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Dear Ms Ebrahimi,

AFA Submission – Financial Services Panel (CP281)

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are required to be practising financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting wealth.

Summary of the AFA’s position

The AFA supports greater professional experience informing regulatory decisions. The proposal from the Australian Securities and Investments Commission (ASIC) to inject a thorough understanding of industry practices into the enforcement aspect of ASIC’s role is a welcome move toward increasing the effectiveness of banning decisions. This is a positive step toward effective co-regulation and one that financial advisers in particular are interested in participating in.

The AFA considers that it is imperative to the success of the Panels that ASIC can draw upon a pool of talent with solid experience across the spectrum of each discipline and across financial product types. As no sole industry representative will be a repository of all knowledge and experience for every situation delegated to the Panels to adjudicate on and these administrative matters are not subject to the same rules of evidence as the court system, the right mix of experience needs to be represented in the pool of ‘adjudicators’. More importantly, the people who select these individuals need to also have the appropriate experience to be able to take the measure of the adjudicators that are in consideration for the role.

Accordingly, the AFA supports the proposal to have practitioners of a craft, corporate peers and equivalent professionals to decide upon future ASIC banning orders, subject to the right people being selected to both sit within the pool of adjudicators and to sit on an appointment body for the adjudicators. Provided the experience pool can be managed effectively as vacancies arise and conflicts need to be managed, the AFA considers that this system should improve regulatory outcomes by:

- improving the integrity of the decisions and fairness of hearings;
- underpinning decisions with real world experience;
- ensuring that the evidence can be meaningfully analysed and critiqued;
- legitimising the scale of sanctions with relevance;
- defusing potential criticisms of the process; and
- securing greater cooperation of the regulated population.

In order to achieve these objectives, the AFA recommends that Financial Services Panels be structured as follows:

1. The AFA’s preference for the composition of each Financial Services Panel would be for Option 1 – two people who specialise in the subject area to sit alongside an ASIC representative – but we also see merit in Option 3 as well. The AFA would not support Option 2;

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2. The key to the success of the Panels will be selecting a complement of people to be ‘adjudicators’ in their respective fields with a good mix of experience, disciplines, and firm types. Protocols may need to be developed to ensure that the mix of experience available in the pool of adjudicators can meet the needs of the types of matters being referred to Panels;
3. Industry experience to be represented as well in the process to appoint of Panel adjudicators to ensure that adjudicator selections can be critiqued with the contribution of a relevantly experienced industry participant (e.g. a well-respected financial adviser who contributes to decisions to appoint financial advisers to the pool of Panel members; a mortgage broker to contribute to mortgage broker appointments, etc);
4. To avoid any gaps in the approach between contested and uncontested matters, Panels should not be prevented from considering uncontested matters and in fact could benefit from the experience in adding to the body of collective understanding of what size sanction fits which circumstances;
5. If the aim is to ensure that costs are managed, ASIC’s proposed measure to select matters for the Panels based on their respective levels of ‘complexity, significance or novelty’ is a good beginning point to refer matters to Panels, with the AFA preferring for such an allocation system to be reviewed every 12 months;
6. There are several additional criteria or filters that should be applied to selecting matters to delegate to Panels which may best be considered as an ‘always refer’ situation irrespective of the significance, complexity or novelty of the issues; and
7. The AFA would support Financial Services Panels in future being delegated other administrative decisions as well, including but not limited to, issuing infringement notices and licensing issues.

Particular recommendations of the AFA

The AFA considers that to better protect consumers of financial services in Australia and engage licensees more effectively in its co-regulatory approach, ASIC should structure the Financial Services Panels in the following manner:

1. The composition of the Panels be a mix of Options 1 and 3

The AFA supports and agrees with the reasons for each Panel having an ASIC representative – preferably from ASIC’s Enforcement Team – as the third member selected to adjudicate over

banning order matters referred to the Panels. For the Panels to be effective there needs to be consistency, legal insight, direct access to surveillance material and appreciation of the range of matters ASIC has dealt with represented on each Panel. If the primary purpose of Financial Services Panels is to introduce a thorough understanding of industry practice into only some banning matters – with other matters to be decided without the need for the same level of practical on-the-ground knowledge – then the second composition option proposed by ASIC would not be of as much value as the first or third options, or a mixture of the two.¹ The AFA recommends that the ASIC Financial Services Panels maximise experiential value of each Panel by requiring each Panel to have two people who specialise across the subject area of each banning order matter and for those individuals to be drawn from a pool of Panel members (‘adjudicators’) who have a mixture of specific specialisations, broad experience or multi-disciplinary experience.

