



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 281

# Financial Services Panel

April 2017

## About this paper

This consultation paper seeks feedback on our proposal to establish a panel called the Financial Services Panel (the Panel) to sit alongside our existing administrative processes. The Panel would add a strong element of peer review to a subset of ASIC's administrative decisions.

The Panel would comprise financial services and credit industry participants and/or non-industry participants with relevant expertise (e.g. lawyers and academics) and at least one ASIC staff member. The Panel would make administrative decisions on certain matters relating to financial services and credit activities.

We are seeking your feedback on how the Panel would enhance the impact of ASIC's administrative decisions, the matters that would be referred to the Panel, and the optimal composition of the Panel.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 11 April 2017 and is based on the Corporations Act as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

# Contents

<b>The consultation process</b> .....	<b>4</b>
<b>A Background to the proposals</b> .....	<b>5</b>
Purpose of this paper .....	5
Background .....	6
Our current approach to banning orders .....	7
<b>B Establishment of the Financial Services Panel</b> .....	<b>10</b>
Purpose of the Panel .....	10
<b>C Matters the Financial Services Panel would consider</b> .....	<b>12</b>
Matters to be referred to the Panel .....	12
Other administrative powers .....	14
<b>D Composition of the Financial Services Panel</b> .....	<b>15</b>
Membership of the Panel .....	15
Role of Secretariat .....	16
Managing conflicts of interest .....	17
Remuneration of sitting members .....	17
Process and procedure .....	17
<b>E Regulatory and financial impact</b> .....	<b>19</b>
<b>Appendix 1: International examples of the peer review model</b> .....	<b>20</b>
<b>Appendix 2: Historical data—banning orders</b> .....	<b>21</b>
<b>Key terms</b> .....	<b>22</b>
<b>List of proposals and questions</b> .....	<b>23</b>

## The consultation process

You are invited to comment on our proposal to establish the Financial Services Panel. The proposals are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the Financial Services Panel.

### Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 23 May 2017 to:

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 Australian Securities and Investments Commission  
 GPO Box 9827  
 Sydney NSW 2001  
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### What will happen next?

<b>Stage 1</b>	11 April 2017	Release of this consultation paper (CP 281)
<b>Stage 2</b>	23 May 2017	Comments due on CP 281
<b>Stage 3</b>	August 2017	Anticipated establishment of Panel

## A Background to the proposals

### Key points

This paper sets out our proposal to establish the Financial Services Panel (Panel) to sit alongside our existing administrative processes in order to enhance the impact of our administrative decisions by way of peer review. Peer review is a form of co-regulation in Australia and overseas.

Initially, the Panel would be responsible for determining (in some circumstances), whether ASIC will make banning orders against individuals for misconduct in the financial services and credit industries. Over time we may expand the range of matters that the Panel may make decisions on.

In Section B of the consultation paper, we seek your feedback on how the Panel will improve regulatory outcomes.

In Section C, we set out the matters we propose the Panel would consider.

In Section D, we explain how conflicts of interest would be managed, and seek your feedback on the proposed composition of the Panel.

### Purpose of this paper

- 1 The purpose of this paper is to set out our proposal to establish, through a form of co-regulation known as peer review, a Panel to:
  - (a) assist ASIC with making administrative decisions on certain matters relating to financial services and credit activities; and
  - (b) enhance the impact of ASIC's administrative decisions.

Note: See paragraphs 8–9 for more information on the peer review model and co-regulation.

- 2 ASIC has a wide range of administrative powers, including the power to make a banning order; issue infringement notices; and cancel, suspend or vary Australian Financial Services (AFS) licences and Australian credit licences (credit licences).

- 3 The Panel would exist alongside our current process for undertaking administrative action against participants in the financial services industry and those engaged in credit activities. Currently, our powers to take administrative action, including holding hearings, are exercised by specialised ASIC staff members with relevant training and expertise with delegated power (delegates) under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act).

Note: Delegates have all the powers given to ASIC under Div 6 of Pt 3 of the ASIC Act and Div 2 of Pt 6-5 of the National Credit Act, and are guided by the principles set out in [Regulatory Guide 8: Hearings practice manual](#) (RG 8).

