

9 October 2019

Manager  
Regulator Powers Reform Unit  
Financial Services Reform Taskforce  
Treasury

By Email: [asicenforcementreview@treasury.gov.au](mailto:asicenforcementreview@treasury.gov.au)

Dear Sir/Madam,

**Re: ASIC Enforcement Review Taskforce**

Industry Super Australia (ISA) undertakes policy research and advocacy on behalf of over five million members of industry superannuation funds, to ensure that the policy settings for superannuation members are consistent with the objective of maximising their retirement incomes.

ISA welcomes the opportunity to comment on Treasury's consultation on the Financial Regulator Reform (No,1) Bill 2019 developed following the ASIC Enforcement Review Taskforce (ERT). ISA's response will cover issues and questions relating to the proposed expansion of ASIC's powers on banning only.

The ERT was established to review ASIC's enforcement regime and make recommendations to improve ASIC's responses to misconduct in a changing corporate and financial services environment. ISA welcomes that the ERT's 50 recommendations have largely been actioned by the proposed amendments to the *Corporations Act (the Act)*.

The scale of the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**the Royal Commission**), and the degree to which it was critical of ASIC's enforcement culture<sup>1</sup>, demonstrate the importance of having an appropriate and broad enforcement toolbox.

#### **Summary of ISA's position**

ISA supports the proposed changes to ASIC's banning powers. It is obvious that ASIC requires greater powers to prevent future misconduct in the financial and credit services industries.

Despite this, there still are missed opportunities to further enhance ASIC's enforcement capabilities in the draft legislation. They are:

- ▶ a banning threshold that does not include senior staff who are not officers; and
- ▶ unnecessary restrictions on the banning of those involved in illegal phoenixing activity.

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<sup>1</sup> Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (2018) Vol 1, pp 424-426

## Banning threshold

The increased grounds on which ASIC can make a banning order from financial services are welcome but could go further.

As currently drafted, only “officers” can be banned from participating in financial services. Under the Act, an officer in a corporation is defined as:

- ▶ a director, secretary, receiver, liquidator or administrator of the corporation; or
- ▶ a person who makes, or participates in making, decisions that affect the whole or a substantial part of the corporation or has the capacity to significantly affect the corporation’s financial standing<sup>2</sup>.

This definition is too restrictive when applied to larger financial institutions like major banks, superannuation funds and insurance companies. Larger institutions are likely to have managers and other senior staff closer to those who provide frontline services who are responsible for conduct that can have a significant negative effect on consumers but who do not qualify as an officer under the Act.

In their submission to the ER Taskforce position paper on changes to banning powers, ASIC specifically requested that the application of these banning orders be expanded. This is due to the restriction the definition of “officer” places on ASIC when dealing with large financial institutions like the major banks<sup>3</sup>. In their submission ASIC used the example of compliance officers, although this situation could feasibly arise in situations involving any lower level manager of a consumer service<sup>4</sup>.

To address this issue, ISA proposes that the banning power be able to be applied to a wider range of roles in order to capture the appropriate roles in financial institutions. This could be achieved by including some of the classes of people identified in the proposed section 920B(1)(d). The expansion of the banning threshold should capture managers whose decisions may affect the broader compliance of the entity (eg. compliance managers). It should also capture divisional heads and those closer to front line services whose directives could lead those under their supervision to break the law.

## Phoenixing Ban Requirements

While the inclusion of the ERT’s recommendation to grant ASIC power to ban individuals involved in phoenixing activity is positive, a stronger approach should be adopted.

The proposed laws and the ERT’s recommendation would ban individuals from performing roles in financial services and credit businesses if an individual was, more than once, an officer, trustee or partner of an entity that was the subject of a liquidator report on phoenixing activity. This was based on the existing laws that can disqualify a person from managing corporations in the same circumstances<sup>5</sup>.

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<sup>2</sup> *Corporations Act 2001* (Cth) s 9

<sup>3</sup> Australian Securities and Investments Commission, ‘ASIC Enforcement Review Position and Consultation Paper 6-ASIC’s power to ban senior officials in the financial sector Submission by the Australian Securities and Investments Commissions’, October 2017, p 17

<sup>4</sup> *Ibid*

<sup>5</sup> *Corporations Act 2001* (Cth) s 206F

Illegal phoenixing activity poses a serious risk to Australian workers, resulting in up to \$298 million dollars in unpaid employee entitlements (including superannuation) in 2015-16<sup>6</sup>. Considering the severity of this risk, there seems to be little justification for the “at least twice” requirement on this banning threshold.

This ‘two-strikes’ rule sends the wrong message to those who intend to break the law and avoid their obligations to employees, creditors and the government. The discretionary nature of the banning powers provides ASIC with a sufficiently flexible tool to filter out those instances which do not warrant an immediate ban, which, post-Royal Commission, should be few and far between.

If ASIC has legitimate concerns that a senior member of a financial service or credit provider has been involved in phoenixing activity, they should not be prevented from acting on those concerns.

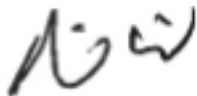
### **Conclusion**

The updated banning powers are, for the large part, a positive step towards a more effective ASIC enforcement regime.

While the ERT’s recommendations have been largely implemented, the draft legislation could be improved by looking beyond what has been specifically recommended. There is no reason why ASIC’s threshold for banning under these new powers should not be expanded considering the damage to consumers that bad actors can cause in the financial services sector.

If you have any questions, please do not hesitate to contact me on 03 9657 4339.

Yours sincerely



Nick Williams  
Legal Counsel

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<sup>6</sup> PricewaterhouseCoopers, ‘The Economic Impacts of Potential Illegal Phoenix Activity’, July 2018, p 12