



ASIC Financial Services Panel

Submission on Consultation Paper 281

**by the
Mortgage & Finance Association of Australia (MFAA)**

In response to:

ASIC Consultation Paper 281: Financial Services Panel (April 2017)

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ASIC Consultation Paper 281: Financial Services Panel

The Mortgage & Finance Association of Australia (MFAA) thanks the Australian Securities & Investments Commission for the opportunity to make a submission on the proposals raised in ASIC's Consultation Paper 281: Financial Services Panel.

Established in 1982, the MFAA is focused on the representation and maintenance of professional standards for mortgage and finance brokers and other intermediaries, including mortgage management businesses and non-bank lenders.

Its membership profile also includes ADI and non-ADI lending institutions that distribute their products via intermediaries and businesses that provide support services to the mortgage and finance sector. The MFAA's current membership is in excess of 12,900 individual and business members.

Overview

The MFAA is supportive of the concept of an ASIC Financial Services Panel (Panel) and industry involvement in the selection and appointment of Panel members provided that appropriate outcomes are delivered to both the consumers and to the industry participants involved. Allowing the inclusion of industry participants on the Panel will provide peer review, current industry knowledge, skills and experience that may not be available to those individuals who currently review material placed before the Regulator relating to inappropriate conduct in making enforcement decisions about industry practitioners.

The MFAA urges the Regulator to consider including experienced member representatives of the MFAA in any pool of individuals who may make themselves available for selection to a Panel appointed to review matters involving alleged misconduct of an industry participant from the credit sector.

Our understanding is that the Panel would operate alongside ASIC's current administrative processes (rather than replacing them) and would:

- offer industry insight into a matter under review;

- supply assistance into what is considered usual, acceptable and appropriate conduct in the relevant industry sector; and
- not add any substantial delay to enforcement resolution timelines.

This submission addresses each of the proposals as they appear in the Consultation Paper.

B1Q1 How would the Panel improve regulatory outcomes?

The concept of peer review of ASIC disciplinary and regulatory processes is well established, and if designed correctly can lead to better outcomes. In terms of regulatory outcomes, the Panel should bring with it experience across all aspects of the financial services value chain, and ensure that all industry participants are represented in some way.

If constituted in a truly representative way, the Panel could:

- provide useful advice on the appropriate type of regulatory response (ASIC enforcement, legislative change or self-regulation);
- assist with implementation to ensure that regulatory change actually achieves the outcomes desired;
- provide peer-based compliance advice including how to implement change in the most efficient manner, and how to minimise avoidance;
- provide advice on emerging industry changes; and
- give the relevant industry sector some satisfaction that reviews of alleged misconduct have had industry peer involvement and not just regulatory oversight.

The panel can also ensure that customer outcomes remain the focus of all proposed regulatory responses, with a genuine focus on the interface between customer and broker, financial services provider or institution.

The MFAA has a strong track record, demonstrable through its disciplinary and Tribunal process, on working with ASIC in a constructive manner to improve customer outcomes, and to strengthen effective regulatory oversight. This demonstrates the benefit of peer review in regulatory change.

Additional examples include our work with ASIC on the industry funding model and the ASIC broker remuneration review. Equally, as the MFAA represents brokers, aggregators and lenders, we are uniquely placed to provide advice particularly across the entire mortgage finance value chain. It also has a history of working well with other industry associations to achieve an agreed industry approach.

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

Our assumption is that 'administrative decisions' refer to powers to:

- make banning orders;
- issue infringement notices; and
- cancel, suspend or vary Australian Financial Services Licences and Australian Credit Licences.

The MFAA's own disciplinary process, which was established in 2004, was the industry's only effective quasi-regulator prior to the implementation of the *National Consumer Credit Protection Act*. The MFAA's disciplinary regime is well respected within the industry and its

decisions involving serious outcomes, which are: expulsion from, or suspension or cancellation of, membership are published within the industry and to others (including ASIC). This publication generally has serious effects on the member involved. Very often these matters are reported to the MFAA for adjudication prior to the matter being put forward to ASIC. In addition, the MFAA's timelines on resolution of these matters are generally reasonably short.

