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## CONSULTATION PAPER 281: Financial Services Panel

### General Position

The FBAA supports the proposal to create a financial services Panel. Despite published regulatory guides and information about ASIC's administrative processes, the process is still opaque and there exists some scepticism within industry that administrative actions by ASIC are free from bias or not driven by underlying agendas. Such thinking diminishes the impact of administrative decisions and creates a divide between regulators and the regulated population.

That said, administrative decisions already have a significant impact on industry. Licensees, representatives and compliance professionals commit a huge amount of resources to reviewing administrative decisions and monitoring business activities to ensure conduct identified in administrative actions is not evident in their own businesses. The FBAA believes that an external, independent financial services Panel will further enhance the impact of administrative decisions and will improve industry acceptance of the validity of administrative decisions.

The degree of ASIC's influence must be carefully managed for a Panel to be accepted as legitimate. We do not support the proposal to include an ASIC staff member on a three-person Panel. If ASIC maintains that it should furnish a staff member to the Panel, the FBAA recommends the Panel size be increased accordingly. The ASIC representative should have no voting rights. Their role would be more appropriately confined to that of an observer, non-voting chair or adviser whose role is to explain the ASIC process.

We think it is important to correctly identify the types of people who should be accepted on the Panel. The purpose of the Panel is to validate and ratify administrative decisions to the regulated population. Such a validation is important to have the regulated population accept and trust administrative decisions. This in turn leads to greater impact.

We do not consider the Panel is suitable for those who have no practical industry experience. Notably the Panel is not a place for academics and theorists. Our view is that the Panel must be comprised of practitioners and those who can demonstrate genuine understanding of, and participation in, the relevant industries.

#### List of proposals and questions

##### 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.**

#### FBAA Position with respect to the proposal under B1

The FBAA supports the creation of a financial services Panel of practitioners and industry representatives that is independent of ASIC.

*B1Q1 How would the Panel improve regulatory outcomes?*

#### FBAA Response

A Panel comprising external, independent parties will improve transparency and consistency of decisions. We also believe the participation of practitioners and peers will validate administrative decisions and demonstrate to the regulated population that industry representatives support outcomes produced by ASIC administrative decisions.

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

#### FBAA Response

Administrative decisions already have significant impact on industry. A peer reviewed Panel will demonstrate to industry that administrative decisions are supported by industry peers. We believe this will ratify the validity of administrative decisions which will in turn improve their acceptance and enhance the impact.

**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?*

**FBAA Response**

We recommend the remit of the Panel be extended to matters that relate to bannings and to the imposition of licence conditions.

*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?*

**FBAA Response**

This is answered in our other responses.

**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.**

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

**FBAA Response**

We require more information about the way in which such elements will be defined and identified before being able to commit to a position on this. We generally agree that matters categorised as significant, complex and novel should be referred.

Who decides whether a matter triggers any of the criteria?

We recommend expanding the basis of referrals under C2(b) to better align the basis of credit referrals with that of financial services.

The basis for referring credit matters to the Panel goes beyond "better inform[ing] consumers and prevent[ing] them from being in unsuitable credit contracts. As with financial services, the basis should also have regard to fairness, honesty and professionalism by those who engage in credit activities and provide credit services.

*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?*

**FBAA Response**

This question requires further discussion. Complexity can relate to a wide range of factors including:

- Complexity of specific transactions and structures
- Product Complexity
- Complexity of a matter where allegations are made relating to breaches of numerous laws or provisions
- Complexity in the application or interpretation of specific provisions

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

**FBAA Response**

It is important that decisions which impact the ability of an individual to remain in the industry are referred to the Panel irrespective of what other criteria are applied. Matters involving bannings based on conviction of offences and other clear cut decisions could be excluded.

**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?*

**FBAA Response**

Yes. Parties may choose not to contest a matter for a range of reasons, only one of which is an admission/acceptance of liability. Entities may also not contest a matter because they have been poorly advised, they are overwhelmed, they do not understand what is being put to them or they do not believe they can construct a properly worded defence.

Uncontested matters will enable the Panel to see the whole range of outcomes giving them a more complete picture of ASIC administrative action. This would provide an opportunity for the Panel to ensure vulnerable, poorly advised entities are not treated unfairly.

**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?*

**FBAA Response**

As a general position, we do not see any reason why all administrative decisions should not be referred to the Panel. However, the number of decisions being referred to the Panel must be manageable and realistic. We require more data about the total number of administrative decisions in each category before being able to provide a complete response. At the very least, decisions that impact the ability of an individual to continue to engage in the industry and are made with some element of discretion should be referred. At a bare minimum, we support licence cancellations/suspensions and bannings being referred to the Panel at the beginning.

As an alternative, we suggest it may be more effective to apply an "if not, why not" approach and have ASIC provide reasons why any category of decision should be excluded. Such an approach would enable ASIC to support its reasons with data.

**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?*

**FBAA Response**

We do not support any option in Table 1. A three-person Panel should not include an ASIC staff member. This is not a strong enough composition. Further we do not support any proposal that would place academics, career public servants (respectfully), or consumer advocates on the Panel. It is not our intention to disparage any of these groups. We do not believe the relevance of experience and respective skill sets are correctly aligned with the objectives of this Panel. We provide further clarification on this view below.

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

**FBAA Response**

The Panel should contain an uneven number of voting members. We consider a more suitable size for the Panel to be either 5 or 7 voting members with the ASIC member filling the sixth or eighth position in a non-voting capacity. We defer to the majority view on the appropriate size of the Panel.

We support having a Panel comprising more than just industry participants. The Panel could include practitioners, compliance professionals and specialist lawyers (lawyers with genuine practical experience in the industry).

The FBAA submits that groups not suitable for the Panel include academics, consumer advocates or career public servants. The Panel is a peer review process aimed at ratifying administrative decisions and improving the transparency of the administrative decision-making process. Panel members need practical experience and a solid understanding of the relevant industry. Academics do not have this. The views of consumer advocates and career / senior public servants are often informed by the same or similar sources. Both groups deal with matters once relationships have soured or where there are problems. Their perspective is one-sided. This is not a criticism of these groups but an observation that such perspectives are unlikely to support balanced outcomes which is a requirement of a review Panel.

Any member of the Panel should have direct industry experience not more than 2 years old.

As the leading professional industry body to finance and mortgage brokers in Australia, we thank you for the opportunity to present this paper on behalf of our Board of Directors, our 7,300 members and the (approx) 13,000 additional industry stakeholders we reach.

Yours faithfully



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