



FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

4 October 2017

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

Email: ASICenforcementreview@treasury.gov.au

Re. **ASIC Enforcement review - Paper 6 - ASIC's power to ban senior official in the financial sector**

Dear Sir/Madam,

The Financial Planning Association of Australia (FPA) welcomes the opportunity to make an submission to the ASIC Enforcement Review's consultation into the ASIC's power to ban senior official in the financial sector.

If you have any queries or comments, please do not hesitate to contact me at policy@fpa.com.au or on 02 9220 4500.

Yours sincerely

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Head of Policy and Government Relations
Financial Planning Association of Australia¹

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The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
- We are recognised as a professional body by the Tax Practitioners Board.

**ASIC ENFORCEMENT REVIEW
PAPER 6
ASIC'S POWER TO BAN SENIOR OFFICIAL IN
THE FINANCIAL SECTOR**

FPA submission to:
Treasury

4 October 2017

INTRODUCTION

It has long been a concern of the FPA that it has been possible for financial advice providers who have been subject to ASIC banning actions to continue actively running financial advice businesses. Further, it has also been concerning that management of advice businesses are often not held responsible by the regulator for systemic failures in advice provision despite having a responsibility for ensuring advice is competently and compliantly provided. This lack of accountability has led to examples of poor cultural environments being developed within financial service and advice businesses.

Both these scenarios have the potential to place consumers unknowingly at considerable risk of adverse outcomes with their financial position which could easily have been avoided with appropriately implemented ASIC powers. For these reasons, the FPA is strongly in support of the positions the ASIC Enforcement Review have proposed regarding ASIC banning powers for management of AFSLs.

With the introduction of FOFA, it has been a legal obligation for financial advice providers to ensure they provide advice only when it is in the best interests of their clients. It is equally important in the FPA's view that the law require directors and management of advice businesses to be equally responsible for ensuring the organisation operates with the client's interest being placed foremost in their operations and therefore at the same level as other legal and directors' obligations.

By aligning outcomes for consumers from the Board level down through all advice organisations, a cultural alignment is made in the client's interests through all levels of the AFSL. While many large AFSLs have now introduced customer advocate positions in their executive leadership, the creation of additional powers for ASIC to ban individuals from directors down creates a greater legal imperative for the whole organisation to place client's interest foremost. Where there is a systemic failure to ensure clients are placed first, directors and management who neglect this obligation should face the consequences of these failures. The FPA believes these additional powers will further encourage new governance structures, business requirements and measurements to be put in place to ensure that the client best interest duty is being delivered upon, as advice failures are the responsibility of the whole organisation, not just the individual providing the service.

To ensure that the new ASIC banning powers are applied effectively across financial advice businesses, the FPA proposes that "manager" be defined as someone who is managerially responsibly for advice being provided.

The FPA would however highlight that while financial advice providers, directors and company secretaries are regulated and registered with ASIC, there is not currently a public register or requirement for management of financial services organisations to be registered. For this reason we question where ASIC will publish and record banning orders in relation to financial services managers.

The FPA would further encourage the ASIC Enforcement Review to consider whether section 961J of the Corporations Act should be expanded to management and directors of advice AFSLs to ensure ASIC's banning powers are able to work efficiently in improving the cultural alignment of businesses and clients.

Response to 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?

The FPA believes ASIC should have the ability to ban anyone in a financial services business where ASIC has identified that their actions have adversely affected a consumers, led to a breach of financial services law, or poses a potential threat to consumers and their financial position through their actions. For the purposes of defining this group of individuals, the FPA believes the definition which should be applied to management is "*someone who is managerially responsible for the financial services being provided*".

If the additional powers are limited, the FPA is comfortable that extending the ASIC banning powers to an officer or senior member of management (as per definitions in section 9) is an appropriate initial step.

As noted above, we would highlight that there appears to be an issue with recording banning of management of financial services organisations given they are generally not registered with ASIC.

2. Is it appropriate that these expanded powers to ban also apply in respect of credit businesses?

The FPA believes regulation of financial services should not create inequality in the delivery of services based on artificial categorisation of products or services, particularly where consumers have the ability to have their financial position adversely affected. Exemptions from conduct and disclosure obligations to retail consumers creates the risk of mis-selling which can lead to significantly adverse financial consequences. They also create incentives to push regulatory boundaries by participants to minimise cost or take advantage of lesser conduct or disclosure obligations.

While credit products are generally simpler for consumers to understand, they are proven to more often lead to worse financial outcomes for consumers than savings products, particularly for vulnerable consumers. For this reason the obligations required of directors, officers and management in an ACL' should match those of an AFSL.

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

The FPA supports the proposed change of 'good fame and character' to 'fit and proper person' test based on the examples provided in Paper 6.

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?

See response to question 1.

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)?

The FPA has significant concern about unpaid EDR determinations and instances where individuals have undertaken phoenixing activities. This is one of the issues which has led to calls for a compensation scheme of last resort which is currently being reviewed by the Professor Ian Ramsay led Review of the financial system external dispute resolution framework. The FPA believes that ASIC should have the power to ban individuals in relation to proven phoenixing activity, however this should not be limited to AFCA related incidents, but more broadly be applied to any ASIC approved EDR scheme, court decisions or where the financial services business has ceased to operate without an opportunity for customers to deal with complaints, within the time limits proposed.

The FPA believes the time limits imposed by section 206F are generally appropriate.

6. Should ASIC be able to impose a ban based on a breach by an individual of a duty under section 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?

The FPA has no concerns with this proposal in relation to sections 180, 181, 182 and 183. We note that breaches under section 181, 182 or 183 would cover most instances where a director fails to meet their duties and adding section 180 may not be required, and would generally be caused by misinformation being provided to directors by management.