



Australian Government

ASIC Enforcement Review

Position and Consultation Paper 6

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

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EXECUTIVE SUMMARY

1. The importance of the financial sector to contemporary Australians is self-evident. To a large extent the sector is the means through which people manage their daily lives, secure their dwellings, plan for their retirement and underpin their security. It follows that the public should have a high degree of confidence in the integrity of the individuals who work in the sector – especially those that occupy more senior positions within financial institutions. In order to foster such confidence, it is important that financial sector regulators have appropriate power to remove individuals whose actions have been contrary to the public interest and prevent their continued involvement in the sector. Put another way, there should be a degree of individual accountability sufficient to underpin the overall integrity of the sector.
2. The Taskforce notes that the Government is currently creating a new Banking Executive Accountability Regime (BEAR) to enhance responsibility and accountability of Authorised Deposit-taking Institutions (ADIs) and their directors and senior executives. The BEAR Consultation Paper was released in July 2017 and proposes to enhance the Australian Prudential Regulation Authority’s (APRA) powers to administratively disqualify a person from being a senior manager, director or auditor. It also proposes that APRA be able to disqualify an ‘accountable person’ where they have not met new expectations of the BEAR ASIC also has the power to ban individuals from providing financial services in certain circumstances, including where they have contravened Australian financial services (AFS) laws. ASIC has broadly similar powers to ban individuals from engaging in credit activity under credit legislation. The circumstances in which ASIC may make a banning order against an individual are set out in section 920A of the Corporations Act. They include where the individual has had their AFS licence cancelled by ASIC, has breached their statutory obligations or has breached a financial services law, has been convicted of fraud, is not of ‘good fame or character’, or is not adequately trained or competent to provide financial services. In addition to making a banning order in respect of a person directly involved in a contravention of their obligations or of financial services law, ASIC can also make a banning order against a person who has been or is likely to become involved in the contravention of a financial services law.¹
3. Potential shortcomings in ASIC’s banning powers have been considered in contexts including the Financial System Inquiry (FSI) and the earlier Senate report on the *Performance of the Australian Securities Investments Commission* (Senate Report). The FSI identified the key problems in this passage:

“Currently, ASIC can prevent a person from providing financial services, but cannot prevent them from managing a financial firm. Nor can ASIC remove individuals involved in managing a firm that may have a culture of non-compliance.”²

1 Subsections 920(1)(g) and (h) respectively.

2 Financial System Inquiry, Final Report, p. 218

4. These issues were considered at some length in the Senate Report. There the problems were characterised in this way:

“ASIC informed the committee that while it has powers to cancel an AFS license or credit licence, or to ban a person from providing financial services or credit services, a missing element was a power to prevent a person from having a role in managing a financial services business or credit business.

It explained that the law as currently drafted means that ASIC can have 'difficulty in removing these managing agents who do not themselves provide a financial service but are integral to the operation of a financial services business'. ASIC explained that it had:

‘...seen instances where we cancel the AFS licence of an advisory business due to poor practices or other misconduct, but those responsible for managing the business move to another licensee's business, or apply for a new licence with new responsible managers. If such managers are not themselves directly providing financial services or credit services in that new role, ASIC may not be able to prevent them from continuing to operate in the industry, even where there were serious failings in the previous business.’³

5. There are essentially two key problems. The first relates to the scope of banning orders. ASIC's power is limited to banning a person from providing financial services. As noted by the FSI above, this limitation means that ASIC may not be able to prevent banned individuals from managing financial services businesses, as opposed to providing financial services. The Taskforce has considered this issue and believes it could be adequately addressed by expanding the scope of the banning order, so that ASIC should have a power to ban a person from:
 - 5.1. performing a specific function in a financial services business, including being a senior manager, or a controller of a financial services business; and/or
 - 5.2. performing any function in a financial services business.
6. The second problem identified goes to the threshold for enlivening ASIC's power to make a banning order. While the circumstances in which ASIC is empowered to make a banning order cover many circumstances involving poor conduct, there is a limitation in that 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.

3 Senate, Economics Reference Committee, Performance of the Australian Securities and Investments Commission, p. 391.

7. The Taskforce believes that this second issue should be addressed by broadening the circumstances in which ASIC may make a banning order against individuals to expressly cover directors, officers and senior managers of financial services companies. Further, the Taskforce considers it appropriate, both in substance and for harmonisation with the banning provisions in the Credit Act, that the Corporations Act power to ban where ASIC has reason to believe that a person is not of good fame and character should be replaced with a ground for banning where ASIC considers that a 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. The 'good fame and character' test has been interpreted as being narrower than the 'fit and proper' test and this can impede ASIC action, and result in different results under the Credit Act and Corporations Act. For example, in *George and Australian Securities and Investments Commission* [2014] AATA 167, the relevant misconduct included dishonest conduct in relation to deposit guarantee applications and falsification of documents provided by Mr George to support the applications. An assessment of the misconduct under the 'fit and proper person' test resulted in the AAT concluding that, as a result of the dishonest nature of the conduct in the relevant credit applications and the falsification of supporting documents, Mr George was not a fit and proper person (at p86). However, an assessment of the same misconduct under the 'good fame or character' test led the AAT to conclude that Mr George was of good fame and character. Mr George's genuine remorse and numerous character witnesses lead the AAT to conclude that the misconduct, "whilst dishonest, was out of character; [and] it did not justify a finding that there is reason to believe he is not of good fame or character" (at p80). The existing ground based on lack of training or competence should also be expanded to cover directors, officers and senior managers.
8. The power to ban for misconduct related to 'phoenixing' activity could be dealt with by including among the grounds on which ASIC may ban an individual, specific provisions similar to those in section 206F of the Corporations Act (power to disqualify where a person has twice been an officer of a Corporation that has been wound up leaving unpaid debts), and introducing a new ground based on reports of non-compliance with determinations of the Australian Financial Complaints Authority (noting that the Final Report of the Review of the financial system external dispute resolution and complaints framework contemplates that the Authority will be required to make reports of non-compliance). These should be subject, as with other grounds in section 920A of the Act, to procedural fairness and administrative review.
9. Finally, the Taskforce considers that the grounds for ASIC to ban a director, officer or senior manager, should include where a person has breached their obligations in sections 181-183 of the Corporations Act (duties of good faith, proper purpose and proper use of position and information). The Taskforce is also minded to include breach of section 180 (duty to exercise care and diligence) as a ground for banning, but recognises that this equates to enabling banning on a 'negligence' standard, and therefore welcomes comments on this.

10. The Taskforce believes that these positions would enhance the regime and address the shortcomings that have been raised in relation to the current regime. An alternative would have been to adopt in ASIC's legislation a regime similar to that contained in the BEAR. This would involve imposing a new set of duties or expectations on individuals within the regulatory purview of ASIC, and enabling ASIC to ban an individual who does not meet those expectations or comply with those duties. However, the Taskforce, while noting that the APRA regime has important differences including considerations around prudential risk that may have influenced the decision to adopt the BEAR, considers that ASIC's powers can be adequately enhanced through the measures outlined in this paper.
11. The positions the Taskforce seeks comment on are as follows.

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.

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.
2. Where a person has more than once been an officer, partner or trustee of a financial services or credit licensee that has been:
 - a. the subject of a report by the Australian Financial Complaints Authority regarding a failure to comply with a determination of that authority; or
 - b. 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.

1. BACKGROUND

REGULATION OF FINANCIAL SERVICES

1. Part 7.6 of the *Corporations Act 2001* (**Corporations Act**) governs licensing of financial services providers. A person who carries on a financial services business in Australia must hold an AFS licence, subject to certain exemptions.⁴ Those exemptions include where a person provides a financial service as a representative of an AFS licensee.⁵
2. A person (defined as the **provider**) must only provide a financial service on behalf of another person (defined as the **principal**) if the principal holds an AFS licence covering the provision of the service and, in general terms, the provider is an:
 - 2.1 employee or director of the principal;
 - 2.2 authorised representative of the principal—and the authorisation covers the provision of the service by the provider;
 - 2.3 employee of an authorised representative of the principal—and the authorisation covers the provision of the service by the authorised representative.⁶
3. ASIC may make a banning order against a person, which prohibits the person from providing any financial services or specified financial services in specified circumstances or capacities. The order may prohibit the person from providing a financial service permanently or for a specified period.⁷
4. ASIC may only make a banning order against a person in certain circumstances, which include:
 - 4.1 the person has not complied with their general obligations under section 912A;
 - 4.2 ASIC has reason to believe that the person is likely to contravene these obligations;
 - 4.3 ASIC has reason to believe that the person is not of good fame or character;
 - 4.4 ASIC has reason to believe that the person is not adequately trained, or is not competent to provide a financial service or financial services;
 - 4.5 the person has not complied with a financial services law;
 - 4.6 ASIC has reason to believe that the person is likely to contravene a financial services law;

4 Corporations Act section 911A.

5 Section 911A(2)(a).

6 Section 911B(1). This does not apply to services which are otherwise exempt from the requirement for a licence under section 911A(2).