- 4 The Panel would initially be responsible (in circumstances where the matter is referred to the Panel) for determining whether ASIC will make a banning order against an individual for misconduct in the course of providing financial services and/or engaging in certain credit activities. Specifically, the Panel would consider banning orders for misconduct by financial services participants (excluding corporate AFS licensees) and participants in the credit industry.
- 5 Over time, we may expand the range of matters that the Panel may make decisions on.
- 6 Establishing the Panel represents an opportunity for financial services and credit industry participants (industry participants) and/or non-industry participants with relevant expertise (e.g. lawyers and academics) to participate in ASIC's administrative decision making processes.

## Background

- 7 In December 2015, the report of the ASIC Capability Review made a number of findings about ASIC. Of particular relevance to this consultation paper, recommendation 28 stated:

ASIC to proactively develop opportunities to enhance the use of co-regulation for selected groups of the regulated population where this will deliver superior regulatory outcomes, including through strengthened licensing and registration regimes.

Note: The ASIC Capability Review formed part of the Australian Government's response to the Financial System Inquiry, which recommended periodic reviews of the capabilities of financial and prudential regulators. The ASIC Capability Review Expert Panel presented its recommendations to the Assistant Treasurer, the Hon. Kelly O'Dwyer MP, on 4 December 2015.

- 8 Peer review is a form of co-regulation in Australia and overseas. The term 'co-regulation' refers to circumstances whereby government agencies

administer and enforce regulatory arrangements in collaboration with industry.

Note: See Appendix 1 for some international examples of peer review bodies that are similar to the proposed Financial Services Panel.

- 9 Examples of peer review bodies in Australia include:
- (a) Takeovers Panel—regulates corporate control transactions in widely held Australian entities, primarily by the resolution of takeover disputes;
  - (b) Markets Disciplinary Panel (MDP)—responsible for disciplinary action against participant and market operators for alleged breaches of the market integrity rules. In this capacity, the MDP makes decisions about whether to issue infringement notices or accept enforceable undertakings;
  - (c) Companies Auditors Disciplinary Board (CADB)—independent peer review body established under the ASIC Act to act as an expert disciplinary tribunal on applications for the cancellation or suspension of the registration of auditors under the *Corporations Act 2001* (Corporations Act); and
  - (d) Liquidator registration and disciplinary committees—convened by ASIC under changes to the Corporations Act introduced by the *Insolvency Law Reform Act 2016*, including committees to consider and decide on applications for registration as a liquidator and some disciplinary matters involving registered liquidators.

## Our current approach to banning orders

- 10 Among ASIC’s wide range of administrative powers is the power to make a banning order.

Note: Section 920B of the Corporations Act defines a banning order as a written order that prohibits the banned person from providing any financial services, whether as an AFS licensee or as a representative of such a licensee, or specified financial services in specified circumstances or capacities. Section 81 of the National Credit Act defines a banning order as a written order that prohibits a person from engaging in any credit activities or specified credit activities in specified circumstances or capacities.

- 11 Generally, ASIC can only make a banning order after giving the person the opportunity to appear or to be represented at a private hearing before us and to make submissions. We can make a banning order which has immediate effect, without giving the person the opportunity of a hearing, if they have been convicted of serious fraud or their licence has been suspended or cancelled.

Note: See s920A(3) of the Corporations Act and s80(5) of the National Credit Act.

