

4 October 2017

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

Westpac Place
Level 8, 275 Kent St
Sydney NSW 2000
westpac.com.au

By email: ASICenforcementreview@treasury.gov.au

Dear Ms Mills

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

The Westpac Group, which includes our Westpac, St.George, BankSA, Bank of Melbourne, RAMS and BT Financial Group (**Westpac**) businesses, welcomes the opportunity to provide a response to Treasury's ASIC Enforcement Review Position and Consultation Paper 6: *ASIC's power to ban senior officials in the financial sector (CP6)*. We are also broadly supportive of the submission made by the Australian Bankers' Association.

Westpac is generally supportive of the Positions set out in CP6 other than Position 2 – Part 3. We have set out our comments in Appendix 1 on each Position in CP6 for Treasury's consideration.

Westpac would welcome the opportunity to discuss our views in more detail with Treasury as these proposals are further developed. Please contact please contact Felicity Minzlaff on 0421 125 273 or by email at felicity.minzlaff@westpac.com.au if you would like any further information on our views.

Yours sincerely



Felicity Minzlaff

Senior Manager, Regulatory Response
Westpac Group

Appendix 1

Introductory comments – overlap with the Banking Executive Accountability Regime (BEAR)

Westpac considers that the additional powers proposed for the Australian Securities & Investments Commission (ASIC) in CP6 could overlap with those proposed for the Australian Prudential Regulatory Authority (APRA) in the draft BEAR legislation. This may result in a situation where both APRA and ASIC are able to take separate enforcement actions against an individual for the same conduct. Westpac recommends the scope for overlap between the two regimes be limited in the legislation so that where one regulator bans or disqualifies an individual, the other regulator would be prevented from imposing a sanction for the same conduct. In addition, APRA and ASIC should have an agreed understanding of which regulator will take enforcement action in particular situations. This would provide greater certainty as to how ASIC and APRA would coordinate their enforcement actions.

Position 1

Westpac generally supports Position 1. However, we recommend that further clarification be included in the legislation or ASIC guidance about the specific roles and functions that the banning power would apply to as this aspect is presently unclear.

In our view, the banning power should apply to the functions that are responsible for managing or controlling a financial services business (that is, the senior positions that this legislative reform is aimed at). Westpac does not see any real benefit in extending the banning power to functions that are not responsible for managing or controlling a financial services business.

Position 2 – Part 1

Westpac supports the use of the 'fit and proper person' test as a ground for banning an individual under s920A of the *Corporations Act 2001 (Act)*. We consider that this test is appropriate because it is an existing and well understood concept under Prudential Standards CPS 220 and CPS 520.

Westpac is generally supportive of the proposal to expand the existing ground for banning in s920A(da) of the Act so that it applies where ASIC has reason to believe that a person is not adequately trained or competent to perform the role of officer or senior manager in a financial services business. However, we recommend that the legislation or ASIC guidance clarify what the terms 'adequately trained' and 'competent' mean for this purpose. While these terms are already used in section 920A(da), we consider that clarification of these concepts would be helpful, given the proposal that this ground apply to a broader category of individuals. We also suggest that careful consideration be given as to what these terms mean as there may be serious consequences for individuals that are banned on this ground.

Position 2 – Part 2

Westpac considers the grounds set out in paragraphs (a) and (b) of Position 2 – Part 2 to be appropriate grounds for banning an individual.

Position 2 – Part 3

As sections 181 to 183 of the Act are civil penalty provisions, ASIC has the existing ability to apply to a Court to disqualify an individual from managing corporations for a particular period following a finding by the Court that those duties have been breached (section 206C of the Act). This process provides individuals with due process and procedural fairness in an open Court setting and an opportunity for a judicial officer to make a decision based on established precedent.

Westpac is of the view that including an additional ground for ASIC to ban an individual based on their breach of sections 180, 181, 182 or 183 would cause confusion and duplication between the existing framework described above and the new ASIC powers. On that basis, in our view, Position 2 – Part 3 is not necessary or desirable.

In addition, given the serious consequences that would follow for an individual found to have breached these duties, in our view, any breach of sections 180 – 183 should continue to be adjudicated by a Court in the first instance before any power to ban an individual is enlivened.