Whilst the majority of ASIC’s previous banning orders have reflected the scale of the misconduct involved, the size of the harm done and been appropriately weighted for the respective mitigating factors involved, there have been some outliers that in some aspects didn’t make complete sense to all in the industry – particularly with regard to disciplinary actions taken against people who misled consumers and advisers alike about failed financial products or where the failed product was the root cause of consumer losses. The AFA recognises that imposing penalties for misconduct and crafting a resolution for damage done by misconduct will never be a perfect science and satisfying everyone is an impossibility because justice is subjective. Nevertheless, by bringing practical experience and at-the-coal-face understanding into the sanctioning of financial services participants the banning of individuals in future should become a more complete process and one with greater precision and recognition of the causative factors.

The AFA’s own disciplinary procedures involve peer review of possible Code of Conduct breaches because we think it’s important that the people adjudicating over a disciplinary issue have an in-depth understanding of the situation. This is not just to ensure that the decision makers can relate to the circumstances that gave rise to the issues, but more importantly to be able to meaningfully critique the submissions of the Respondent. Without practical on-the-ground knowledge of what a professional should and can do in a particular circumstance, how systems and technology work, what processes and resources could have been drawn upon for support and how long things generally take, the legitimacy of any sanction subsequently imposed may be compromised. Where an action has the potential to have an adverse impact upon people’s careers, it is imperative that

¹ Table 1, page 16 of Consultation Paper 281.

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the decision is arrived at with relevant input from the subject's own peers – people who have a better appreciation for the circumstances of the situation than the average person.

The criminal justice system has incorporated peer review by jury into criminal proceedings for centuries. Most – if not all – professional bodies and consumer dispute resolution schemes arbitrate disciplinary issues and consumer disputes with experts in the subject matter adjudicating. The civil and administrative dispute jurisdictions also incorporate expert determination / appraisal, adjudication by subject matter experts or have retired or distinguished peers presiding over the process. All these systems recognise the value to procedural fairness and to the integrity of the process in having practical expertise represented in the resolutions.

An ASIC banning order can substantially disrupt a person's career path to effectively nullify that person's qualifications and any prior positive acts they have extended to their communities. It is imperative that the people who impose the ban bring experiential analysis to weighing the evidence. Whilst it is also important that all decision makers demonstrate fairness, empathy to all affected, an open mind and be free from conflicts or any apprehension of bias, the subject matter experience of disciplinary panels are vital to the process when someone's career and family income are at stake.

The rules of natural justice say that people should legitimately expect to have a fair hearing and for decisions to be based upon relevant evidence. It would be hard to fathom how a fair hearing can be provided if the decision makers did not have an appreciation of the situation – and all the surrounding facts – being decided. Likewise, for a decision to have integrity and be less likely to be overturned on appeal, the decisions must be able to draw upon the evidence in a meaningful and relevant manner and apply the evidence to the facts in a real-world sense rather than in an abstract or normative manner. Only a person who has walked a mile in the shoes of the person who is subject to a banning order can do this unquestionably.

To put it another way, it would be inappropriate for a life insurance adviser to adjudicate over a stockbroking matter. Likewise, unless the lawyer, academic or consumer representative member of a Panel had on-the-job experience with the subject matter of the banning order and could bring an experiential view point to analysis, the end decisions that Panels hand down are at risk of not being as founded in fact and professional opinion. It would undermine the investment in setting up Panels if Panel decisions became perceived as being subject to ideological opinions, uninformed views or abstract academic airs. To ensure the integrity of and respect for the Panel decisions – which ultimately in turn has an effect on the enforceability and acceptance of decisions – the AFA recommends ASIC prefer Options one or three.

In the limited occasions when the views of a lawyer (being their sole discipline), academic or a consumer representative (who are not ASIC employees) are needed, ASIC can elect not to refer that particular banning order matter to the Panels of Financial Services professionals and deal with under its current (or an amended) process.

2. A complement of adjudicators with a mix of experiences, disciplines

Complementary to the above, the adjudicators appointed to the Panel will also need to have the right type of experience for the role. As no sole industry representative will be repository of all knowledge and experience for every situation delegated to the Panels to adjudicate on, the right mix of experience needs to be represented in the pool of 'adjudicators'.

For example, for bans of financial advisers to be considered effectively the range of specialities represented in the profession should be represented in the pool of adjudicators to draw upon. The pool of people that ASIC should be able to call upon for a particular Panel should include experienced life insurance advisers, retirement advisers, stockbrokers, aged care specialists, self-managed superannuation fund specialists and generalist advisers who have collected their experiences across a range of licensee sizes and advice firm types (e.g. sole practitioners, suburban practices, inner city and rural firms).

