

24 May 2017

Ms Bresna Ebrahimi
Australian Securities & Investment Commission
GPO Box 9827
SYDNEY NSW 2001

By email: policy.submissions@asic.gov.au

Dear Ms Ebrahimi

SUBMISSION ON CONSULATATION PAPER 281 – FINANCIAL SERVICES PANEL

This submission has been prepared by the Superannuation Committee of the Law Council's Legal Practice Section (**the Committee**).¹ The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and clear. The Committee makes submissions and provides comments on the legal aspects of the majority of all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

The Committee is pleased to have the opportunity to respond to the Australian Securities and Investment Commission (**ASIC**) Consultation Paper 281 entitled 'Financial Services Panel' (11 April 2017). The Committee is guided by its objectives identified above and has only made comments below where the Committee has identified issues within its remit.

Establishment of the Financial Services Panel

The Superannuation Committee welcomes the establishment of the Panel as a peer review mechanism and agrees that it could improve regulatory outcomes through the specialist input of experienced industry participants.

Matters the Financial Services Panel would consider

The Committee agrees that, in the first instance, complex, significant or novel matters involving misconduct that could lead to a banning order would be appropriate for the Panel to consider.

However, consistent with overseas experience, we consider that ASIC's other administrative powers, such as the power to issue infringement notices and the power to suspend or cancel a licence, could also benefit from Panel review.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

Composition of the Financial Services Panel

In the Committee's view the Panel should be comprised of two industry participants and one ASIC staff member. Including non-industry participants may counteract what the Committee sees as one of the main benefits of the Panel, being review by industry specialists who are 'peers'.

Specifically addressing the questions raised in the Consultation Paper, we respond as follows:

Question B1Q1 - *How would the Panel improve regulatory outcomes?*

The Committee considers that the Panel would improve regulatory outcomes by introducing knowledge and experience of industry good practice that may not be available to ASIC in the course of its regulatory activities. This would enable administrative powers to be used more effectively where alleged misconduct is outside the bounds of both the law and industry practice.

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

Peer review is used widely within industry as a quality control tool. Knowing that a regulatory action has been reviewed by industry peers may act as a disincentive to appeal decisions to the Administrative Appeals Tribunal.

The potential disadvantages of peer review, listed in paragraph 25 of CP 281, could largely be overcome by selecting respected members of industry, who are also familiar with ASIC policy, as Panel members.

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

The Superannuation Committee has no objection to the Panel initially considering matters that relate to the making of banning orders.

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?*

The Committee considers that matters relating to the imposition of licence conditions would also be appropriate for the Panel to consider, again because input as to industry good practice may enable more apt outcomes.

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

The Superannuation Committee agrees that the best use of the Panel would likely be where matters are significant, complex or novel because this is where specialist input may be most useful.

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?*

Complex matters might be distinguished by the range of considerations involved in making the decision or where the law or factual matrix is complicated. We do not consider that the

Panel should be used where fraud or criminality is involved, since a judicial process rather than peer review is more appropriate in such instances.

Question C3Q1 - *Should uncontested matters also be referred to the Panel?*

The Committee does not consider that uncontested matters should be referred to the Panel, as these matters are not likely to benefit from peer review.

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?*

Consistent with overseas experience, we consider that the power to issue infringement notices and the power to suspend or cancel a licence could also benefit from Panel review. In the Committee's view, the issue of an initial licence may not be appropriate for peer review because it could involve assessing a potential competitor.

The power to issue a final stop order might also be an administrative power that could usefully be delegated to the Panel, particularly where there have been significant or complex submissions made by the issuer. Knowledge of best industry disclosure practice may be helpful in these cases.

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?*

In the Superannuation Committee's view the Panel should be comprised of two industry participants and one ASIC Staff member. Including non-industry participants may counteract what the Committee sees as one of the main benefits of the Panel, being review by industry specialists who are 'peers' because of their familiarity with the industry. Including a Tribunal member would seem to overlap with the right of appeal to the Administrative Appeals Tribunal that already exists.

Contact

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Mr Luke Barrett, Chair, Superannuation Committee on (T) 03 9910 6145 or at (E) luke.barrett@unisuper.com.au; or
- Ms Lisa Butler Beatty, Deputy Chair, Superannuation Committee on (T) 0477 753 941 or at (E) BeattyLi@cba.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Smithers', with a long horizontal line extending to the right.

Jonathan Smithers
Chief Executive Officer