



31 May 2017

Ms Breshna Ebrahimi
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
SYDNEY NSW 2001

By email: policysubmissions@asic.gov.au

Dear Breshna

ASIC Consultation Paper 281 – Financial Services Panel

The Australian Financial Markets Association (AFMA) is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

AFMA's comments on the proposal to establish a Financial Services Panel are attached.

Please contact me on 02 9776 7997 or tlyons@afma.com.au if you have any queries about this submission.

Yours sincerely

Tracey Lyons
Head of Policy

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.**

B1Q1 How would the Panel improve regulatory outcomes?

The process could improve the outcome for individuals. They would be assessed by those that are better placed to understand the environment in which the individual was operating and perhaps be better placed to make a determination on the relative seriousness of the event(s) in question.

Existing comparable peer review processes such as the ASIC Markets Disciplinary Panel (MDP) are well-accepted by industry participants as a part of the overall compliance regime of the Corporations Act. However, even in relation to established arrangements such as the MDP, which has its origins in the ASX disciplinary panel process, the importance of periodically refreshing the panel to maintain expertise, knowledge of current market practice (including electronic trading) and products, and avoid conflicts of interest in the longer term (ie. an individual who sits on a panel for an extended period of time may be more prone to develop certain biases) is critical to the success of the panel as a respected decision maker. These considerations will apply equally to the proposed Financial Services Panel.

It is also very important to ensure that appointees to the Panel do not bring any inherent biases or subjectivity of views that may unfairly impact on individuals who are the subject of matters referred to the Panel.

To the extent that the Financial Services Panel (FSP) may consider matters relating to non-retail and/or wholesale and over the counter markets (on the basis that these matters might be significant, complex or novel), it will be crucial that the FSP is comprised of skilled and experienced practitioners who have an in-depth understanding not only of OTC markets, but also of the particular product class, as the issues that might arise in relation to market practice and conduct could vary quite substantially between product classes. This may have an impact, at least in the initial stages of the operation of the FSP, on the types of matters that can be referred to the Panel if appropriate peer experts have not been appointed. Otherwise, there is a risk that individuals will not receive fair treatment in the process.

To the extent that the MDP is a model for the FSP, the process should include substantial procedural fairness protections for individuals – for example, allowing an individual to review a draft statement of reasons prior to it being finalised. Prior experiences with the MDP have shown that there are occasions when the statement of reasons contains inaccuracies, or require further information and enquiries by the relevant investigations teams to ensure the complete facts are put before the FSP. Experience has also shown that there can be assumptions made in the statement of reasons which have not been fully tested and which may give the Panel a skewed impression on first reading.

More generally, the results of actions and the reasons behind the findings should be published (subject to only relevant privacy obligations) to ensure market participants and individuals benefit from the matters heard by the Panel, and the findings have the desired deterrent effect.

It will be necessary to clarify the demarcation of the FSP's terms of reference viz the terms of reference of existing panels including the MDP. It will be critical that the new panel has clearly defined parameters that address any areas where the responsibilities of the new panel may overlap with those of an existing panel, including for example:

- What sort of unique matters will only be referred to the FSP, as opposed to an existing panel;
- What sort of matters that are currently referred to an existing panel such as the MDP will instead be referred to the FSP after its establishment;
- What sort of matters that are currently referred to an existing panel will continue to be referred to that panel after the establishment of the FSP.

In considering the consultation paper, our members have raised some additional issues where clarification would be useful, namely:

- (a) What appeal process will be in place for an individual who has a banning order made against them by the Panel; and
- (b) Where an employee of an AFSL holder has a banning order made against him/her, the decision could have implications for the licensee in terms of the general obligations under s912A of the Corporations Act. Procedural fairness will be important if a Panel decision has impacts beyond the individual in question.

B1Q2 How do you see the Panel, as a peer review mechanism, enhancing the impact of ASIC's administrative decisions?

It is unclear that this would enhance the impact of the decisions, other than increasing awareness of the detail of particular matters. Public censure is key for increasing impact. However, care needs to be taken to ensure that information does not leak out where the finding of the Panel is that the person is not to be banned. Currently, no-one outside those directly involved in a matter knows if ASIC decides not to ban an individual and it should remain the same under the new regime.

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.

C1Q1 What are your views on the Panel initially only being referred matters to consider that relate to the making of banning orders?

It is reasonable to limit the scope of the Panel in the first instance, and given the personal impact on an individual as a result of a banning order, it makes sense that additional due process is afforded to individuals.

The circumstances in which ASIC will refer a matter to the Panel, and conversely the circumstances in which it will not, needs to be made clear in order to avoid the risk of an inconsistent regime and consequently differences in procedural fairness afforded to individuals.

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?

Other areas that could be considered for inclusion are decisions by ASIC relating to breaches of Regulations eg. client money issues. Fairer outcomes for an individual may result if a panel of peers considers a matter in light of the complex business environment, rather than ASIC considering those matters in isolation. If ASIC proposes to include other matters in the scope of the Panel, there should be a further opportunity for industry to provide comments on those additional areas.

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

C2Q1 Is 'complexity, significance or novelty' an appropriate measure for the types of matters to be considered by the Panel?

This is a difficult test to apply as it introduces an element of discretion in the type of procedural fairness afforded to an individual who is facing a banning order.

It would be more appropriate if an objective test were imposed eg. breaches involving particular conduct would always go to the Panel, versus other/lesser offences which are considered by ASIC internally.

Otherwise, much greater clarity and granularity should be provided by ASIC as to what would constitute 'significant, complex or novel', so that there is more transparency for industry and ASIC can be held accountable in relation to the use of its referral power. It would also be helpful to clarify process issues in the guidance such as whether an individual would have a right of appeal for the matter not to be referred to 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?

It may be more appropriate if matters are referred by topic. Matters can be complex due to their fact pattern, but the breaches involved may be simple (or vice versa).

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

See above.

C3 We propose that only matters that are contested by the notice recipient (Recipient) would be referred to the Panel.

C3Q1 Should uncontested matters also be referred to the Panel?

No. If the parties are open to agreeing a resolution in a matter, then there is no need to use up Panel resources to consider the matter.

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.**

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?

Given the significant consequences of the powers that ASIC is able to exercise, there should be additional detailed consultation on any proposal to delegate other administrative powers to the Panel either now or in the future so that all of the relevant issues can be properly considered.

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?

Option 1 would be most suitable, on the basis that non-industry participants and people from a "range of professions" may not have the appropriate skill set to consider and understand all of the relevant factors in a matter, particularly in light of the fact that it is intended to refer 'complex, significant or novel' matters.

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

Conflicts need to be appropriately managed. Where possible, the selection of industry participants should be relevant to the particular matter ie. the Panel should have experience in the area the subject of the matter, otherwise there is a risk the peer review process will not be effective.