7 Section 920A(1) and 920B. If ASIC has reason to believe that the person is not of good fame or character, ASIC may only make a permanent banning order: section 920B(2).

- 4.7 the person has been involved in the contravention of a financial services law by another person; or
 - 4.8 ASIC has reason to believe that the person is likely to become involved in the contravention of a financial services law by another person.⁸
5. The general obligations under section 912A are those imposed on all AFS licensees (**general obligations**), including that they:
- 5.1 do all things necessary to ensure that the financial services covered by their licence are provided efficiently, honestly and fairly;
 - 5.2 comply with the conditions on the licence;
 - 5.3 comply with the financial services laws;
 - 5.4 take reasonable steps to ensure that their representatives comply with the financial services laws;
 - 5.5 maintain the competence to provide financial services;
 - 5.6 ensure that their representatives are adequately trained, and are competent, to provide those financial services;
 - 5.7 have adequate resources and risk management systems.⁹
6. The 'financial services laws' include specified provisions of the Corporations Act and *Australian Securities and Investments Commission Act 2001 (ASIC Act)*, together with any other Commonwealth, State or Territory legislation in so far as it covers conduct relating to the provision of financial services.¹⁰
7. A person is 'involved' in a contravention of a financial services law in specified circumstances set out in section 79 of the Corporations Act, discussed further below.
8. ASIC may only make a banning order against a person after giving the person an opportunity to appear, or be represented, at a private hearing before ASIC, and to make submissions to ASIC on the matter.¹¹
9. Hearings for the purpose of considering the exercise of ASIC's power to make a banning order are generally held by an ASIC staff member to whom this power, together with ASIC's power to hold hearings under Part 3 Division 6 of the ASIC Act, has been delegated.¹²

8 Section 920A(1)(b), (ba), (d), (da), (e), (f), (g) and (h). The circumstances also include where ASIC suspends or cancels an AFS licence held by the person, or the person becomes an insolvent under administration or is convicted of fraud.

9 Section 912A(1)(a), (b), (c), (ca), (d), (e), (f) and (h).

10 A 'financial services law' is defined in section 761A.

11 Section 920A(2). This requirement does not apply in so far as ASIC's grounds for making the order include that the person's AFS licence was suspended or cancelled under section 915B—which does not require a hearing—or that the person has been convicted of serious fraud.

12 *ASIC Regulatory Guide 8: Hearings Practice Manual*.

10. Application may be made to the Administrative Appeals Tribunal (**AAT**) for review of a decision by ASIC to ban a person from providing financial services.¹³
11. ASIC provides guidance on the exercise of its power to ban a person from providing financial services in *Regulatory Guide 98: Licensing: Administrative action against financial services providers (RG 98)*. This includes guidance on the key factors ASIC considers in deciding to take administrative action and examples of conduct relating to specific periods of banning.¹⁴
12. A person who engages in conduct that breaches a banning order is guilty of an offence, the maximum penalty for which is a fine of \$4,500 or 6 months imprisonment.
13. A person against whom a banning order has been made cannot be granted an AFS licence contrary to the banning order.¹⁵ In order to grant an application for an AFS licence, ASIC must, among other things, be satisfied that there is no reason to believe that:
 - 13.1 if the applicant is a natural person, the applicant is not of good fame or character;
 - 13.2 if the applicant is a body corporate, any of the applicant's responsible officers (meaning an officer who would perform duties in connection with the holding of the licence) are not of good fame or character;
 - 13.3 if the applicant is a partnership or the trustees of a trust, any of the partners or trustees who would perform duties in connection with the holding of the licence are not of good fame or character.¹⁶
14. ASIC may also suspend or cancel a licence if it is no longer satisfied of these matters.¹⁷
15. In considering whether there is reason to believe that a person is not of good fame or character, the matters to which ASIC is required to have regard include whether a banning order has previously been made against the person.¹⁸

REGULATION OF CREDIT

12. Chapter 2 of the *National Consumer Credit Protection Act 2009 (Credit Act)* governs the licensing of persons who engage in credit activities. A person must not engage in a credit activity unless the person holds an Australian credit licence, or engages in the activity as a credit representative or as an employee or director of a credit licensee or related body corporate.¹⁹

¹³ Section 1317B.

¹⁴ RG 98.42–45 and Tables 1 and 2.

¹⁵ Sections 920C and 1311 and Schedule 3.

¹⁶ Section 913B(2) and (3) and the definition of 'responsible officer' in section 9. *Regulatory Guide 105: Organisational Competence (RG 105)* refers to the requirement that a licensee's responsible managers be nominated for assessment of organisational competence at the time of applying for an AFS licence or for variation of a licence and that ASIC be notified of any change in responsible managers: RG 105.14. However, a responsible manager is not necessarily a 'responsible officer' as defined in section 9 of the Corporations Act.

¹⁷ Section 915C.

¹⁸ Section 913B(4).

¹⁹ Credit Act section 29. A 'credit activity' is defined in section 6(1).

13. ASIC may make a banning order against a person, which prohibits the person from engaging in any credit activities or specified credit activities in specified circumstances or capacities. The order may prohibit the person from engaging in a credit activity permanently or for a specified period.²⁰
14. ASIC may only make a banning order against a person in certain circumstances, which include:
 - 14.1. the person has contravened any credit legislation, or been involved in the contravention of a provision of any credit legislation by another person;
 - 14.2. ASIC has reason to believe that the person is likely to contravene any credit legislation or be involved in the contravention of a provision of any credit legislation by another person;
 - 14.3. ASIC has reason to believe that the person is not a fit and proper person to engage in credit activities.²¹
15. The 'credit legislation' includes the Credit Act and specified provisions of the ASIC Act, together with any other Commonwealth, State or Territory legislation in so far as it covers conduct relating to credit activities.²²
16. The definition of when a person is 'involved' in a contravention of a provision of the credit legislation mirrors the definition in section 79 of the Corporations Act discussed further below.²³
17. ASIC may only make a banning order against a person after giving the person an opportunity to appear, or be represented, at a private hearing before ASIC, and to make submissions to ASIC on the matter.²⁴
18. Hearings for the purpose of considering the exercise of ASIC's power to make a banning order are generally held by an ASIC delegate.²⁵ Application may be made to the AAT for review of a decision by ASIC to ban a person from engaging in credit activities.²⁶
19. ASIC provides guidance on the exercise of its power to ban a person from engaging in credit activities in *Regulatory Guide 218: Licensing: Administrative action against persons engaging in credit activities (RG 218)*. This includes guidance on the key factors ASIC considers in deciding to take administrative action and examples of conduct relating to specific periods of banning.²⁷

20 Section 80(1) and 81.

21 Section 80(1)(d), (e) and (f). The circumstances also include where ASIC suspends or cancels a credit licence held by the person, or the person becomes insolvent (otherwise than as the trustee of a trust) or is convicted of fraud.

22 'credit legislation' is defined in section 5.

23 Section 5.

24 Section 80(4). This requirement does not apply in so far as ASIC's grounds for making the order include that the person's credit licence was suspended or cancelled without a hearing under section 54 or that the person has been convicted of serious fraud.

25 ASIC *Regulatory Guide 8: Hearings Practice Manual*.

26 Section 1317B.

27 RG 218.55 and Tables 1 and 2.

20. A person who engages in conduct contrary to a banning order may be liable to a maximum civil penalty of \$360,000, or guilty of an offence the maximum penalty for which is a fine of \$18,000 or 2 years imprisonment or both.²⁸
21. A person against whom a banning order has been made cannot be granted a credit licence contrary to the banning order.²⁹ Further, in order to grant an application for a credit licence, ASIC must, among other things, have no reason to believe that the applicant is not a fit and proper person to engage in credit activities. For that purpose, ASIC must have regard to a number of matters, including:
- 21.1. whether a banning order has ever been made against the applicant under the Credit Act or the Corporations Act;
 - 21.2. if the applicant is a body corporate, whether ASIC has reason to believe that any of the directors, secretaries or senior managers³⁰ of the body corporate who would perform duties in relation to the credit activities to be authorised by the licence is not a fit and proper person to engage in credit activities;
 - 21.3. if the applicant is a partnership or the trustees of a trust, whether ASIC has reason to believe that any of the partners or trustees who would perform duties in relation to the credit activities to be authorised by the licence is not a fit and proper person to engage in credit activities.³¹
22. ASIC may also suspend or cancel a licence if ASIC has reason to believe that the licensee is not a fit and proper person to engage in credit activities, for which purpose ASIC must have regard to a number of matters including those set out in the above paragraph at 23.1 to 23.3.³²

DUTIES OF OFFICERS

23. The provisions of Part 2D.1 of the Corporations Act impose a range of duties on officers of corporations, contraventions of which can give rise to civil penalty action³³ or criminal prosecution.³⁴ A person who is convicted of an offence under these provisions is automatically disqualified from managing corporations.³⁵ If a Court declares that a person has contravened a civil penalty provision the Court may make an order disqualifying them from managing corporations.³⁶

28 Section 82.

29 Section 40(1).

30 Section 5 of the Credit Act defines 'senior manager' as having the same meaning as in section 9 of the Corporations Act, where it is defined in relation to a corporation to mean a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, or has the capacity to affect significantly the corporation's financial standing (and in similar terms in relation to a partnership, trust and joint venture).

