



ASIC

Australian Securities & Investments Commission

REPORT 551

Response to submissions on CP 281 Financial Services Panel

November 2017

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 281](#) *Financial Services Panel* (CP 281) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 263 Financial Services and Credit Panel](#) (RG 263).

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A Overview/Consultation process

- 1 In [Consultation Paper 281](#) *Financial Services Panel* (CP 281), we consulted on the proposal to establish the Financial Services Panel (the Panel).
- 2 In CP 281, we sought feedback on how the Panel would enhance the impact of ASIC's administrative decisions, the matters that would be referred to the Panel, and the optimal composition of the Panel.
- 3 This report highlights the key issues that arose out of the submissions received on CP 281 and our responses to those issues.
- 4 This report does not contain a comprehensive summary of all responses received. It is also not a detailed report on every question from CP 281. We have limited this report to the key issues.
- 5 We received two confidential and 11 non-confidential responses to CP 281 from industry bodies, banks, consumer groups and other interested parties. We are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 281, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 281.

Responses to consultation

- 7 Most respondents supported our proposal to establish the Panel and agreed that it should be responsible for determining whether ASIC should make banning orders for misconduct by financial services participants and participants in the credit industry.
- 8 Most respondents supported the proposed considerations ASIC would take into account when selecting matters to refer to the Panel (namely, whether it is appropriate for peer review because of its significance, complexity or novelty). However, some respondents sought further clarification about how these considerations would be interpreted and/or suggested various approaches to these considerations.
- 9 Most respondents preferred the proposed Option 1 for the composition of each individual sitting panel (sitting panel) (which included up to two members being drawn from a pool of industry participants and the third being an ASIC staff member). However, some respondents supported the inclusion of non-industry participants (Option 2) or variations to the number of Panel members, depending on the types of matters before each sitting panel.

- 10 While respondents recognised that Panel members would require relevant expertise and experience, some requested clarification and made suggestions on how Panel members would be selected and managed, and how conflicts of interest would be handled.
- 11 [Regulatory Guide 263](#) *Financial Services and Credit Panel* (RG 263) incorporates the feedback we received on [CP 281](#) and provides guidance on the Panel's composition, processes and procedures.

Note: The Panel will be named the Financial Services and Credit Panel (FSCP); however, we use the term 'Panel' throughout this report, as this was the term used in CP 281.

B Establishment of the Financial Services Panel

Key points

This section outlines the feedback we received on our proposal to establish the Panel to sit alongside our existing administrative processes.

Overall, there was strong support for establishing the Panel because it could enhance the impact of ASIC's administrative decisions and improve regulatory outcomes.

Purpose of the Panel

- 12 In [CP 281](#), we stated that establishing 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;
 - (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.
- 13 We acknowledged some potential disadvantages of a peer-based model; however, we proposed that to potentially mitigate these concerns, the Panel would:
- (a) include an ASIC staff member who is specialised and trained in making these types of decisions; and
 - (b) only make decisions on a subset—rather than all—of ASIC's administrative decisions.
- 14 The majority of respondents supported the establishment of the Panel. They agreed that the Panel may improve regulatory outcomes by assisting ASIC to make administrative decisions on certain matters relating to financial services and credit activities, and could enhance the impact of ASIC's administrative decisions.
- 15 One submission qualified its full support for the establishment of the Panel by questioning whether it was necessary. They considered there to be no major concerns about ASIC's current administrative decision-making

processes and that single-delegate decisions have been of high quality in significant, complex or novel cases.

ASIC's response

ASIC has established the Financial Services and Credit Panel (FSCP), taking into consideration the matters raised in the submissions we received.

The Panel comprises a pool of industry participants. We will draw upon this pool to form sitting panels to decide whether we will make a banning order against an individual for misconduct in the course of providing retail financial services and/or engaging in credit activities.

The sitting panels sit alongside our existing administrative decision-making processes and will assist us with making administrative decisions on certain matters relating to financial services and credit activities by providing an element of peer review.

[RG 263](#) sets out the principles and processes of the Panel.

C Matters the Financial Services Panel would consider

Key points

This section outlines the feedback we received on our proposals that:

- the Panel would be responsible for determining whether ASIC would make banning orders;
- we would refer a particular matter to the Panel where it is appropriate for peer review because of its significance, complexity or novelty; and
- only matters that are contested by the notice recipient would be referred to the Panel.

It also addresses the feedback we received about:

- distinguishing between ‘complex’ and ‘simple’ matters and which of these would more appropriately be considered by the Panel; and
- what other administrative powers we could delegate to the Panel now or in the future.

This section also outlines our response to this feedback.