The MFAA's regime is a peer review process where a three-person Tribunal is formed, chaired by a non-member solicitor, and following appointment of two members from a pool of senior and experienced practitioners, these three individuals review the relevant matter, consider evidence supplied by the complainant(s), seek feedback from the member(s) involved and then come to a decision. The onus is on a complainant to provide evidence to support allegations of misconduct.

In many cases, MFAA Tribunal decisions have resulted in subsequent ASIC banning orders or cancellation of an Australian Credit Licence.

In many cases these are leading indicators on misconduct because a potential 'bad apple' will often be subjected to the MFAA's disciplinary regime before ASIC investigation. Peer review of these processes may minimise duplication of processes, and often provide a deeper understanding of the facts involved. Equally, peer involvement will help to streamline processes to minimise overlap, and in cases where effective action has been taken at the industry level, may negate the need for further enforcement action by ASIC. It will also enhance natural justice, as the Panel will contain industry experts who will be able to better determine whether activities are merely negligent or something more serious.

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

The MFAA believes that initially this is the area where the Panel can have its greatest impact. The making of banning orders has an important impact on the industry and it is important that the process is supported by the industry and has the confidence of all industry participants. The Panel, if appropriately constituted, will have direct experience in the day to day activities of industry participants, and will therefore bring an industry-focussed perspective to banning procedures. This experience will also enable ASIC to better determine which cases have the most significant customer impact, and indeed the behaviours it should be trying to eradicate.

It is, however, important that the Panel does not slow the process down, as it is important that decisions are delivered in a timely fashion. The proposal to only send certain matters to the Panel (based on complexity, or the need for a hearing) is a good starting point, but we need to ensure that these criteria are realistically set and complied with – lest the panel be sent cases which could be dealt with administratively by ASIC.

The Panel should have relatively wide powers to recognise the extent of any misconduct and apply only appropriate sanctions. This may involve the provision of information from de-identified historical regulatory decisions that included a ban and upon what basis, or bases, these decisions were made.

Also, a banning order, in the view of the Panel may be inappropriate or insufficient. The Panel should be allowed to recommend other forms of enforcement including, for example, the issue of an infringement notice or cancellation of a licence, or perhaps some lesser alternative. This may be a challenge to determine initially until some precedents have been recorded upon which a subsequent Panel may rely.

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?

Over time, the panel could provide advice on all areas of industry change or consumer concern, for which a regulatory response is being considered. The Panel should not in any way limit the wider industry consultation approaches around regulatory change, but could help ASIC to initially prioritise the issues of concern.

The Panel could also help ASIC to:

- be more forward looking in its regulatory outlook;
- have a stronger focus on self-regulation (where appropriate); and
- enhance industry consultation processes by ensuring that the right organisations and associations are consulted on the appropriate issues.

An example of where the use of a Panel may have been more effective includes in the early stages of industry consultation on the ASIC industry funding model's development, and in the ASIC response to the review on External Dispute Resolution. Such processes could be introduced over time, so as not to initially distract the Panel during its establishment phase.

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

All of these measures are appropriate for the determining of the types of matters to forward to the Panel, however, work needs to be done on what the definitions of each will be. 'Complexity' could be based on the scale of the matter; the number of customers involved; the reach across the value chain; or even the type of product involved.

The Panel would provide extremely good understanding of product and practice, ensuring that such complexity can be considered appropriately. The complexity, however, needs to be assessed against the Panel's role and skills base. If ASIC is facing a complex matter, it needs to first ask whether the Panel has the specific expertise to assist before the matter is referred to it. Many complex matters will be just as complex to the Panel, and could in some cases be better resolved by ASIC alone.