31 Section 37. *Regulatory Guide 204: Applying for an varying a credit licence (RG 204)* refers to the requirement that an application for a credit licence or for variation of a licence identify a licensee's 'fit and proper people', being the people involved in the management of the credit business, and indicate which of these people are responsible managers, being the people relied on to demonstrate competence to engage in credit activities: RG 204.16 and Table 1; RG 204.34.

32 Section 55(1)(c) and (2)(a) and (b).

33 Sections 180–183.

34 Section 184.

35 Section 206B.

36 Section 206C.

24. There are other circumstances in which the Court or ASIC may disqualify a person from managing corporations in Chapter 2D.³⁷ However, the provisions of this Chapter, including the duties of officers and employees in Part 2D.1, are not financial services laws. Accordingly, a contravention of these provisions is not a specific ground for banning a person from providing financial services under section 920A of the Corporations Act.³⁸ In some circumstances, disqualification from managing a corporation may provide a basis for ASIC to conclude that a person is not of good fame or character³⁹ and that is appropriate to exercise the discretion to ban the person from providing financial services as well.
25. Chapter 5C of the Corporations Act imposes separate duties on officers of responsible entities of registered schemes, contravention of which can again give rise to civil penalty action or criminal prosecution.⁴⁰ In contrast to Chapter 2D, the provisions of Chapter 5C are financial services laws. Accordingly, contravention of the duties imposed on an officer of a responsible entity is potentially a ground for banning a person from providing financial services.

37 See sections 206–206F.

38 See the definition of 'financial services law' in section 761A.

39 Thereby enlivening the ability to ban a person under subsection 920A(1)(d) of the Corporations Act.

40 Section 601FD.

2. ISSUES WITH ASIC'S EXISTING POWERS

1. There are two key problems with ASIC's current banning powers, which can be summarised as follows:
 - 1.1 Scope issue: ASIC's banning power only prevents individuals from providing financial services. This means ASIC may not be able to prevent banned individuals from managing financial service businesses.
 - 1.2 Threshold issue: The current circumstances in section 920A that enliven ASIC's banning power 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.

SCOPE ISSUE: BANNED INDIVIDUALS TAKING MANAGEMENT POSITIONS

2. The effect of a banning order is that a person is prohibited from providing financial services.⁴¹ However, this does not prevent a person from having another role in a business that provides financial services, for example as a director, officer, compliance manager or owner, unless they are providing the services themselves.
3. This means that a person can be banned from providing financial services, but still hold a senior position or management role in a financial services business. In that capacity they may be responsible for the provision of financial services by others in the business and/or the policies and procedures of the business. In some circumstances, the person's ongoing responsibility for the provision of financial services may pose an ongoing risk to consumers given the conduct that gave rise to the banning order being made.

CASE STUDY 1

In late 2015 ASIC banned a financial adviser, Mr M, from providing financial services. Mr M was one of a number of advisers employed by M Pty Ltd, a corporate authorised representative of an AFS licensee. M Pty Ltd is still authorised by the licensee and other advisers at M Pty Ltd continue to provide financial services.

Despite being banned, Mr M remains the sole director and (indirectly) the sole shareholder of M Pty Ltd. He is therefore responsible for the management of the financial advice business, despite not being able to provide financial services himself. He can interact with clients in his role as director/shareholder, despite the fact that he has been banned (and despite the fact that this may cause confusion among clients as to the nature of his role in the business).

41 Section 920B.

CASE STUDY 2

ASIC permanently banned Mr C from providing financial services after he was found guilty of fraud by the NSW Magistrates Court. Despite this ban, Mr C has advised he hopes to secure employment within the financial services industry in a product design/consulting role. It is possible for Mr C to carefully structure his role in such a way that may enable him continue to work for an AFS licensee in a senior role, despite his banning.

THRESHOLD ISSUE: TAKING BANNING ACTION AGAINST MANAGERS

Administrative action

4. The circumstances in which ASIC may make a banning order are set out in paragraph 4 above. In most cases they arise where the relevant person has provided financial services. However, ASIC can also make a banning order against a person who:
 - 4.1 has been involved in the contravention of a financial services law; or
 - 4.2 ASIC has reason to believe is likely to become involved in the contravention of a financial services law by another person.⁴²
5. These provisions enable ASIC to some extent to take action when a person has contributed to or caused another person to breach the financial services laws. While these existing provisions cover circumstances where directors, officers or senior managers were knowingly involved in contraventions, the residual concern is not that the senior person participated in or had knowledge of the facts giving rise to each contravention but that they were responsible for the relevant business and failed to ensure that it was conducted in a lawful manner. In more serious cases, that person may be responsible for developing an environment or business model that led to the relevant contraventions occurring, although the specific acts were engaged in by others. In these more serious cases, it may be appropriate that ASIC have the flexibility to protect consumers by making a banning order.

CASE STUDY 1

ASIC conducted surveillance of a large licensee which identified numerous compliance and systems failings leading to widespread breaches of the Corporations Act. ASIC accepted an enforceable undertaking from the licensee. ASIC had concerns about the behaviour of a number of senior managers of that licensee, including Mr G.

ASIC has some years later conducted surveillance of a different licensee and found Mr G to be involved in management failings at this licensee. Despite the fact that Mr G appears to be involved in management failings at a number of licensees, ASIC is unable to ban him from managing financial services providers.

⁴² Subsections 920A(1)(g) and (h) respectively.

CASE STUDY 2

ASIC is investigating an AFS licensee that employs a one-size-fits-all business model for advising clients to acquire superannuation and life insurance products, which generates payment of higher fees and commissions by clients, substantially depleting their superannuation balance. The advice is provided through a number of authorised representatives, but the business model was apparently established and is overseen by the owner and manager of the licensee, Mr N.

Unless ASIC can establish that Mr N himself (as opposed to the business and its authorised representatives) is providing financial services in contravention of a financial services law, ASIC is unlikely to be able to ban him from providing financial services. Further, ASIC has no power to ban Mr N from managing a financial services business, therefore even if ASIC is able to suspend or cancel the licence, this may not prevent Mr N from becoming involved in the management of another AFS licensee.

Court proceedings

6. ASIC may apply to a Court for orders disqualifying managers of financial services businesses from managing corporations and restraining them from carrying on a financial services business.⁴³
7. A director or other officer of a financial services licensee may have breached their duties under section 180 of the Corporations Act, in failing to take steps to ensure that the licensee or its representatives comply with financial services laws. This will depend on, among other things, the role and responsibilities of the individual within the relevant financial services business.
8. A person in an executive or management position may not be an "officer"⁴⁴ who is subject to the obligations in s180 of the Corporations Act particularly where the licensee involved is a large corporate entity. In addition, whether a director or officer has exercised the degree of care and diligence required by s180 requires an objective assessment of the circumstances of the relevant corporation and the responsibilities performed by the director or officer within that corporation.
9. Further, because section 180 is not a financial services law, the officer's breach of this section is not a ground for banning that person from providing financial services under section 920A. Court proceedings can lead to a more expensive and protracted outcome in comparison to the exercise of an administrative power.

⁴³ See for example ASIC's proceeding against the directors of Storm Financial Limited, reported on ASIC's website <http://www.storm.asic.gov.au/proceedings/cassimatis-civil-penalty-proceeding/>. See also *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064.

⁴⁴ See the definition of officer in section 9 of the Corporations Act.

10. A breach of the duties of an officer of a responsible entity under section 601FD may be a ground for banning that person, because section 601FD is a financial services law. However, in their capacity as an officer of a responsible entity, a person is not themselves providing financial services. As stated above a ban from providing financial services may not address the concern that gave rise to the ban i.e. that the person breached their obligations as an officer of a responsible entity. A more appropriate response to their misconduct as an officer may be to ban them from managing or holding particular positions within a financial services business (such as a responsible entity).

