

FSU Submission:

Submission to Treasury

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



FINANCE SECTOR UNION

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SUBMISSION TO TREASURY: ASIC's power to ban senior officials in the financial sector

Dear Secretariat

Thank you for the opportunity to provide comment on the Treasury Enforcement Review of ASIC. The Finance Sector Union of Australia represents 34 000 members across the Australia's finance sector. We take our responsibilities to identify poor practice, and laud good culture, very seriously.

Over the recent past, a number of examples of poor practice have been identified in a range of financial service providers. These examples have been, rightly, amplified in the media. Further, the Federal Government has established a range of inquiries and reviews aimed at creating greater scrutiny of the finance sector. In addition, the prospect of a Royal Commission into the banking sector remains a live consideration.

It has been the Finance Sector Union's experience that there are significant cultural issues within banks that mitigate against the effectiveness of accountability, disclosure and enforcement regimes. It is a matter of public record that the Chief Executive Officers of large banks support the principles of greater accountability and transparency. And, for those bank employees engaged directly in customer service and support, our experience is that they have an admirable collective commitment to quality service and customer satisfaction.

However, the experience of the Finance Sector Union is that the transmission and execution of improved culture from the senior executive level into senior manager levels needs serious improvement. In many cases, individuals have risen through the ranks of an incentives based industry over a period of decades. A "whatever it takes" culture remains pervasive in some entities, and flies beneath the radar of very senior executives. This culture can manifest in excessive pressure to meet targets on the staff below. Too often, relatively junior staff are held to a higher account than their managers, and bear the punitive action that arises. The public record is replete with examples of individuals being subject to disciplinary procedures, whilst senior management is not held to account for broader and systemic poor practice.

The review seeks commentary on two key aspects, and the FSU outlines detail of our views below.

"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"***

The FSU seeks to emphasise the point that there are vastly different management and accountability frameworks across the finance sector. Our concern lies primarily with bank and insurance employees who often operate in high pressure and profit-pursuing environments. As indicated in the opening paragraphs, under these conditions an employee can make an administrative or judgement error that the bank then seeks apply punitive measure to. There is very little, if any, recourse to the basics of procedural fairness, such as a right of appeal.

It is entirely possible that these individuals, who may have provided sterling service for many years, are caught up in broader regulatory measures aimed at identifying rogue operators in less regulated sectors such as mortgage broking.

For this reason, the FSU strongly believes that an administrative banning power must be supported by a transparent, fair and appellable process. Media reports today (October 11, 2017) indicate that the Government has acceded to requests to allow procedures under the BEAR regime to be subject to appeal, firstly to the Administrative Appeals Tribunal, and subsequently to the Federal Court.

The FSU supports this move, but notes that the BEAR regime applies only to relatively very senior managers ie around twenty five managers, in a big four bank.

The FSU holds a strong view that the underlying administrative fairness principles inherent in allowing an appeals mechanism MUST be replicated in procedures relating to Conduct and Background Checks (CBC's). It is unconscionable that two different sets of rules apply; one for very senior manager and another for junior staff.

With regard to comment on Position 1, this therefore becomes an extremely serious consideration. Whilst the FSU is broadly supportive of banning rogue operators from the industry, the critical issue is the reasonableness of the process applied prior to enactment of any ban. It is not appropriate that internal bank reviews of individuals, that fall well short of common law and administrative fairness requirements, be relied on to inform any regulatory process.

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.*

A fit and proper person test is a reasonably well established standard in legal terms. Industry related civil actions and criminal convictions are an obvious starting point in establishing a threshold, but the FSU recognises there may be compelling cases for a lowering of these thresholds - by way of example, repeat phoenixers, or managers of financial services that repeatedly oversee poor custom and practice and negative impacts on customers.

However, the FSU would point to potential difficulties in assessing civil thresholds, for example bankruptcies of individuals working in the industry, but in which the bankruptcy was unrelated to financial service activities.

Furthermore, the FSU reiterates the point made in relation to position 1. That is, action taken against individuals by regulators must only be based on investigations of adequate quality by approved authorities. In the experience of the FSU, there are serious flaws in the investigative regimes of banks as they relate to individuals, and there is gross inconsistency in the quality of investigations across the sector.

There is also the potential for the sector to effectively "outsource" investigations through self referrals of units or individuals to an enforcement agency, thereby shedding reputational and financial risk. This potential speaks to the threshold adopted by regulatory agencies for investigation.

With regard training and competency, by way of background the FSU notes that there is an extremely broad level of skills and experience in the sector. On the one hand there are highly qualified practitioners with multiple university degrees and international experience. Conversely, there are others who entered the banking sector after leaving school, and have effectively learnt on the job for decades.

Against this backdrop, the FSU notes that the finance sector is undergoing unprecedented wholesale technological change. These changes have enormous implications for the workforce. Into the future, FSU supports the concept of an industry based minimum level qualification that is portable across the sector with universal recognition.

The establishment of such a qualification would provide consumers and regulators with an additional level of comfort as to standards and ethical conduct. Any consideration by regulators /ASIC to ban individuals on the basis of a perceived or real lack of training or competency should be on a case by case basis rather than broad policy. The financial services sector has large numbers of individuals with no formal qualifications who provide high quality and ethical services.

The FSU supports an ASIC power to ban those identified at position 2.2a and b.

The Future of Regulation, Compliance and Enforcement

The Finance Sector Union notes the rapid and substantial changes in the Finance Sector broadly. Compliance and regulatory regimes will also need to adapt quickly to match the new landscape.

The FSU supports strong regulatory oversight and compliance regimes to ensure the stability of the Australian financial system. However, the regulatory and compliance regime must be:

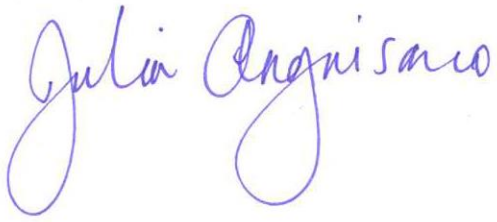
1. Proportionate to risk
2. Easy to understand, for consumers, businesses, the sector and employees, agents and contractors
3. Independent and transparent
4. Have clear lines of accountability
5. Be subject to regular review
6. Provide for administrative fairness

Currently, there are multiple agencies, policies and regulations administered across a range of departments and ministers.

For maximum effectiveness of any new regime, the FSU considers that Government should consider reducing the number of agencies to a minimum of, say, two; one agency to deal with regulatory regimes and policy, and another tasked with compliance and investigation.

Thank you for the opportunity to make a submission to your review, the FSU is happy to work with Treasury and ASIC on these important matters, and is available to answer any queries you may have now and into the future.

Yours sincerely



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