The issue of 'significance' is a good determinant. 'Significant' needs also to be well defined. It could relate to scale, scope, customer impact or profile. In all of these cases, the Panel could play a role in ensuring that justice is both done and seen to be done. As for novelty, this is in many ways similar to complexity, and only 'novel' cases which the Panel has the specific expertise to resolve should be forwarded to it.

In addition, matters may be relatively 'ordinary' but perhaps, for example, evidence of misconduct provided may need industry participant insight to determine whether or not the activities of the individual(s) in the matter were appropriate in the circumstances.

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?

As mentioned above, complexity could be determined by the:

- scale of the matter;
- nature and seriousness of the matter;
- number of customers impacted;

- types of products involved;
- mitigating factors, if any; or
- reach across the value chain.

In terms of reach across the value chain, this is when the matter impacts more than one industry participant. For example, in the broking space it could involve a matter relating to a licensed broker and aggregator; or when it relates to a credit representative, aggregator and lender.

Matters referred to the Panel should be considered on the basis of the Panel's expertise to supply useful information or input on whether or not the activities alleged in the misconduct were within the normal parameters of acceptable behaviour within that particular sphere of operation and whether the Panel could therefore make a recommendation of an appropriate resolution or, if necessary, sanction.

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

As mentioned above, the issue of suitability for the Panel to review is vital. Certain matters may well be complex in nature or indeed novel, but they may not be worthy of reference to the Panel. The test should be whether the Panel can actually add value to the process in terms of industry expertise, insight or process. Insight and expertise will help ensure that the right decision is made; and the process will help guarantee natural justice. Adding this as an overall objective of the referral process will ensure that cases are not just passed to the Panel to free up ASIC resources, but rather are referred only when the Panel can actually add value.

C3Q1 Should uncontested matters also be referred to the Panel?

As a general rule, no. The only time where it may be appropriate is when there are wider, systemic issues at play. This could be another criterion employed.

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?

The examples given are potentially things which the Panel could deal with, but again only in exceptional circumstances. The key test needs to be the value the Panel can bring to the process, lest it simply duplicate existing efficient ASIC processes.

If the Panel considers that the alleged misconduct does not warrant a serious sanction such as a banning notice, it could also be given the power to:

- issue a Warning Notice that an activity is inappropriate and any repetition or other further report to ASIC will incur a serious outcome; or
- issue an Infringement Notice or recommend that ASIC issue one; or
- issue a Public Warning.

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: As we understand it, the Panel would be selected from a pool of either financial services or credit industry experts depending on the matter(s) in hand. If the Panel is to remain at three, then the MFAA would support option 1 – allowing the inclusion of two industry participants. This is the optimal way to ensure that the Panel has the right skills, technical expertise, and up-to-date financial services or credit knowledge as appropriate.

Option 2: Inclusion of a consumer advocate may at first appear reasonable. Unfortunately, there is a tendency for some of these advocates to automatically embrace a very poor attitude to industry participants because most of their dealings are with those participants who have provided poor or very poor client services and these industry participants do not reflect the general standard of the relevant sectors where most place a very high value on maintaining a good customer relationship.

Option 3: is also a good option if an experienced Tribunal member is selected and an appropriately experienced industry participant is selected from the pool from the relevant industry sector.

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

There is one other option which should be considered:

Option 4: is a Panel of five people: with up to three industry participants with either credit/broker background or with financial services experience as appropriate to the matter in hand and up to two non-industry participants (e.g. lawyers, academics or consumer representatives). The fifth member would be an ASIC staff member. This option may be appropriate in matters that are more complex or significant.

This would give the panel scope to represent other key stakeholder groups, such as customers, without limiting the required credit and financial services industry expertise on the Panel.

The Mortgage & Finance Association of Australia (MFAA) again thanks ASIC for the opportunity to make this submission on Consultation Paper 281: Financial Services Panel.

Yours sincerely



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