Good fame or character requirement

11. ASIC may refuse to grant, or may suspend or cancel, an AFS licence if any 'responsible officer' of the licensee is not of good fame or character. One of the matters relevant to this question is whether the person has previously been banned from providing financial services.⁴⁵
12. The good fame or character requirement applies to the licensee but does not apply to managers. As such, a banned person may hold a management role for a licensee or may assume a management role after a licence has already been granted.⁴⁶

Negotiated outcomes

13. ASIC may accept enforceable undertakings which include terms that exclude a person from management of a financial services licensee. However, an enforceable undertaking depends on the cooperation and voluntary participation of the parties to the undertaking.
14. Further, a breach of an enforceable undertaking does not have the same consequences as a breach of a banning order. On breach of an enforceable undertaking, ASIC may apply to the Court for an order that the undertaking be complied with, but breach of a banning order is an offence.⁴⁷

CASE STUDY 1

ASIC is conducting surveillance of an AFS licensee, Z Pty Ltd, and one of its key advisers, Mr S, who is also the sole director of Z Pty Ltd and sole shareholder of a company that wholly owns Z Pty Ltd. ASIC's surveillance has identified significant issues with Mr S's advice and with the compliance arrangements of Z Pty Ltd.

However given Mr S's directorship and indirect ownership of Z Pty Ltd, ASIC is concerned that even if Mr S is banned from providing financial services, he is likely to continue managing Z Pty Ltd going forward. In light of this concern ASIC is considering the appropriateness of an enforceable undertaking, instead of banning Mr S, because ASIC may be able to negotiate terms of the undertaking that exclude Mr S from managing Z Pty Ltd.

45 In the case of a body corporate. See paragraphs 20 to 22 above.

46 For credit licences, the 'fit and proper person' requirement applies more broadly, to any director, secretary or senior manager of a corporate licensee, but a similar potential exists for a person to assume a management role following the grant of a licence.

47 ASIC Act section 93A and Corporations Act section 920C.

CASE STUDY 2

In 2013, ASIC accepted an enforceable undertaking from AFS licensee Wealthsure Pty Ltd (**Wealthsure**), associated company Wealthsure Financial Services Pty Ltd (**Wealthsure FS**) and the former CEO of both companies, Mr Darren Pawski, due to wide-ranging concerns about the adequacy of their compliance systems.

As part of the negotiated outcome between ASIC and the Licensee, Mr Pawski offered a separate enforceable undertaking that he would remove himself from management of Wealthsure and Wealthsure FS and permanently refrain from taking part in the management of any AFS licensee. ASIC could not have achieved this outcome using its existing banning powers.⁴⁸

⁴⁸ <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2013-releases/13-240mr-asic-accepts-enforceable-undertaking-from-wealthsure-pty-ltd-wealthsure-financial-services-pty-ltd-and-their-former-ceo/>.

3. PREVIOUS INQUIRIES

PREVIOUS INQUIRIES

1. ASIC has previously made submissions to the Senate inquiry into the performance of ASIC (**Senate inquiry**) and the Financial System Inquiry (FSI) on issues around banning powers.⁴⁹ ASIC's submissions referred to:
 - 1.1 limitations 'particularly in ASIC's ability to regulate individuals who do not themselves provide financial services, but are integral to the operation of a financial services business'; and
 - 1.2 problems that arise where ASIC cancels the AFS licence of an advisory business due to poor practices or other misconduct, but those responsible for managing the business move to another licensee's business, or apply for a new business with new responsible managers.
2. The Senate inquiry final report acknowledged ASIC's submission and recommended that 'the government consider the banning provisions in the licence regimes with a view to ensuring that a banned person cannot be a director, manager or hold a position of influence in a company providing a financial service or credit business'. The recommendation was supported by the Financial Planning Association.⁵⁰
3. The Senate inquiry final report referred to the case of Peter and Anne-Marie Seagrim, who had been banned from providing financial services but were reported to be still involved in the management of a financial services business.⁵¹
4. The FSI final report recommended that the Government amend the law 'to provide ASIC with an enhanced power to ban individuals, including officers and those involved in managing financial firms, from managing a financial firm'.⁵² In relation to phoenixing, the report observed:

"Currently, ASIC can prevent a person from providing financial services, but cannot prevent them from managing a financial firm. Nor can ASIC remove individuals involved in managing a firm that may have a culture of non-compliance."⁵³

49 Senate inquiry into the performance of the Australian Securities and Investments Commission: Main submission by ASIC, October 2013, at [595] and [597]; Financial System Inquiry: Submission by the Australian Securities and Investments Commission, April 2014, at Appendix 1; Financial System Inquiry interim report: Submission by the Australian Securities and Investments Commission, August 2014, at [179]–[182].

50 The Senate Economic References Committee report: Performance of the Australian Securities and Investments Commission (**Senate inquiry final report**), June 2014, at [24.62] Recommendation 47 and [24.49].

51 Senate inquiry final report at [24.46].

52 Financial System Inquiry Final Report, November 2014, Recommendation 24 at page 217.

53 At page 218.

5. The report concluded:

“An enhanced banning power should improve professional behaviour, management accountability and the culture of firms, by removing certain individuals from the industry and preventing them from managing a financial firm. This should also include individuals who are licence holders or authorised representatives, or managers of a credit licensee. It should prevent those operating under an Australian Financial Services Licence from moving to operate under a credit licence and vice versa.”⁵⁴

54 At page 220.

4. INTERNATIONAL APPROACHES TO THE ISSUE

1. A review of a number of overseas jurisdictions indicates the following alternative approaches:
 - 1.1 a power to make an order, in the public interest, that a person resign their position as, or is prohibited from acting as, a director or officer of a regulated entity, officer being defined to include a number of specified management positions (Ontario, Canada);
 - 1.2 standing to apply to a court for an order banning a person from taking part in the management of an entity, or providing financial services (New Zealand);
 - 1.3 a power to give approval to an individual to perform a certain function in the management of a regulated entity and to withdraw that approval if the individual is not fit and proper to perform the function, together with a power to prohibit an individual from carrying out certain functions (United Kingdom);
 - 1.4 a power to prohibit an individual from taking part in the management of or becoming a substantial shareholder in a regulated entity (Singapore);
 - 1.5 a power to prohibit a person from working in any capacity with an industry participant (United States).

CANADA (ONTARIO) – ONTARIO SECURITIES COMMISSION

2. The Ontario Securities Commission (OSC) administers and enforces compliance with the Securities Act and the Commodity Futures Act. This includes regulating firms and individuals who are in the business of advising or trading in securities or commodity futures, and firms that manage investment funds in Ontario.⁵⁵
3. The OSC's enforcement powers include the ability to lay quasi-criminal charges, pursue civil proceedings and take administrative action.⁵⁶ As to administrative action, if in the OSC's opinion it is in the public interest to do so, the OSC may make orders including that:
 - 3.1 a registration or recognition granted to a person or company be suspended or restricted for a specified period, or terminated, or that terms and conditions be imposed on the registration or recognition;
 - 3.2 a market participant submit to a review of its practices and procedures and institute such changes as may be ordered by the OSC—a 'market participant' includes a range of regulated entities, including a 'registrant' which is a person or company required to be registered under the Securities Act;
 - 3.3 a person or company be reprimanded;

⁵⁵ http://www.osc.gov.on.ca/en/About_our-role_index.htm; http://www.osc.gov.on.ca/en/Dealers_index.htm.

⁵⁶ http://www.osc.gov.on.ca/en/Proceedings_before-court_index.htm; Securities Act, Part XXII.

- 3.4 a person resign one or more positions held as, or is prohibited from acting as, a director or officer of an issuer, registrant or investment funds manager;
- 3.5 a person or company who has not complied with Ontario securities law is required to pay an administrative penalty up to \$1 million and/or disgorge to the Commission any amounts obtained as a result of the non-compliance.⁵⁷
4. Because these orders may be made in the public interest, it is not necessary that the OSC find that there has been a specific breach of Ontario securities law before making an order, except in the case of imposing an administrative penalty or disgorgement. However, an order may not be made without a hearing, which is convened by an administrative tribunal of the Commission, generally in public.⁵⁸ A right of appeal lies from a decision of the Commission to the Divisional Court.⁵⁹
5. The OSC's power to order that a person resign their position as a director or officer, or not act in such a position, is exercised for the protection of the public rather than to punish the person concerned.⁶⁰ An 'officer' is defined to include a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer, a general manager and every individual who performs functions similar to those normally performed by an individual holding one of these positions.⁶¹
6. An 'officer' also includes an 'ultimate designated person', which means, in respect of a registrant that is a registered dealer, registered adviser or registered investment fund manager, an individual designated by the registrant:
 - 6.1 to supervise the registrant's activities that are directed towards ensuring compliance with Ontario securities law by the registrant and by each individual acting on the registrant's behalf; and
 - 6.2 to fulfill such other functions as may be prescribed by regulations in order to otherwise promote compliance with Ontario securities law.
7. If a company has not complied with Ontario securities law, a director or officer of the company who authorised, permitted or acquiesced in the non-compliance is deemed to also have not complied with the law.⁶² Officers of a company who fail to take steps to ensure that the company complies with securities law may therefore be ordered to resign their position and prohibited from occupying such a position in a company regulated under the Securities Act.