To limit the size of the pool of Financial Services Panel adjudicators to call upon, many of these people should preferably also:

- be multi-disciplined (e.g. accountant, mortgage broker, insurance broker, Responsible Manager, corporate executive, trustee),
- have solid experience practicing across financial product areas (e.g. they have been authorised for more than ten years or more across at least six of the twelve financial product categories), and/or
- have a relevant past discipline to call upon (lawyer, former police officer, fund manager, insurance underwriter, business development manager, real estate agent).

The pool of adjudicators will also need to be managed effectively to ensure the coverage of experience remains as vacancies arise and to ensure that conflicts of interest are managed appropriately over time.

3. Adjudicator appointments to also draw on industry experience in the appointment process

Having a detailed understanding of the discipline is also an important quality for the people who recruit or appoint the adjudicators and then allocate them to particular banning order cases. The AFA is not suggesting that the 'Appointment Panel' of people need to also represent all segments of every form or style of financial advice discipline – they just need sufficient experience to have the capacity to measure the quality of an adjudicator appointee's skills, experience and professional judgement when it comes to financial advice. Someone who can genuinely pick a quality adviser who has good practices and a solid understanding of the financial advice disciplines.

In other words, the AFA considers that it would not be appropriate for financial adviser adjudicators to be interviewed and selected by a group of doctors or engineers, and even an appointment panel of all lawyers. There needs to be at least one experienced financial adviser who can contribute to the appointments of those Financial Services Panel adjudicators – and likewise, for the pool of adjudicators reserved for banning order matters about mortgage brokers to be selected with the input of a mortgage broker; for stockbroking bans, a stockbroker; and so on.

By ensuring that 'relevant experience' is at the core of the process of appointing adjudicators, the process – as well as the people involved – will have greater integrity and support from the regulated population.

4. Panels not to be prevented from considering uncontested matters

If only uncontested matters had the benefit of industry experience in deciding whether and the length of a possible ban of an individual, a risk arises that the size of bans where a matter is contested may not accord with size of bans of uncontested matters. Whilst the AFA acknowledges that to refer every potential banning matter to Financial Services Panels on every occasion could result in substantial costs due to more people being involved in more decisions, the AFA considers that consistency of decisions is imperative to the integrity and support for the process. Unless a protocol could be developed to ensure the genuine comparability of matters (whether contested or not) is guaranteed – and importantly, to be perceived by subjects of a ban to be comparable – demarcating a matter to be referred to Panels based on whether they are contested or not could result in the subjects of banning orders forum shopping, or introduce an unnecessary grounds for appeal.

Removing all risk of inconsistency is not possible when humans and their respective judgements are involved. To mitigate against risks, however, the AFA recommends that Panels not to be prevented from considering uncontested matters. Doing so will assist in ensuring consistency across banning decisions, to develop the appreciation of Panel recipients on the merits of cooperating, and to ensure that people who electing to not contest a matter have not been coerced into the option or are not prejudiced by a relative experience in the industry.

5. The ‘complexity, significance or novelty’ case selection criteria

The AFA recognises that no two banning situations are identical. While several people could be involved in the same series of events – such as with the recent NSG case – or could involve the same type of financial product, being able to compare ASIC bans is a difficult task. The AFA appreciates that the list of matters in Regulatory Guide 78 and the categorisation of indicative ban lengths in Table 2 of Regulatory Guide 98 is helpful. But there are degrees of complexity and with differing mitigating and aggravating factors involved with each.

As the AFA agrees that not every banning matter needs (or should, if we are to minimise regulatory costs that flow onto advice practices from their licensees) be adjudicated over by the proposed Panels, the AFA agrees that there needs to be some sort of selection criteria to decide which matters are referred to Panels and which are not. To that end, there are not many measures or filters that could accommodate appropriate selection criteria beyond those proposed by ASIC – being where the complexity, significance or novelty of the matter would benefit from the industry viewpoint.

Of these three measures, however, it would appear that judgements about the level of complexity or novelty to a matter are probably more objectively arrived at than judgements about the significance of a situation. That is because if you ask the individual subject to the possible ban, unless they are not contesting the matter every single individual is likely to argue that the matter is so significant (that is, to their career and personal situation) they should only be judged by their peers. This may accordingly give rise to a higher risk of appeal and less degrees of acceptance of banning decisions.

To give some sense to the selection criteria, the AFA recommends that each of these three terms be further defined or measured against examples:

- significance (e.g. involving several clients or substantial consumer losses),
- complexity (e.g. involving several possible breaches of financial services laws or borderline cases), and/or

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- novelty (e.g. that have not been subject to a ban before, and not subject to a precedent).

Further, to mitigate against the selection criteria being applied inconsistently, subject to a high degree of appeals or overturns, or criticism by the adjudicators, the AFA recommends that the selection criteria measures be reviewed every 12 months.

