making often difficult decisions in relation to the management of companies.

The operation of the "business judgment rule" and indeed the operation of the reasonable person" test in section 180 (1) of the Corporations Act require difficult and often quite subjective tests and assessments when consideration

is being given to whether there has been a breach of the section. The Taskforce notes that section 180 is essentially a “negligence” standard of conduct and behaviour.

NIBA would like to submit that any regulatory action for an alleged breach of section 180 should be undertaken in a more formal manner than occurs in relation to banning orders. This will require a comprehensive review of actions and decisions giving rise to the alleged breach, in a more formal legal setting. NIBA would prefer that section 180 is not included in the proposed expanded banning order powers.

In relation to the remaining proposals, NIBA strongly supports the proposal to ensure that the new banning powers be subject to procedural fairness and full rights to administrative review.

Once again, thank you for the opportunity to provide these comments on this important issue.

If you have any questions in relation to this submission, please do not hesitate to contact me.

Yours sincerely,

Dallas Booth
Chief Executive Officer
National Insurance Brokers Association of Australia