57 Securities Act section 127(1).

58 http://www.osc.gov.on.ca/en/Proceedings_before-commission_index.htm;
http://www.osc.gov.on.ca/documents/en/Proceedings/osc_20140107_guide-enf-proceedings.pdf; section 127(4).

59 Section 9.

60 For examples of such orders as part of a settlement of proceedings before the Commission, see http://www.osc.gov.on.ca/en/Proceedings_set_20111026_hucalt.htm,
http://www.osc.gov.on.ca/en/Proceedings_set_20140225_dwekj.htm.

61 Section 1, a director is also defined to include a person performing a similar function or occupying a similar position.

62 Section 129.2.

HONG KONG – SECURITIES AND FUTURES COMMISSION

8. The Securities and Futures Commission (**SFC**) regulates Hong Kong's securities and futures markets, deriving its investigative, remedial and disciplinary powers from the *Securities and Futures Ordinance (Ordinance)*. Entities regulated by the SFC include brokers, investment advisers and fund managers dealing in or advising on securities, futures contracts and leveraged foreign exchange trading, also financial institutions but in relation to their securities business only.⁶³
9. The SFC may grant licences under the Ordinance to a corporation, which becomes a 'licensed corporation' and to an individual, as a 'licensed representative' of a licensed corporation. The SFC may also approve an individual as a 'responsible officer' of a licensed corporation. The SFC may register a financial institution, as a 'registered institution'.⁶⁴
10. The SFC has disciplinary powers which may be exercised where a 'regulated person' has been guilty of misconduct or in the SFC's opinion is not a fit and proper person to be licensed or registered. A 'regulated person' is defined to include:
 - 10.1 a licensed corporation or representative, responsible officer or 'a person involved in the management of the business of a licensed corporation';
 - 10.2 a registered institution, executive officer of a registered institution, or 'a person involved in the management of the business constituting any regulated activity for which a registered institution is or was (as the case may be) registered'.⁶⁵
11. The disciplinary powers of the SFC include powers to:
 - 11.1 reprimand or fine the regulated person;
 - 11.2 if the person holds a licence or registration, revoke or suspend the licence or registration;
 - 11.3 if the person has approval as a responsible officer, revoke or suspend the approval;
 - 11.4 prohibit a person from applying for approval as a responsible officer of a licensed corporation, or for consent to act as an executive officer of a registered institution.
12. Accordingly, the SFC may reprimand or fine a 'person involved in the management' of a licensed corporation or registered institution, or prevent the person from being a responsible officer or executive officer (as those roles are defined). However, the SFC does not have power to ban a person from performing a management role that does not require a licence (which may for example include a chief executive officer, board director, head of compliance or head of legal).

63 <http://www.sfc.hk/web/EN/about-the-sfc/our-role/>; <http://www.sfc.hk/web/EN/about-the-sfc/our-role/who-we-regulate.html>.

64 The Ordinance, sections 116 to 121 and 126.

65 Sections 194 and 196.

13. The SFC is required to give the regulated person an opportunity to be heard before exercising its disciplinary powers and a right of appeal lies to the Securities and Futures Appeal Tribunal.⁶⁶
14. On 16 December 2016, the SFC issued a circular to licensed corporations introducing measures to increase accountability of senior management, including a requirement that individuals be designated as managers-in-charge (**MICs**) of eight core functions and that key managers seek approval as responsible officers.⁶⁷
15. The eight core functions are:
 - 15.1 overall management oversight;
 - 15.2 key business line;
 - 15.3 operational control and review;
 - 15.4 risk management;
 - 15.5 finance and accounting;
 - 15.6 information technology;
 - 15.7 compliance; and
 - 15.8 anti-money laundering and counter-terrorist financing.
16. Under the new measures:
 - 16.1 corporate licence applicants and existing licensed corporations will have to submit up-to-date management structure information and organisational charts to the SFC;
 - 16.2 MICs of the overall management oversight and key business line functions who are not already responsible officers will have to apply for approval to become responsible officers. This is because the MICs of these core functions 'actively participate in or are responsible for directly supervising the business of the regulated activities'.⁶⁸

66 <http://www.sfc.hk/web/EN/regulatory-functions/enforcement/disciplinary-proceedings.html>.

67 <http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=16PR143>.

68 Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management; <http://www.sfc.hk/edistributionWeb/gateway/EN/circular/intermediaries/licensing/doc?refNo=16EC68>.

NEW ZEALAND – FINANCIAL MARKETS AUTHORITY

17. The Financial Markets Authority (**FMA**) is New Zealand’s financial conduct regulator, responsible for ensuring public confidence in financial markets and supporting the growth of New Zealand’s capital base through effective regulation. With the introduction of the *Financial Markets Conduct Act 2013 (FMC Act)*, the FMA has ‘an extended range of regulatory tools available to achieve better outcomes for investors, financial markets professionals and businesses’.⁶⁹ Its main objective is to promote and facilitate the development of fair, efficient and transparent financial markets.
18. Under the FMC Act a banning order may only be made against a person by the Court, on application by an ‘entitled person’ which includes the FMA. The grounds upon which an order may be made include that the person has been convicted of a specified offence, a pecuniary penalty order has been made against the person, or the person has, while a director of an entity, ‘persistently contravened, or been involved in the contravention of’, specified Acts.⁷⁰
19. A banning order may, permanently or for a specified period, prohibit or restrict a person from:
 - 19.1 being a director or promoter of, or in any way (whether directly or indirectly) being concerned or taking part in the management of, an entity;
 - 19.2 providing financial adviser services or broking services, or contributing, as employee or agent, to the provision of those services.
20. A person who contravenes a banning order commits an offence.⁷¹
21. As an alternative to Court action, individuals may undertake that they will not be a director or promoter of, or in any way (whether directly or indirectly) be concerned or take part in the management of, an entity, under the terms of an enforceable undertaking offered to the FMA by the person concerned.⁷²
22. The FMA may also make a temporary banning order against a person under the *Financial Advisers Act 2008*, for a period of 14 days or less, if satisfied that the person has consistently contravened that Act or the FMC Act.⁷³

69 <https://fma.govt.nz/fmas-role/what-we-do/our-role/>.

70 FMC Act section 517. An ‘entity’ includes a body corporate, the trustees of a trust and a partnership: section 6. Persistent failure to comply with the FMC Act is also a ground upon which the Court may disqualify a person from taking part in the management of a company under s383 of the *Companies Act 1993*.

71 Section 519.

72 Accepted by the FMA under s46 of the *Financial Markets Authority Act 2011*. An example is the undertaking accepted from David John Hobbs and Jacqueline Hobbs, following the periods of banning and disqualification imposed on them by the NSW Supreme Court – <https://fma.govt.nz/assets/Enforceable-undertakings/150713-Enforceable-undertaking-David-J-Hobbs-and-Jacqueline-Hobbs.pdf>. Disciplinary proceedings against financial advisers are conducted by an independent body established under the *Financial Advisers Act 2008*, the Financial Advisers Disciplinary Committee, which may impose a range of sanctions from a fine to cancellation of an adviser’s authorisation: <https://fma.govt.nz/compliance/role/authorised-financial-advisers/financial-advisers-disciplinary-committee/>.

73 *Financial Advisers Act 2008*, sections 137M to 137S.