- 12 As set out in [RG 8](#), s59(1) of the ASIC Act and s285 of the National Credit Act, we must conduct administrative hearings with as little technicality and formality, and as expeditiously, as possible. However, we must bear in mind the need for a proper consideration of the issues in question and the legislative requirements of the corporations legislation (other than the excluded provisions).
- 13 We list the circumstances where we may make a banning order against a person under s920A of the Corporations Act in [Regulatory Guide 98 Licensing: Administrative action against financial service providers](#) (RG 98).
- Note: See RG 98.28 of [RG 98](#).
- 14 We list the circumstances where we may make a banning order against a person under s80 of the National Credit Act in [Regulatory Guide 218 Licensing: Administrative action against persons engaging in credit activities](#) (RG 218).
- Note: See RG 218.32 of [RG 218](#).
- 15 [RG 98](#) and [RG 218](#) also set out the factors we consider when deciding to make a banning order. These factors include those listed in Table 1 in [RG 98](#), which include:
- (a) the nature and seriousness of the suspected misconduct;
  - (b) internal controls;
  - (c) conduct after the alleged contravention occurs;
  - (d) the expected level of public benefit;
  - (e) likelihood that:
    - (i) the person's behaviour will change in response to a particular action; or
    - (ii) other industry participants will be deterred from engaging in similar conduct through greater awareness of its consequences; and
  - (f) mitigating factors.
- 16 Under both the Corporations Act and the National Credit Act, a banning order may be permanent or for a specified period. For examples of factors likely to lead to a banning for a greater or lesser period of time in the financial services context, see Table 2 in [RG 98](#).
- 17 A longer banning period will apply to a person assessed as posing a higher risk.
- 18 In our risk assessment, we consider what the person's conduct shows about them and their motivation, if any, for engaging in the conduct. For example, we are likely to consider that:



- (a) a person who has acted dishonestly, or has chosen to engage in conduct despite knowing that it could potentially adversely affect others, poses a higher risk than a person who should have realised the potential for adverse consequences to others but did not, or a person whose misconduct is the result of being careless; and
  - (b) a person who shows a deliberate disregard for compliance with the law poses a higher risk than a person who fails to comply due to incompetence.
- 19 Multiple instances of misconduct can increase the seriousness of risk that the person poses to investors and consumers if they are not banned and may lead to a longer banning period.
- 20 We emphasise that each case will depend on its particular circumstances and will be determined on a case-by-case basis.
- 21 Table 3 in Appendix 2 of this consultation paper summarises the number and types of financial services and credit banning orders we have made in each of the last three financial years.
- 22 The total banning orders figures in the table include all matters—that is, matters that were significant, complex or novel, as well as those that were simple, uncontested or made without a hearing.

## B Establishment of the Financial Services Panel

### Key points

We anticipate that the Panel may improve regulatory outcomes by ensuring that ASIC's administrative decisions take into account current industry practices. This would be achieved through the participation of industry participants or non-industry participants with relevant experience and expertise.

### Purpose of the Panel

#### Proposal

- B1** We propose that establishing the Panel may improve regulatory outcomes by:
- (a) assisting ASIC with making administrative decisions on certain matters relating to financial services and credit activities; and
  - (b) enhancing the impact of ASIC's administrative decisions.

#### *Your feedback*

- B1Q1 How would the Panel improve regulatory outcomes?  
 B1Q2 How do you see the Panel, as a peer review mechanism, enhancing the impact of ASIC's administrative decisions?

#### Rationale

- 23 Establishing the Panel may assist with improving regulatory outcomes by:
- (a) ensuring that ASIC's administrative decisions are based on a thorough understanding of current industry practice and standards;
  - (b) bringing a broader range of experiences and perspectives into the decision-making process;
  - (c) increasing awareness of the decisions being made by ASIC and the standards they set; and
  - (d) potentially increasing the significance of decisions—both for the individual who is subject to the potential banning, and for other market participants—when these decisions are made with peer involvement.
- 24 This is consistent with generally recognised benefits of effective co-regulation, for example by:
- (a) utilising the expertise of the regulated population;

- (b) being potentially more flexible and adaptable, and therefore suited to monitor and deal with market and technical innovations; and
  - (c) being more likely to secure the cooperation of the regulated population.
- 25 Conversely, a peer based model may have potential disadvantages, including risks of:
- (a) inconsistency in the decisions made;
  - (b) decisions not aligning with ASIC policy;
  - (c) decisions being made by people who are less regularly engaged with the legal standards and concepts involved;
  - (d) potential community concerns that the industry is judging itself; and
  - (e) increasing costs due to more people being involved in the decision-making process.
- 26 However, as explained in Section C, to potentially mitigate these concerns, we propose that the Panel would:
- (a) include an ASIC staff member who is specialised and trained in making these types of decisions; and
  - (b) only make decisions on a subset—rather than all—of ASIC’s administrative decisions.

