

4 October 2017

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

By email: ASICenforcementreview@treasury.gov.au

Dear Sir/Madam

ASIC's Power to Ban Senior Officials in the Financial Sector

The Insurance Council of Australia (the Insurance Council) welcomes the opportunity to comment on the ASIC Enforcement Review Taskforce's (the Taskforce) Consultation Paper 6, *ASIC's power to ban senior official in the financial sector*. The Insurance Council acknowledges the importance of strong public confidence in the integrity of individuals who work in the financial sector, and agree in-principle with the proposed changes to strengthen ASIC's powers with regards to the banning of individuals.

While financial sector regulation should aim to reduce the impact of systemic risk and information asymmetry on the efficiency and stability of the financial system, there needs to be an appropriate balance between the costs and benefits of regulatory intervention. Any regulatory or legislative proposal which will have the effect of increasing the regulatory or administrative burden on business should only be implemented where material benefits are expected to outweigh the costs. To ensure that the compliance costs associated with the proposed changes do not outweigh the likely benefits, ASIC's enhanced banning powers should be used in a targeted manner.

Position 1

The Taskforce adopts as a 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:

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

The Insurance Council agrees that, once the administrative banning power is triggered, ASIC should be able to ban a person from performing a specific function. We also agree that enhancing ASIC's banning power in this way is likely to improve corporate conduct,

management accountability and culture by removing certain individuals from the financial services industry and preventing them from managing a financial services organisation.

We suggest that the term “management” should be narrowly defined. The approach taken in Canada to prescriptively list specified management positions is not helpful, as the function an individual performs may not necessarily correlate with their position/position title. A targeted definition of management should focus on the functions that are deemed critical to the conduct and culture of an organisation.

While the Insurance Council agrees that ASIC should be able to ban individuals from performing a specific function, the Insurance Council does not support the extension of ASIC’s powers to the banning of individuals from performing *any* function in a financial services organisation. Empowering ASIC in this way goes beyond the policy intent of banning individuals from adopting managerial roles or roles with an influence on the conduct of an organisation.

It is unnecessary for ASIC to be given a power to prohibit a person from working in any capacity within the sector; not every position or function is going to influence the conduct or culture of an organisation. Allowing a banned individual to be employed in the sector represents a low risk, as long as the person is not providing financial services, or managing/supervising/influencing people who are providing financial services, and is not responsible for the organisation’s policies and procedures.

Position 2

The Taskforce adopts as a preliminary position that the banning power should be enlivened 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.

The Insurance Council acknowledges the merit of replacing the good fame and character test by a fit and proper test in aiding consistency with the fit and proper test applied by the Australian Prudential Regulation Authority (APRA) to responsible persons. We note that such a change is likely to broaden the existing good fame and character test.

The Taskforce also proposes to extend the banning power to officers, partners or trustees who had on more than one occasion been involved in a financial services or credit licensee that has been the subject of a report by the Australian Financial Complaints Authority (AFCA) regarding a failure to comply with a determination of that authority.

Instead of specific references to the use of reports on non-compliance with AFCA determinations, ASIC should consider a range of regulatory and/or law enforcement decisions and reports in considering whether to ban individuals. Such a provision should be principles-based and subject to the procedural fairness and administrative review provisions.

Where AFCA non-compliance reports are considered, there should be evidence that the individual was responsible for the non-compliance and that the non-compliance was wilful before the banning power is triggered. For example, failure to implement a determination due to an administrative error, inefficient process or similar should not lead to an individual being banned in all circumstances.

If you have any questions or comments in relation to our submission, please contact John Anning, General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



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