SINGAPORE – MONETARY AUTHORITY OF SINGAPORE

23. The Monetary Authority of Singapore (**MAS**) has a range of functions, which in addition to acting as central bank include conducting integrated supervision of financial services and financial stability surveillance.⁷⁴ MAS has regulatory functions under the Securities and Futures Act, relating to institutions in the securities, futures and derivatives industry, and the Financial Advisers Act, relating to financial advisers and their representatives.
24. Both Acts confer on MAS a power to make a prohibition order against a person. The grounds upon which MAS may make a prohibition order against a person under the Securities and Futures Act include:
- 24.1 MAS suspends or revokes the capital markets services licence held by the person or their status as a representative of a licensee;
 - 24.2 MAS has reason to believe that the person has contravened, is contravening or is likely to contravene a provision of the Act, or a condition or restriction imposed or written direction issued by MAS under the Act;
 - 24.3 the person has been convicted of an offence under the Act, or any offence involving fraud or dishonesty, or been ordered to pay a civil penalty under the Act; or
 - 24.4 the person has been removed at the direction of MAS as an officer of the holder of a capital markets licence.⁷⁵
25. In relation to the ground referred to in the above paragraph at 95.4, MAS has the power, if it thinks it necessary in the interests of the public or a section of the public or for the protection of investors, to direct the holder of a capital markets services licence to remove a director or executive officer, where MAS is satisfied that the director or executive officer has:
- 25.1 wilfully contravened or wilfully caused the holder to contravene any provision of the Securities and Futures Act;
 - 25.2 without reasonable excuse, failed to secure the compliance of the holder with that Act; or
 - 25.3 failed to discharge any of the duties of their office.⁷⁶
26. The order may prohibit the person, permanently or for a specified period, from performing any regulated activity, or 'taking part, directly or indirectly, in the management of, acting as a director of, or becoming a substantial shareholder of' the holder of a capital markets services licence.⁷⁷

74 <http://www.mas.gov.sg/About-MAS/Overview.aspx>.

75 Securities and Futures Act section 101A(1).

76 Section 97(1A). The text of section 101A(1) refers to section 97(1)(h), presumably a reference to section 97(1A).

77 Section 101A(3).

27. Before making a prohibition order against a person, MAS is required to give the person an opportunity to be heard.⁷⁸ The person has a right of appeal to the Minister from a decision by MAS to make an order.⁷⁹
28. The grounds upon which MAS may make a prohibition order against a person under the Financial Advisers Act are similar to those under the Securities and Futures Act.⁸⁰ Similarly also, the order may prohibit the person, permanently or for a specified period, from providing any financial advisory service, or ‘taking part, directly or indirectly, in the management of, acting as a director of, or becoming a substantial shareholder of’ a licensed financial adviser.⁸¹ The person has the same right to be heard and right of appeal from a decision by MAS to make an order.⁸²

UNITED KINGDOM – FINANCIAL CONDUCT AUTHORITY

29. In the United Kingdom, the Financial Conduct Authority (**FCA**) is the conduct regulator for financial services and consumer credit firms and financial markets, under the *Financial Services and Markets Act 2000* (UK) (**FSM Act**).⁸³
30. The FCA may give a firm, referred to as an ‘authorised person’, permission to carry on a regulated activity, but in giving or varying such permission must ensure that the firm will satisfy the ‘threshold conditions’ in relation to the regulated activities for which it will have permission. These include conditions relating to the effective supervision, appropriate resources, suitability and business model of the firm.⁸⁴
31. The FCA may give its approval for an individual, referred to as an ‘approved person’, to perform a ‘controlled function’ relating to the carrying on of a regulated activity by a ‘relevant authorised person’. A ‘controlled function’ may be an FCA-designated senior management function, which includes an ‘Executive director function’, ‘Compliance oversight function’ and ‘Other overall responsibility function’.⁸⁵
32. The FCA has the power to prohibit an individual who is not fit and proper from carrying out particular functions in relation to regulated activities, or from carrying out any function. The FCA may exercise this power where it considers it is appropriate to achieve any of its statutory objectives. These include its strategic objective of ensuring that markets function well and its operational objectives, described as the consumer protection objective, integrity objective and competition objective.⁸⁶

78 Section 101A(4).

79 Section 101A(5).

80 Financial Advisers Act, section 59(1). The power to direct that a licensed financial adviser remove an officer is found in section 57(1).

81 Section 59(3).

82 Section 59(4) and (5).

83 <https://www.fca.org.uk/about/the-fca>, <https://www.fca.org.uk/about/how-we-authorise>.

84 <https://www.fca.org.uk/firms/authorisation/apply-authorisation>, FCA Handbook High Level Standards COND 2 Threshold Conditions.

85 FSM Act section 59 and FCA Handbook SUP 10C FCA senior management regime for approved persons in relevant authorised persons, at SUP 10C.2 and SUP 10C.4.3R.

86 FCA Handbook Enforcement Guide EG 9.1; FSM Act section 56.

33. The FCA also has power to withdraw the approval of an approved person to perform the controlled function to which the approval relates, if the person is not fit and proper to perform that function. Where it considers appropriate, the FCA may prohibit an approved person, in addition to withdrawing their approval.⁸⁷ In deciding whether to withdraw an approval or make a prohibition order, the FCA considers in each case whether its statutory objectives can be achieved adequately by imposing disciplinary sanctions, for example public censures or financial penalties, or by issuing a private warning.⁸⁸
34. The decision to withdraw an approval or make a prohibition order is made by the Regulatory Decisions Committee (**RDC**), an FCA Board Committee operationally separate from the rest of the FCA. The RDC issues a warning notice to the person concerned, who has a right to respond through written and/or oral representations. If the RDC decides to proceed with the proposed action it issues a decision notice, in which case the person may elect to refer the matter to the Upper Tribunal.⁸⁹
35. On 7 March 2016, the UK Government introduced the Senior Managers Regime (**SMR**) and Certification Regime, which currently apply to the banking sector but are intended to extend to all authorised firms in 2018.
36. The SMR applies to individuals performing a senior management function (**SMF**), which are specified by the Prudential Regulatory Authority (**PRA**) and the FCA. The FCA has also specified 'prescribed responsibilities' that must be allocated among SMFs. In effect the SMR applies to the most senior individuals in firms who hold key roles or have responsibility for whole areas of relevant firms.⁹⁰ Firms are required to:
 - 36.1 prepare a management responsibilities map, setting out their governance and management arrangements, and how responsibilities are allocated to individuals within the firm;
 - 36.2 ensure that all senior managers performing an SMF role are pre-approved by the FCA;
 - 36.3 submit a Statement of Responsibilities to the regulator that sets out the areas of the firm that the prospective senior manager will be responsible for managing. The firm must resubmit the Statement of Responsibilities whenever there is a significant change in the senior manager's responsibilities.
37. The Government also introduced a 'duty of responsibility', which means senior managers are required to take the steps that it is reasonable for a person in their position to take, to prevent a regulatory breach from occurring. The duty of responsibility is supported by conduct rules and the FCA is currently consulting on how it will enforce this duty.⁹¹

87 EG 9.1.

88 EG 9.3.

89 <https://www.fca.org.uk/about/committees/regulatory-decisions-committee-rdc>, FCA Handbook Decision Procedure and Penalties Manual, DEPP 3 The nature and procedure of the RDC.

90 <https://www.fca.org.uk/firms/senior-managers-certification-regime>.

91 <http://www.fca.org.uk/publications/consultation-papers/guidance-duty-responsibility>.

38. The Certification Regime applies to employees of a firm who perform ‘significant harm functions’, which are functions that might involve a risk of significant harm to the firm or any of its customers. Firms are required to certify employees as being fit and proper to perform these functions and the certification must be renewed annually.
39. The SMR and Certification Regime are supported by new Code of Conduct Rules, which include Individual Conduct Rules that apply to all employees (including senior managers) with some exclusions for ancillary staff and the Senior Manager Conduct Rules. The Senior Manager Conduct Rules require individuals to:
 - 39.1 ensure that the business of the firm for which they are responsible is controlled effectively;
 - 39.2 ensure that the business of the firm for which they are responsible complies with relevant requirements and standards of the regulatory system;
 - 39.3 ensure that they delegate responsibilities to appropriate persons and effectively oversee the discharge of the delegated responsibility;
 - 39.4 disclose information that the regulators would reasonably expect to be notified.

UNITED STATES – SECURITIES AND EXCHANGE COMMISSION

40. The US Securities and Exchange Commission (**SEC**) oversees the key participants in the securities industry, including securities exchanges, securities brokers and dealers, investment advisers and mutual funds. Enforcement action by the SEC includes administrative proceedings, in which a variety of sanctions can be imposed, including cease and desist orders, suspension or revocation of broker-dealer and investment adviser registrations, censures, bars from association with the securities industry, civil monetary penalties, and disgorgement.⁹²
41. Administrative proceedings are initiated by the SEC’s Division of Enforcement. Generally, the order initiating proceedings directs that a hearing be held before an administrative law judge (ALJ), who is independent of the Commission. The ALJ issues an initial decision, including any recommended sanction. Either the person who is the subject of the proceeding or the Division of Enforcement may appeal to the Commission, which may also determine on its own initiative to review an initial decision. The Commission’s decision may be appealed to a United States Court of Appeals.⁹³

92 <https://www.sec.gov/about/whatwedo.shtml>.

