

23 May 2017

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Dear Colleagues

**CONSULTATION PAPER 281 (Paper)
FINANCIAL SERVICES PANEL (Panel)**

The Financial Services Council (**FSC**) has over 100 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. The industry is responsible for investing more than \$2.7 trillion on behalf of 13 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Thank you for the opportunity to provide a submission on this topic. Our comments are set out below.

For convenience, we have set out the Paper's proposals and questions, followed by our comments (adopting the lettering and numbering in the Paper).

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?

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

1. Our members broadly support the principles behind the establishment of the new Panel;

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2. In our view, a peer review body such as the Panel would be a positive approach to removing “bad apples” from the financial services industry, particularly where there have been “problem areas;”
3. We have witnessed the positive effectiveness of other Australian peer review bodies, such as the Takeovers Panel and the Markets Disciplinary Panel (**MDP**) for ASX and ASX24, which deals with narrower issues related to disciplinary action against ASX market participants and market operators for alleged breaches of the Market Integrity Rules. We acknowledge that the proposed Panel would hear a broader range of issues related to misconduct in the provision of “financial services” and certain “credit activities”, as opposed to a specific set of rules (i.e. Market Integrity Rules), issues and processes;
4. Therefore, we suggest that the proposed Panel may in fact require different “benches” or divisions i.e. for consumer banking and credit cards vs custodian services vs OTC traded markets, similar to the MDP. This way, the various benches would consist of the relevant experts, which would further enhance the impact and outcomes of ASIC’s administrative decisions;

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?

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?

5. Generally, we consider it desirable to give in principle support for an increase in or expansion of the Panel’s scope to enable it to hear other areas of regulatory priority as this may give the Panel more flexibility (similar to that of the MDP) and enable the Panel (consisting of market experts) to produce more targeted outcomes. As seen with the MDP, orders made by the peer review body are specific, and can assist in setting or driving new or better industry standards, whilst fostering industry “buy-in” and input, particularly in topics and areas where ASIC may not have the same level of expertise in-house;

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6. However, we believe that further detailed consultation between ASIC and the industry would be required before the Panel's scope is broadened beyond banning orders. In particular, we are concerned that the delegation of ASIC's more serious powers i.e. to refuse a licence, or to vary, suspend or revoke a license may not be appropriate for peer review and should remain with ASIC;
7. We acknowledge that if the scope of the Panel is expanded too far, this may create challenges whereby the Panel is setting new industry standards through its delegated powers, which may be inconsistent with overarching ASIC policies. There needs to be consistency in the direction taken by the Panel's decision-making, and changes to ASIC's policies. Otherwise, this may lead to a conflict between industry standards and ASIC policies (to which the industry is ultimately required to adhere);
8. We do note that clarification is required as to the mechanics of how the final decision to implement banning orders would be made. Would ASIC make the ultimate decision as to whether a banning order is made based on the Panel's recommendation following the hearing, or would the Panel make the banning order itself?
9. In the normal course, we would anticipate that, as with other similar bodies and powers, decisions made by ASIC or the Panel can be subject to further review or appeal. We do note of course that the intent of such bodies is to minimise the risk of further, complex proceedings, either by the regulator or in the legal process; however, it is important in our view that appropriate review rights be retained;

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?

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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?

10. We are broadly supportive of ASIC's proposal to refer matters deemed appropriate for peer review because of significance, complexity or novelty. It is stated in the Paper that matters would be referred to the Panel because of *significance, complexity or novelty* and based on the *facts of the matter*. In a practical sense, it would be useful if some examples of such matters, to the extent practicable, could be provided. Further, it would be appropriate in developing guidelines around referrals to the Panel if some element of materiality could be introduced. For instance, individuals suspected of misconduct, who are representing a large corporate AFSL (as opposed to a small firm) may be more suited to be heard by the Panel as a banning order relating to a small firm could seriously impact the ongoing AFSL: it could be a de facto decision to revoke an AFSL. However, such instances may be appropriate for the Panel to hear if the Panel's role is to make a recommendation to ASIC, as opposed to making the banning order directly (see above comments seeing ASIC clarification of the Panel's power to make recommendation vs making of a banning order);
11. We acknowledge and support ASIC's proposal that ASIC would determine the appropriateness of matters referred to the Panel based on the facts of the case, as well as s760A of the Corporations Act which encapsulates tenets of Market Integrity;

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?

12. We are supportive of ASIC's proposal to refer only contested banning order matters to the Panel. However, we are open to uncontested banning order matters also being referred to the Panel on the basis that the Panel would have the technical knowledge to hear and effectively determine the matter. Further, this would be useful in cases of complexity and novelty for precedent value in other matters;
13. This may also assist in ensuring that high standards are maintained in the industry by having an effective order which would have industry-wide impact;

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:

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- 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?

14. As we indicated in our response to C1 above, in principle, an expansion of the Panel's powers in some instances, may be appropriate, for example, a power to impose fines or outcomes other than banning. However, it is important that any proposed expansion of the Panel's powers take place only after prior industry consultation. Further information around Panel governance and rights of review would be required before further administrative powers are delegated to the Panel;
15. The FSC does not currently support the delegation of ASIC's powers to revoke, or refuse AFSs to the Panel. Given the seriousness of these decisions, in our view, these powers are more suited to remain with the ASIC Commissioner.

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.

16. The FSC broadly supports the various proposed options for the composition of the Panel. However, clarity should be provided in relation to governance, in particular, around Panel member selection and what processes will be put in place to ensure fairness in the selected members. For instance, there is a risk that the Panel hearing a consumer banking case may be made up of consumer advocates, which may result in inconsistency in decisions, decisions not aligning with ASIC policy or decisions being made by people who are less regularly engaged with the legal standards and concepts involved. These are all disadvantages that have already been raised by ASIC;
17. We also note that there are issues around the personnel and level of seniority, expertise and experience of persons which ASIC proposes to appoint to the Panel. We also assume that lawyers will be appointed by ASIC to assist the Panel as currently occurs with the MDP;

Conflicts of interest

18. The Paper states that ASIC will *have thorough processes in place to identify and manage conflicts of interest*. Where a Panel member

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faces a conflict regarding a matter they are scheduled to hear, or are hearing, they are required to disclose that interest. It would be useful if clarity could be provided around these processes. We assume that these processes will be similar to those outlined in *REGULATORY GUIDE 225: Markets Disciplinary Panel practices and procedures* and in particular, RG 225.26-.29. We also assume that in due course a separate RG may issue detailing similar matters for the Panel.

Should you have any questions, please contact the writer on 02-9299 3022.

Yours Faithfully

A handwritten signature in blue ink that reads "Paul Callaghan". The signature is written in a cursive style with a period at the end.

Paul Callaghan

General Counsel