## C Matters the Financial Services Panel would consider

### Key points

We propose that the Panel would initially be responsible for determining whether ASIC would make banning orders for misconduct by financial services participants (excluding corporate AFS licensees) and participants in the credit industry.

We would refer a particular matter to the Panel where it is appropriate for peer review because of its significance, complexity or novelty.

Over time we may expand the range of matters that the Panel may make decisions on.

### Matters to be referred to the Panel

- 27 We would delegate to the Panel our power to ban a person from providing financial services and/or engaging in credit activities by making a banning order. This power is available to us under s920A of the Corporations Act and s80 of the National Credit Act: see paragraphs 13–14.
- 28 Consistent with our current approach to banning orders, and as per our powers under s920B(2) of the Corporations Act and s81(2) of the National Credit Act, the banning orders imposed by the Panel would either be permanent or for a specified period.
- 29 We would not refer a matter to the Panel where the grounds for making a banning order do not require giving the person the opportunity of a hearing.
- 30 We would refer a matter to the Panel where it is appropriate for peer review because of its significance, complexity or novelty. Whether a matter is appropriate will depend on the facts of each matter.
- 31 While it would be possible to refer all banning matters to the Panel, this would increase the cost of the process and the demands placed on Panel members. We consider this would only be justified where the potential benefits of having a Panel decision (see paragraphs 23–24) outweigh the additional costs of doing so. These potential benefits are greatest where the matter is significant, complex or novel.

## Proposal

- c1** We propose that when a matter is referred to the Panel, the Panel would be responsible for determining whether ASIC will make a banning order against an individual for misconduct in the course of providing financial services (as defined in s766A of the Corporations Act) and/or engaging in credit activities (as defined in s6 of the National Credit Act). Specifically, the Panel would consider banning orders for misconduct by financial services participants (excluding corporate AFS licensees) and participants in the credit industry.

### *Your feedback*

- C1Q1 What are your views on the Panel initially only being referred matters to consider that relate to the making of banning orders?
- C1Q2 What other areas of regulatory priority should be included in the scope of the matters to be considered by the Panel (in addition to individual misconduct in the financial services and credit industries) either now or in the future?

## Proposal

- c2** In deciding whether to refer a matter to the Panel, we would consider whether it is appropriate for peer review because of its significance, complexity or novelty. Whether a matter is appropriate will depend on the facts of each matter. In addition, we would take into account:
- (a) the objects of Ch 7 of the Corporations Act, that is to promote:
    - (i) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and
    - (ii) fairness, honesty and professionalism by those who provide financial services; and

Note: See s760A(a) and (b) of the Corporations Act. We also take into account the objects of the ASIC Act as contained in s1(2).

- (b) the objects of the National Credit Act, that is to better inform consumers and prevent them from being in unsuitable credit contracts.

Note: See s111 in Div 1 of Ch 3 of the National Credit Act.

### *Your feedback*

- C2Q1 Is 'complexity, significance or novelty' an appropriate measure for the types of matters to be considered by the Panel?
- C2Q2 What are your views on how ASIC should distinguish between 'complex' and 'simple' matters and which do you see as more appropriate to be considered by the Panel?

C2Q3 What alternative or additional criteria should be used to assist in determining which matters would be referred to the Panel?

### Proposal

c3 We propose that only matters that are contested by the notice recipient (Recipient) would be referred to the Panel.

#### *Your feedback*

C3Q1 Should uncontested matters also be referred to the Panel?

## Other administrative powers

32 We are not proposing to delegate our other administrative powers to the Panel at this stage.

### Proposal

c4 We may consider expanding the Panel's powers and/or the scope of the matters to be referred to the Panel in the future. Some examples of powers that we may delegate to the Panel in the future include the power to:

- (a) issue infringement notices;
- (b) refuse an AFS licence or credit licence application;
- (c) impose conditions on an AFS licence or credit licence; and/or
- (d) cancel or suspend an AFS licence or credit licence.