93 <https://www.sec.gov/alj>.

42. Registration and regulation of brokers and dealers is governed under section 15 of the *Securities Exchange Act of 1934 (Exchange Act)*. Section 15(b)(4) requires the SEC to 'censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of any broker or dealer', if it finds that this is in the public interest and that the broker or dealer, or any person associated with them, has (among other things):
 - 42.1 made a materially false or misleading statement to the SEC or other regulatory agency;
 - 42.2 committed a relevant felony or misdemeanour (which generally includes offences of dishonesty or arising in the course of a securities business);
 - 42.3 been enjoined by court order from acting in a capacity in the securities industry;
 - 42.4 wilfully violated or is unable to comply with a provision of the Exchange Act or certain other Acts relating to the securities industry;
 - 42.5 failed reasonably to supervise another person who has committed such a violation, except where:
 - a) there were established procedures that could reasonably be expected to prevent such a violation;
 - b) the person has reasonably discharged their obligations under those procedures, without reasonable cause to believe they were not being complied with;
 - 42.6 been barred or suspended by the SEC from associating with a broker or dealer or related industry participant.
43. Section 203(e) of the *Investment Advisers Act of 1940 (Advisers Act)*, which governs the registration and regulation of investment advisers, provides for similar powers by the SEC.
44. Section 15(b)(6) of the Exchange Act requires the SEC to 'censure, place limitations upon the activities of such person, or suspend for a period not exceeding 12 months, or bar' a person 'from being associated with a broker, dealer, investment adviser' and certain other bodies, if the SEC finds that this is in the public interest and that the person has engaged in conduct as referred to in paragraph 113 above. Section 203(f) of the Advisers Act provides the SEC with similar authority.
45. The *Investment Company Act of 1940* bars certain persons from involvement in registered investment companies. Section 9(a) makes it unlawful for a person to act in the capacity of 'employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company' if the person has been convicted of a relevant misdemeanour or enjoined by court order from acting in a capacity in the securities industry.

46. Section 9(b) of that Act allows the SEC to prohibit, ‘conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company’, if it finds that the person has (among other things):
- 46.1 made a materially false or misleading statement to the SEC;
 - 46.2 wilfully violated the Exchange Act or certain other Acts relating to the securities industry.
47. In effect, these provisions allow the SEC to either prohibit a person on a permanent basis from working in any capacity with an industry participant, or suspend the person from doing so for a period up to 12 months. Where a prohibition order is made, it may allow the person to re-apply for registration at a later date.⁹⁴

94 For example, see Release No 34-79521, <https://www.sec.gov/litigation/admin/2016/34-79521.pdf>.

5. BANNING FROM MANAGEMENT OF A FINANCIAL SERVICES BUSINESS

1. Currently, a person who is banned from providing financial services can own, hold a senior position within, and be involved in the management of a financial services business despite the banning. As discussed above, this may not always be appropriate. For example, where the banned person supervises others who are providing financial services and/or the banned person is responsible for the licensee's policies and procedures.

PRELIMINARY POSITION - POSITION 1

2. After taking account of the matters outlined in detail above, the Taskforce has formulated preliminary positions on reforms to enhance ASIC's power to ban senior officials in the financial sector.

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.

3. The Taskforce adopts as its preliminary position 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:
 - 3.1 performing a specific function in a financial services business,⁹⁵ including managing a financial services business;⁹⁶ and
 - 3.2 performing any function in a financial services business.⁹⁷
 - 3.3 equivalent powers should apply to ASIC's powers in respect of credit regulation.
4. This new power to ban a person from specific or any financial services functions would only be triggered when the power to making a banning order under section 920A of the Corporations Act is enlivened. This type of approach has been adopted in a number of international jurisdictions. For example:
 - 4.1 the Ontario Securities Commission can make orders requiring a person to resign from one or more positions held as or prohibiting a person from acting as a director or officer, where officer is defined to include a number of specific positions,⁹⁸ a general manager and every individual who performs functions similar to those identified;

95 As in the United Kingdom and Ontario, Canada.

96 As in Singapore.

97 As in the United States.

98 Including a chair or vice chair of the board of directors, chief executive officer, chief operating officer, chief financial officer, president, vice president, secretary, assistant secretary, treasurer and assistant treasurer.

- 4.2 the Monetary Authority of Singapore can prohibit a person from taking part, directly or indirectly, in the management of, acting as a director of or becoming a substantial shareholder of the holder of a capital markets licence.
5. The advantage of this approach is that the banning order can specify functions from 'control of a licensee' to 'management' of a financial services or credit business based on the circumstances that enlivened the power to make the banning order. It also means that other kinds of management roles (such as compliance officers) can be captured.
6. To allow flexibility for ASIC, the Taskforce adopts the view that the power to ban should be cast so that ASIC can ban a person from fulfilling specified positions, such as senior manager or manager, or, in some cases, it may be justifiable to ban a person from any involvement in a financial services business.
7. In all of these cases, the person the subject of the ban would retain the right to have ASIC's decision reviewed by the Administrative Appeals Tribunal.

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 financial services business how should the term 'management' be defined?
2. Is it appropriate that these expanded powers to ban also apply in respect of credit businesses?

6. TRIGGERING THE POWER TO BAN FROM MANAGEMENT

1. The second issue identified in this paper is that ASIC does not have an express power to administratively ban senior office holders and managers in circumstances where they did not provide financial services (and were not strictly involved in contraventions of financial services laws) but were managing or overseeing the conduct of a financial services business that exhibits systemic non-compliance with financial services laws or other regulatory requirements. This issue also applies to the financial services licensing and credit licensing regimes.
2. The Government is currently considering reforms to enhance accountability of directors and senior executives in the banking sector, known as the BEAR. One of the proposals under the BEAR would enhance APRA's powers to administratively disqualify 'accountable persons'. Accountable persons would include banking directors and senior executives that must be registered with APRA under the new regime. These directors and senior executives may be removed and/or disqualified where they have not met the new BEAR expectations, as follows:
 - 2.1 to act with integrity, due skill, care and diligence and be open and co-operative with APRA; and
 - 2.2 to take reasonable steps to ensure that:
 - a) the activities or business of the Authorised Deposit-taking Institution (ADI) for which they are responsible are controlled effectively;
 - b) the activities or business of the ADI for which they are responsible comply with relevant regulatory requirements and standards;
 - c) any delegations of responsibilities are to an appropriate person and those delegated responsibilities are discharged effectively; and
 - d) these expectations and accountabilities of the BEAR are applied and met in the activities or business of the ADI group or subgroup for which they are responsible.
3. The Taskforce considered whether similar measures could be adopted into ASIC's legislation to address misconduct by senior managers in the financial services and credit sectors. This would involve imposing a new set of duties or expectations on individuals within the regulatory purview of ASIC, and enabling ASIC to ban an individual who does not meet those expectations or comply with those duties. However, APRA's regime has important differences, particularly with regard to prudential risk that is unique to ADIs. The Taskforce considers that in respect of financial services businesses, ASIC's banning powers can be adequately enhanced through the positions proposed in this paper, without creating new duties or a specific set of expectations.

PRELIMINARY POSITION - POSITION 2

The threshold for the exercise of ASIC's power to ban senior officials in the financial sector should be expanded

4. The Taskforce adopts as its preliminary position that the banning power would be enlivened where ASIC has reason to believe that the person is not:
 - 4.1 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
 - 4.2 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.
5. In the credit context, the existing powers to ban where ASIC has reason to believe that a person is not fit and proper, adequately trained or competent would be extended to those who perform the role of officer or senior manager in a credit business.
6. Further, the banning power would also extend to officers, partners or trustees who had on more than one occasion been involved in a financial services or credit licensee that has been:
 - 6.1 the subject of a report by the Australian Financial Complaints Authority regarding a failure to comply with a determination of that authority; or
 - 6.2 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.
7. Finally, the banning power would be enlivened where a person has breached their duty under sections 180, 181, 182 or 183 of the Corporations Act. These duties extend to directors, other officers and, in the case of sections 182 and 183, employees.
8. The requirements at paragraphs 61.1 and 61.2 above would focus on an individual's fitness, capacity and competence to provide financial services and perform in a senior role, instead of introducing new obligations or duties. It would enable ASIC to ban, for example, a senior manager who fails to take reasonable steps to ensure that the licensee and its representatives do not contravene their obligations or breach financial services laws.
9. The scope of the provision (so far as it relates to senior roles) would be limited by the current definitions of 'officer' and 'senior manager' in the Corporations Act⁹⁹ (for comparative approaches in foreign jurisdictions, see Annexure A). This would include persons who occupy specified roles (such as directors and secretaries) and who perform particular functions within a corporation, including persons who:
 - 9.1 make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the institution;

