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23 May 2017

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Australian Securities and Investments Commission  
GPO Box 9827  
Sydney NSW 2001

**Email:** [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

Re. **Consultation Paper 281 Financial Services Panel**

Dear Madam,

We welcome the opportunity to provide comments on the consultation paper on the proposed Financial Services Panel. We complement ASIC on this initiative and are happy to assist.

We have provided brief answers to the questions you raise in the paper, below.

*ASIC 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.

*ASIC question*

B1Q1 How would the Panel improve regulatory outcomes?

*FPA response*

We agree that

[e]stablishing 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;

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A thorough understanding of current industry practice and standards is conducive to ASIC's administrative decisions being more predictable. This will reduce the risk of administrative action being taken in circumstances where the subject of the action didn't reasonably expect they would face administrative action.

*ASIC question*

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

*FPA response*

We agree that establishing the Panel may enhance the impact of ASIC's administrative decisions by:

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(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.

*ASIC 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.

*ASIC question*

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

*FPA response*

We appreciate that limiting the scope of panel activities initially, allows more time and resources to be devoted to assessing the effectiveness of the new system, than if a broader range of activities were undertaken by panels from day 1. Further, given the consequences of banning, the case for review is probably stronger than for some other matters.

However, there is precedent for similar review arrangements being undertaken by professional associations. We would argue that because panel review has a proven track record, there is a low risk of unintended consequences if the composition of each panel is appropriate (see our response below).

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Given the practical benefits, we would prefer that a broad range of matters are referred to panel from day 1.

*ASIC question*

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?

*FPA response*

In our view, the Panel's role should be expanded to monitor compliance of AFSLs and individuals with a view to prevention (as opposed to being engaged in punitive considerations only). That could include monitoring compliance with RG 175 for example to ensure that:

- Approved Product Lists are sufficiently broad
- General Advice warnings are being given appropriately
- client 'fact find' processes are adequate; and
- proper and timely disclosure is being given in Statements of Advice and Financial Services Guides as to whether a serious conflict of interest exists.

Such monitoring could be conducted by way of random or targeted audit as an effective way of identifying any compliance concerns before they result in consumer losses or complaints and require punitive action.

*ASIC 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.

*ASIC question*

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

*FPA response*

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We agree in principle that 'complexity, significance or novelty' is an appropriate measure for the types of matters to be considered by the Panel. This is because, deciding on matters within these parameters is likely to benefit from explanation and elaboration by people who participate in the industry or are deeply engaged with its consumers.

For example, reviewers deciding matters that are complex, significant or novel are more likely to warrant guidance from industry, in determining whether the individual under review acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice (being the statutory standard of care under s.50 of the Civil Liability Act 2002). Industry participants on the panel will have deeper insight into this question by reference to their own industry experience and practices.

By contrast, matters that fall outside these parameters are more likely to be already understood or be able to be discovered without external guidance in the decision-making process.

#### *ASIC question*

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?

#### *FPA response*

Factors that are more likely to indicate a matter is complex include:

- there are multiple issues
- there is a high degree of interaction between issues
- the original determination of the matter is based to a not insignificant extent on perceived industry practice and standards
- there are multiple consumers or other individuals who may be adversely impacted by the conduct under review, and the potential damages are significant

Although there is a greater risk that peer review panels will make inconsistent decisions where the matters are more complex, there is a countervailing benefit because of the presence of enhanced knowledge and experience. The risks could be managed by ensuring that the ASIC representative on each panel is a lawyer with appropriate expertise and experience in administrative decision-making (as discussed below).

#### *ASIC question*

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

#### *FPA response*

We are not proposing any alternative or additional criteria.

#### *ASIC proposal*

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

*ASIC question*

C3Q1 Should uncontested matters also be referred to the Panel?

*FPA response*

We recommend that, in exceptional cases, uncontested matters should also be referred to the Panel. To be exceptional, the matter must be unusually complex, significant or novel.

In relation to an uncontested matter, an alternative to referring the matter to the Panel would be for the Panel to provide advice to ASIC on questions of principle and other issues that are not discreet to the particular individual's factual case.

*ASIC 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.

*ASIC question*

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?

*FPA response*

All the administrative powers mentioned in C4 should be delegated to the Panel (and ideally now) because the arguments for peer review apply for all these powers.

*ASIC 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.

*ASIC question*

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?

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*FPA response*

We recommend option 2 because:

- it ensures (in contrast to option 3) that the Panel is weighted with members with specifically relevant knowledge and experience
- it reduces the risk (compared to option 1) that decisions are biased (whether towards protecting or undermining a peer) due to industry participation

*ASIC question*

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

*FPA response*

Although we believe that option 2 strikes a good balance between competing concerns, we believe that, in selecting a panel for a given case all, or at least both non-ASIC, panellists have specific knowledge of the industry practice and standards relevant to that case. This would promote improved deliberation, especially where a decision turns on industry practice, and at the same time would not give too much relative weight to industry.

In addition, the non-industry participant should have experience in consumer advocacy within the financial services industry.

Further, we recommend that the ASIC representative on each panel is a lawyer and that reasons for each decision are recorded and made publicly available. This will help enhance the quality and consistency of decisions. Consideration should be given as to whether or not a determination should be published in a de-identified manner.

In addition, ASIC should identify whether any proposed panel member (particularly the industry participant) ought to be excluded, or if already appointed, recused, from determining a particular referral where they have an interest in the matter under referral including a significant competitive interest (for example where the proposed panel member is an authorised representative of the same AFSL (or related body corporate to the AFSL) of the individual under review).

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If you have any queries or comments, please do not hesitate to contact me at [policy@fpa.com.au](mailto:policy@fpa.com.au) or on 02 9220 4500.

Yours sincerely

**Dimitri Diamantes CFP®**

*Policy Manager*

Financial Planning Association of Australia<sup>1</sup>

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The Financial Planning Association (FPA) has more than 12,000 members and affiliates of whom 10,000 are practising financial planners and 5,600 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
  - In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
  - We have an independent conduct review panel, Chaired by Mark Vincent, dealing with investigations and complaints against our members for breaches of our professional rules.
  - The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 24 member countries and the 150,000 CFP practitioners that make up the FPSB globally.
  - We have built a curriculum with 17 Australian Universities for degrees in financial planning. As at the 1st July 2013 all new members of the FPA will be required to hold, as a minimum, an approved undergraduate degree.
  - CFP certification is the pre-eminent certification in financial planning globally. The educational requirements and standards to attain CFP standing are equal to other professional bodies, eg CPA Australia.
  - We are recognised as a professional body by the Tax Practitioners Board.
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