#### *Your feedback*

C4Q1 What other administrative powers should we delegate to the Panel (in addition to the power to make banning orders) now or in the future?

## D Composition of the Financial Services Panel

### Key points

We propose that the Panel would generally be comprised of three sitting members with up to two industry participants or non-industry participants and at least one ASIC staff member.

The Panel's members would be appropriately remunerated and ASIC secretariat personnel would be appointed to assist them with administrative tasks.

Where an actual or perceived conflict of interest is determined, a Panel member would not be able to hear, or continue to hear, the matter.

### Membership of the Panel

- 33 We propose that the Panel would usually consist of three sitting members to ensure that an outcome is achieved (by simple majority vote) if there are differences of views among the members.
- 34 Up to two of the three sitting members would be industry participants and/or non-industry participants and the remaining member(s) would be ASIC staff.
- 35 We propose that an ASIC staff member would sit on the Panel, as this will ensure there is a Panel member who is specialised and trained in these types of decisions, and is familiar with the law and ASIC's policy and guidance. An ASIC staff member on the Panel would also mitigate the potential disadvantages of a peer based model: see paragraphs 25–26.
- 36 See Appendix 1 for examples of different models of membership adopted in international peer review models.

### Proposal

- D1 We propose that one of the three options set out in Table 1 would form the basis for selecting members of the Panel.

#### *Your feedback*

D1Q1 Of the options for the Panel's composition that we have set out in Table 1, which is the most suitable for the Panel's purpose?

D1Q2 Are there other options for the Panel's composition that we should consider? Please explain.

**Table 1: Proposed options for selecting members of the Financial Services Panel**

Option	Description
1. Industry participants only	Up to two members to be drawn from a pool of industry participants. The third member would be an ASIC staff member.
2. Industry and non-industry participants from a range of professions	Up to two members to be drawn from a pool comprised of industry participants and non-industry participants with relevant expertise (e.g. lawyers, academics and consumer representatives). The third member would be an ASIC staff member.
3. Industry and independent participants	One member to be an industry participant, and one member to be a participant independent of the financial services and credit industries (e.g. experienced Tribunal member). The third member would be an ASIC staff member.

## Rationale

### Option 1: Industry participants only

37 This approach may ensure that non-ASIC Panel members would have current experience and expertise relevant to the matter being decided by the Panel.

### Option 2: Industry and non-industry participants from a range of professions

38 This approach would broaden the range of experience, expertise and perspective brought to bear by the Panel.

### Option 3: Industry and independent participants

39 This approach would further broaden the range of experience and expertise that Panel members would bring to bear; however, this range of experience and expertise may be less relevant to the particular matter being decided by the Panel.

## Role of Secretariat

40 We would establish a secretariat comprised of ASIC staff members to assist the sitting members of the Panel.

41 Secretariat staff would provide support to the Panel by assisting members to prepare for hearings and undertaking other administrative tasks. The Secretariat would also have an important role in identifying and managing conflicts of interest.



## Managing conflicts of interest

- 42 We would ensure thorough processes are in place to identify and manage conflicts of interest.
- 43 Where a Panel member has an interest that could conflict with the proper performance of their functions in determining a matter they are scheduled to hear, or are hearing, they would be required to disclose that interest.
- 44 Where an actual or perceived conflict of interest is determined, a Panel member would not be able to hear, or continue to hear, the matter.

## Remuneration of sitting members

- 45 Generally, the payment of Panel members (other than ASIC staff) would be consistent with item 8 in 'Part 2 – Fees' of the Remuneration Tribunal's [Determination 2015/20: Remuneration and Allowances for Holders of Part-Time Public Office](#) (PDF 761KB).

## Process and procedure

- 46 The Panel members would be required to conduct hearings in accordance with Div 6 of Pt 3 of the ASIC Act and Div 2 of Pt 6-5 of the National Credit Act and with the principles set out in [RG 8](#).
- 47 We may publish further guidance for industry in relation to the procedures the Panel will follow, after the consultation period.
- 48 Table 2 sets out the main stages of the Panel process generally.