6. Additional criteria or filters to apply to selection of matters

To the question of whether additional criteria or filters should be overlaid to the selection criteria beyond those recommended above, the AFA considers that there should be value in drawing upon the adjudicators' experiences. Several matters that come to mind where the experience of a Financial Services Panels should be sought out are:

- where an industry practice is a contested point between ASIC and the individual whom is the subject matters of the banning order;
- where ASIC staff's assessment of whether the requisite standard had been met is in dispute;
- where there is disagreement over the proposed length of ban;
- where a statement of agreed facts cannot be secured between the parties; and
- where the technical understanding of a financial product or a financial strategy are critical to an understanding of whether there was an error of judgement or whether misconduct was more applied.

This list is unlikely to be exhaustive and the other submissions are likely to raise other areas where banning orders would be appropriately referred to Panels. In any event, the above matters need not always be complex, significant or novel. Accordingly, the AFA supports additional 'always refer' filters being applied, to avoid matters slipping through the selection criteria and not gaining the benefit from the investment in industry experience on the Panels.

7. Financial Services Panels to also delegated other administrative decisions in time

The AFA supports ASIC drawing further on the experience that will be represented on Financial Services Panels for other administrative decisions. We support Panels in time also being referred administrative decisions about:

- Issuing infringement notices,
- Licence application refusals,
- Consideration of appropriate licence conditions to be imposed, and

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- Appeals against licence suspensions and cancellations.

Three of the four above proposed areas appear to go hand in glove with banning orders. This is especially so where there are systemic issues identified in a banning order – as was found in the NSG case recently. Where an individual may be self-licensed, a banning order may not be appropriate if a licence condition or an infringement notice were able to address the issues that brought the matter to ASIC’s attention in the first place.

As for licence application refusals (and licensing decisions in general), it must be noted that the financial services system is structured around a licensing regime where the licensee carries the lion’s share of the compliance responsibility. Given this, it would make sense to draw upon the experiences of Panel adjudicators in determining whether a licence that would otherwise be refused by ASIC’s licensing team (many of whom do not have substantial industry experience due to the pay grade offered for the role) could be permitted but with changes to the applicant’s proposed structure or processes.

To put it another way, if we are to permit innovation in financial services licensing with regulatory sandbox approaches and with giving relief from Responsible Manager requirements (as proposed in Consultation Paper 260), we should not close the door on licensing applicants who might actually have a solid (but somewhat innovative model) and who therefore do not ‘fit in the box’ of what ASIC’s licensing team expects of an applicant. If a licensing applicant were to be refused by both ASIC’s licensing team and a Financial Services Panel, then it wouldn’t be supported by the community. However, if a licence were to be refused for an applicant with a business model that was truly revolutionary – such as one that separated financial products from financial advice or invested consumers’ funds truly in line with their needs or protected their families with specialised insurance contracts – wouldn’t we want the system to permit such a model from being explored and developed even though it was atypical of the licensing applications that generally come in?

The AFA supports ASIC considering in future whether other administrative decisions could be referred to Financial Services Panels if there is a benefit in drawing on the experiences of the Panel members.

Concluding comments

The AFA considers the Australian consumer protection regime to be one of the most robust and rigorous in the world, partly as a result of the co-regulatory approach taken by ASIC. The AFA considers that the Australian banning and enforcement regime is generally working well with other parts of the system to protect consumers. However, we have received feedback querying the apparent inconsistency of some bans (or lack of bans) – especially when a financial product failure that affects hundreds or thousands of Australians has been involved.

Accordingly, the AFA welcomes ASIC's proposal to include more experienced professionals in the regulatory system and recommends ASIC structure Panel appointments around Options 1, 3 or a mixture of both. The AFA recommends that in order to have greater integrity of decisions and greater support from the regulated population, the adjudicators who are selected to preside over their peers should be selected with the input of a relevantly experienced professional. The AFA considers that a banning system structured around experience should improve regulatory outcomes particularly by ensuring that the evidence can be meaningfully analysed and critiqued and defusing potential criticisms of the process.

The methods, however, in selecting cases to refer to Panels may not fall on the 'right formula' to immediately to begin with, but if Panels are not prevented from considering uncontested matters, and if cases are selected more for their complexity, novelty or where particular facts or opinions between ASIC and the individual may be disputed, then this is a good beginning point to structure the allocation system around. As the system is unlikely to be perfect from the outset, we recommend the case allocation system to be subject to review every 12 months – with particular input sought from the appointed adjudicators.

The AFA also supports ASIC expanding the range of administrative decisions that would have the benefit of the experience of Panel members.

If you require clarification of anything in this submission, please contact us on 02 9267 4003.

Yours sincerely,



Phil Kewin
Chief Executive Officer
Association of Financial Advisers Ltd