99 Section 9 of the Corporations Act.

- 9.2 have the capacity to affect significantly the institution's financial standing; and
- 9.3 are shadow officers – in accordance with whose instructions the directors are accustomed to act.
10. Introducing a new ground based on reports of non-compliance with determinations of the Australian Financial Complaints Authority would reflect the importance of complying with determinations of the new authority.
11. A new ground for banning in cases of 'phoenixing' related misconduct would be similar to the grounds to disqualify a person from managing corporations currently in section 206F of the Corporations Act. This director disqualification power is capped at a maximum five-year disqualification period and applies to officers of '2 or more corporations' that were the subject of a section 533(1) report relating to the inability to pay debts within the preceding seven years.
12. Subject to submissions on this point, the Taskforce will give further consideration as to whether the requirements of ('within 7 years' and '2 or more corporations') and the five-year cap will also be adopted in this new ground.
13. Including breach of officers' duties in the circumstances that enliven a banning order will ensure such misconduct can be captured without creating new obligations for directors, other officers and employees. It would also align these duties with duties in Chapter 5C of the Corporations Act,¹⁰⁰ which form part of financial services laws and, therefore, can trigger the banning order power (see earlier discussion at paragraph 28).
14. These additional grounds, as with other grounds in section 920A of the Corporations Act, would be subject to procedural fairness and administrative review.

QUESTIONS

3. Should the 'good fame and character' test in section 920A of the Corporations Act be replaced by a 'fit and proper person' test?
4. Should the positions outlined above, 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?
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)?
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?

100 Section 601FD of the Corporations Act.

ANNEXURE A - DEFINITION OF 'SENIOR MANAGER' IN DIFFERENT JURISDICTIONS

JURISDICTION	DEFINITION														
United Kingdom	<p>Approved Persons Regime (to be phased out by 2018 for all firms)</p> <p>Part 4 of the <i>Financial Services and Markets Act</i> (UK) prevents financial services firms from employing a person to perform a 'Controlled Function' unless they have been approved by the relevant regulator.</p> <p>'Controlled Functions' are those functions identified by the Financial Conduct Authority and Prudential Regulation Authority that influence a firm's regulatory conduct and involve either customer functions, or 'Significant Influence Functions', such as those carried out by individuals closely involved in running the firm.</p> <p>Once approved, these individuals become personally accountable to the regulator and have to comply with a series of binding standards of professional conduct. If there is found to be a breach – regulators can take enforcement action against the approved persons.</p> <p>New Senior Manager Regime</p> <p>The Senior Manager Regime replaces the 'Approved Persons' regime with persons performing Senior Management Functions (SMF) and focuses on individuals holding key roles or with overall responsibility for whole areas of the firms. The SMF are:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Executive</th> <th style="text-align: left;">Non-Executive</th> </tr> </thead> <tbody> <tr> <td>Chief Executive function</td> <td>Chairman</td> </tr> <tr> <td>Chief Finance function</td> <td>Chair of the Risk Committee</td> </tr> <tr> <td>Chief Risk function</td> <td>Chair of the Audit Committee</td> </tr> <tr> <td>Head of Internal Audit</td> <td>Chair of the Remuneration Committee</td> </tr> <tr> <td>Head of key business area</td> <td>Senior Independent Director</td> </tr> <tr> <td>Group Entity Senior Manager</td> <td></td> </tr> </tbody> </table> <p>Firms will be required to ensure that individuals seeking to perform in a SMF must have approval from the relevant regulator. Non-approval prior to taking up the role may lead to enforcement action against the firm and/or the individual.</p>	Executive	Non-Executive	Chief Executive function	Chairman	Chief Finance function	Chair of the Risk Committee	Chief Risk function	Chair of the Audit Committee	Head of Internal Audit	Chair of the Remuneration Committee	Head of key business area	Senior Independent Director	Group Entity Senior Manager	
Executive	Non-Executive														
Chief Executive function	Chairman														
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Chief Risk function	Chair of the Audit Committee														
Head of Internal Audit	Chair of the Remuneration Committee														
Head of key business area	Senior Independent Director														
Group Entity Senior Manager															

JURISDICTION	DEFINITION
<p>United Kingdom (continued)</p>	<p>Certification Regime</p> <p>This regime will apply to a broader range of individuals not carrying out SMFs, those whose roles could <i>cause significant harm to the firm or its customers</i>. Firms will need to certify that a person is fit and proper to perform a particular certification function at least annually and whiles these individuals do not need regulatory pre-approval, they are accountable to regulators. These individuals will also be subject to high level Rules of Conduct.</p>
<p>New Zealand</p>	<p>Senior manager: means 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 (for example a chief executive or a chief financial officer).</p> <p><i>(Section 6 Financial Markets Conduct Act 2013)</i></p>
<p>Hong Kong</p>	<p>New measures recently introduced by the HK Securities and Futures Commission (SFC) – Senior management of a Licensed Corporation includes directors, Responsible Officers (ROs) and Managers in Charge (MIC).</p> <p>MIC refers to an individual by a licensed company to be principally responsible, either alone or with others, for managing any of the following functions of the LC:</p> <ul style="list-style-type: none"> • Overall Management Oversight; • Key business line; • Operational control and review; • Risk management; • Finance and accounting; • Information Technology; • Compliance; or • Anti-money laundering and Counter-terrorism Financing. <p>The SFC expects that an MIC should report directly to and be accountable to the Board or the MIC for Overall Management Oversight. The Board of a LC should ensure that each MIC has acknowledged his or her appointment as MIC and the particular Core Function(s) for which he or she is principally responsible.</p>

JURISDICTION	DEFINITION
<p>Canada</p>	<p>No definition of Senior Manager under the Securities Act.</p> <p>An 'officer' is defined to include a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer, a general manager and every individual who performs functions similar to those normally performed by an individual holding one of these positions.</p>

ANNEXURE B - ASIC ENFORCEMENT REVIEW TERMS OF REFERENCE

The Taskforce will review the enforcement regime of the Australian Securities and Investments Commission (ASIC), to assess the suitability of the existing regulatory tools available to it to perform its functions adequately.

The review will include an examination of legislation dealing with corporations, financial services, credit and insurance as to:

- The adequacy of civil and criminal penalties for serious contraventions relating to the financial system (including corporate fraud);
- The need for alternative enforcement mechanisms, including the use of infringement notices in relation to less serious contraventions, and the possibility of utilising peer disciplinary review panels (akin to the existing Markets Disciplinary Panel) in relation to financial services and credit businesses generally;
- The adequacy of existing penalties for serious contraventions, including disgorgement of profits;
- The adequacy of enforcement related financial services and credit licensing powers;
- The adequacy of ASIC's power to ban offenders from occupying company offices following the commission of, or involvement in, serious contraventions where appropriate;
- The adequacy of ASIC's information gathering powers and whether there is a need to amend legislation to enable ASIC to utilise the fruits of telephone interception warrants or to grant the equivalent of Federal Crimes Act search warrant powers under ASIC's enabling legislation for market misconduct or other serious offences;
- The adequacy of ASIC's powers in respect of licensing of financial services and credit providers, including the threshold for granting or refusing to grant a licence, the circumstances in which ASIC may vary, suspend, or cancel licenses; and its coercive powers (including whether there is a need for ASIC to have a power to direct licensees to take, or refrain from taking, particular action);
- The adequacy of the frameworks for notifying ASIC of breaches of law, including the triggers for the obligation to notify; the time in which notification is required to be made; and whether the obligation to notify breaches should be expanded to a general obligation (currently confined under the Corporations Act to auditors, liquidators, and licensees, and noting that obligations to report offences exist under other Federal or State statutes); and
- Any other matters, which arise during the course of the Taskforce's review of the above, which appear necessary to address any deficiencies in ASIC's regulatory toolset.

Upon completion of the Review, the Taskforce will identify any gaps in ASIC's powers and make recommendations to the Government which it considers necessary to strengthen any of ASIC's regulatory tools and as to the policy options available that:

- address gaps or deficiencies identified in a way that allows more effective enforcement of the regulatory regime;
- foster consumer confidence in the financial system and enhance ASIC's ability to prevent harm effectively;
- do not impose undue regulatory burden on business, and promote engagement and cooperation between ASIC and its regulated population;
- promote a competitive and stable financial system that contributes to Australia's productivity growth; and
- relate to other matters that fall within this Terms of Reference.

Further information on the ASIC Enforcement Review taskforce is available at our website: <http://www.treasury.gov.au/ConsultationsandReviews/Reviews/2016/ASIC-Enforcement-Review>.