**Table 2: Panel process and procedure**

Stage	Description
1	Investigation conducted and ASIC belief formed as to whether the suspected misconduct is appropriate for peer review because of its complexity, significance, or novelty.
2	Areas of concern, opportunity to be heard, and relevant material is given by ASIC to Recipient.
3	If Recipient wishes to be heard in relation to ASIC's concern, sitting members of Panel are convened and briefed.
4	Recipient provided with notification of: <ul style="list-style-type: none"> <li>• hearing date; and</li> <li>• Panel members who will hear the matter.</li> </ul> Recipient given opportunity to raise any conflict of interest concerns with ASIC.

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Stage	Description
5	Panel conducts hearing.
6	If appropriate, banning order made against Recipient.

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## E Regulatory and financial impact

49 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) enhancing the impact of a subset of ASIC's administrative decisions by adding a strong element of peer review; and
- (b) fulfilling our regulatory responsibilities as underpinned by the objects of the financial services regime, which include promoting:
  - (i) investors and consumers making confident and informed decisions;
  - (ii) fairness, honesty and professionalism by those who provide financial services; and
  - (iii) fair, orderly and transparent markets for financial products.

Note: s760A of the Corporations Act.

50 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

51 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, we are unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

52 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

## Appendix 1: International examples of the peer review model

- 53 Overseas regulators in various jurisdictions have adopted a peer review model.
- 54 In the United Kingdom, the Financial Conduct Authority (FCA) has established a committee of its board known as the Regulatory Decisions Committee (RDC). The RDC's Chair is an FCA employee and the other members include industry practitioners and non-practitioners with experience across various industries.
- 55 The RDC decides whether the FCA should issue certain statutory notices. The statutory notices given by the RDC are usually warning notices, decision notices and supervisory notices.
- Note: Financial Conduct Authority, '[Regulatory Decisions Committee \(RDC\)](http://www.fca.org.uk)' webpage, [www.fca.org.uk](http://www.fca.org.uk).
- 56 The Financial Services Commission of Ontario (FSCO) established the Financial Services Tribunal (FST) as an independent adjudicative body composed of nine to fifteen current and former practitioners including the Chair and two Vice-Chairs. The members of the FST include financial market participants, consultants and legal practitioners.
- Note: Financial Services Tribunal, '[Financial Services Tribunal](http://www.financialservicestribunal.on.ca)' webpage, [www.financialservicestribunal.on.ca](http://www.financialservicestribunal.on.ca).
- 57 The FST has exclusive jurisdiction to determine all questions of fact or law that arise in any proceeding before it.
- Note: See Financial Services Commission of Ontario, '[Case summaries of FST and PCO decisions](http://www.fSCO.gov.on.ca)' webpage, [www.fSCO.gov.on.ca](http://www.fSCO.gov.on.ca).
- 58 In New Zealand, the Minister of Commerce has established an independent committee called the Financial Advisers Disciplinary Committee (FADC) to conduct disciplinary proceedings arising from complaints about Authorised Financial Advisers (AFA) referred to it by the Financial Markets Authority (FMA). Members of the FADC are practitioners and non-practitioners as determined by its Chairperson.
- 59 The FADC has the ability to make determinations and impose penalties ranging from recommending to the FMA that it cancel an AFA's authorisation through to imposing a fine not exceeding \$10,000.
- Note: Financial Advisers Disciplinary Committee, '[Home](http://www.fadc.govt.nz)' webpage, [www.fadc.govt.nz](http://www.fadc.govt.nz).

## Appendix 2: Historical data—banning orders

- 60 The following table summarises the number and types of financial services and credit banning orders we have made in each of the last three financial years.
- 61 The total banning orders figures in the table include all matters—that is, matters that were significant, complex or novel, as well as those that were simple, uncontested or made without a hearing.

**Table 3: Banning orders made in last three financial years**

Financial year	Total banning orders made	Permanent banning orders made	Permanent banning orders as percentage of total	Banning orders made for a specified period	Banning orders for a specified period as percentage of total
FY16	69	41	59.4%	28	40.6%
FY15	45	23	51.1%	22	48.9%
FY14	53	37	69.8%	16	30.2%

Source: ASIC internal data.

## Key terms

Term	Meaning in this document
AFS licensee	Australian Financial Services licensee
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
hearing	Has the meaning given by s5 of the ASIC Act
industry participants	Means, for the purposes of this consultation paper, financial services participants (excluding corporate AFS licensees) and participants in the credit industry.
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
Panel	ASIC's proposed Financial Services Panel, to which ASIC would delegate its power to make a banning order against an individual for misconduct in the course of providing financial services and/or engaging in credit activities
Recipient	Means the recipient of ASIC's notice in the form of a Statement of Reasons.

## List of proposals and questions

Proposal	Your feedback
<p>B1 We propose that establishing the Panel may improve regulatory outcomes by:</p> <p>(a) assisting ASIC with making administrative decisions on certain matters relating to financial services and credit activities; and</p> <p>(b) enhancing the impact of ASIC's administrative decisions.</p>	<p>B1Q1 How would the Panel improve regulatory outcomes?</p> <p>B1Q2 How do you see the Panel, as a peer review mechanism, enhancing the impact of ASIC's administrative decisions?</p>
<p>C1 We propose that when a matter is referred to the Panel, the Panel would be responsible for determining whether ASIC will make a banning order against an individual for misconduct in the course of providing financial services (as defined in s766A of the Corporations Act) and/or engaging in credit activities (as defined in s6 of the National Credit Act). Specifically, the Panel would consider banning orders for misconduct by financial services participants (excluding corporate AFS licensees) and participants in the credit industry.</p>	<p>C1Q1 What are your views on the Panel initially only being referred matters to consider that relate to the making of banning orders?</p> <p>C1Q2 What other areas of regulatory priority should be included in the scope of the matters to be considered by the Panel (in addition to individual misconduct in the financial services and credit industries) either now or in the future?</p>

Proposal	Your feedback
<p>C2 In deciding whether to refer a matter to the Panel, we would consider whether it is appropriate for peer review because of its significance, complexity or novelty. Whether a matter is appropriate will depend on the facts of each matter. In addition, we would take into account:</p> <p>(a) the objects of Ch 7 of the Corporations Act, that is to promote:</p> <p>(i) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and</p> <p>(ii) fairness, honesty and professionalism by those who provide financial services; and</p> <p>Note: See s760A(a) and (b) of the Corporations Act. We also take into account the objects of the ASIC Act as contained in s1(2).</p> <p>(b) the objects of the National Credit Act, that is to better inform consumers and prevent them from being in unsuitable credit contracts.</p> <p>Note: See s111 in Div 1 of Ch 3 of the National Credit Act.</p>	<p>C2Q1 Is 'complexity, significance or novelty' an appropriate measure for the types of matters to be considered by the Panel?</p> <p>C2Q2 What are your views on how ASIC should distinguish between 'complex' and 'simple' matters and which do you see as more appropriate to be considered by the Panel?</p> <p>C2Q3 What alternative or additional criteria should be used to assist in determining which matters would be referred to the Panel?</p>
<p>C3 We propose that only matters that are contested by the notice recipient (Recipient) would be referred to the Panel.</p>	<p>C3Q1 Should uncontested matters also be referred to the Panel?</p>
<p>C4 We may consider expanding the Panel's powers and/or the scope of the matters to be referred to the Panel in the future. Some examples of powers that we may delegate to the Panel in the future include the power to:</p> <p>(a) issue infringement notices;</p> <p>(b) refuse an AFS licence or credit licence application;</p> <p>(c) impose conditions on an AFS licence or credit licence; and/or</p> <p>(d) cancel or suspend an AFS licence or credit licence.</p>	<p>C4Q1 What other administrative powers should we delegate to the Panel (in addition to the power to make banning orders) now or in the future?</p>



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Proposal	Your feedback
D1 We propose that one of the three options set out in Table 1 would form the basis for selecting members of the Panel.	D1Q1 Of the options for the Panel's composition that we have set out in Table 1, which is the most suitable for the Panel's purpose?  D1Q2 Are there other options for the Panel's composition that we should consider? Please explain.

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