Matters to be referred to the Panel

Banning orders

- 16 In [CP 281](#), we proposed that we would delegate to the Panel our power to ban a person from providing financial services (as defined in s766A of the *Corporations Act 2001* (Corporations Act)) and/or engaging in credit activities (as defined in s6 of the *National Consumer Credit Protection Act 2009* (National Credit Act)). Specifically, the Panel would consider banning orders for misconduct by financial services participants (excluding corporate Australian financial services (AFS) licensees) and participants in the credit industry. This power is available to us under s920A of the Corporations Act and s80 of the National Credit Act.
- 17 Most respondents agreed with the proposal that the Panel would be responsible for making banning orders for misconduct by financial services participants (excluding corporate AFS licensees) and participants in the credit industry.

Considerations when referring a matter to the Panel

18 We proposed that, when 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.

19 We also proposed that only matters that are contested by the notice recipient would be referred to the Panel.

'Significance, complexity or novelty' of matters

20 Many respondents agreed that a matter's 'significance, complexity or novelty' is an appropriate measure for the types of matters to be considered by the Panel. Respondents considered that referring such matters would be the most beneficial use of the Panel's time and where Panel members would add value.

21 Some respondents queried how these considerations would be interpreted and requested further ASIC guidance on this. A few respondents also suggested alternative or additional criteria, including whether the matter concerns a 'systemic issue' or had an 'an element of materiality'.

Distinguishing between 'complex' and 'simple' matters

22 Most respondents were of the view that 'complex' and 'simple' matters should be distinguished and that complex matters would be more appropriate for consideration by the Panel.

23 Some respondents expressed concern about the potential risks of the Panel making decisions on complex matters; however, as outlined in paragraph 13, having an ASIC staff member on the Panel would potentially mitigate any risks.

Uncontested matters

24 There were varied responses to our proposal that only matters that are contested by the notice recipient would be referred to the Panel. Some supported this proposal, while others were open to, or in favour of, both contested and uncontested matters being referred to the Panel. A reason given for this was that it would ensure consistency in all banning decisions made.

Other administrative powers

25 We did not propose to delegate our other administrative powers to the Panel; however, we sought feedback on what additional administrative powers we could delegate to the Panel now or in the future.

- 26 Some respondents suggested that ASIC could also delegate other administrative powers to the Panel, including:
- (a) issuing infringement notices;
 - (b) refusing AFS or Australian credit licence (credit licence) applications;
 - (c) imposing conditions on AFS licences or credit licences; and/or
 - (d) cancelling or suspending AFS licences or credit licences.
- 27 However, detailed rationales were not provided for these suggestions, and most respondents acknowledged that further consultation would be needed if ASIC proposed to delegate these powers.
- 28 Some respondents considered that if the Panel's decision-making scope is expanded, this may create challenges. One noted that the scope of matters referred to the Panel should not be expanded until it is evident that regulatory outcomes have improved as a result of establishing the Panel.

ASIC's response

[RG 263](#) provides guidance on the matters that will be referred to the Panel.

The Panel will be responsible for determining whether we will make banning orders against individuals for misconduct in the course of providing retail financial services and/or engaging in credit activities.

We will refer a banning matter to a sitting panel where we consider it is appropriate for peer review because of its significance, complexity or novelty.

Because uncontested matters may also be significant, complex or novel, we may also refer these matters to sitting panels, to ensure consistency in decisions made.

We note that different or additional considerations may apply to other decisions of ASIC. In the future, we may conduct further consultation with industry to consider whether the scope of the matters to be referred to the Panel should be expanded.

D Composition of the Financial Services Panel

Key points

This section outlines the feedback we received on our proposal that each sitting panel would generally consist of three sitting members, with up to two industry participants or non-industry participants and at least one ASIC staff member.

It also covers feedback on our three proposed options that could form the basis for selecting members of the sitting panel.

Membership of the Panel

- 29 In [CP 281](#), we proposed that each sitting panel would usually consist of three members to ensure that an outcome is achieved if there are differences of views among the members.
- 30 We proposed that up to two of the three sitting members would be industry participants and/or non-industry participants, and the remaining member(s) would be ASIC staff. We proposed that including an ASIC staff member would ensure that a member of the sitting panel is specialised and trained in these types of decisions, and is familiar with the law and ASIC's policy and guidance. This would also mitigate the potential disadvantages of a peer-based model.
- 31 We proposed three options that could form the basis for selecting members of each sitting panel. We asked which option would be most suitable for the Panel's purpose and whether there are other options for each sitting panel's composition that we could consider.
- 32 Respondents acknowledged the importance of carefully selecting qualified and experienced Panel members given the nature of the matters they would be considering.
- 33 Most respondents considered Option 1 to be the most suitable approach for selecting members of the sitting panel—that is, up to two members drawn from a pool of industry participants with the third being an ASIC staff member. Respondents agreed that this may ensure that non-ASIC Panel members would have current experience and expertise relevant to the matter being heard.
- 34 Some respondents supported including non-industry participants on each sitting panel (e.g. Option 2—that is, up to two members drawn from a pool comprising industry participants and non-industry participants with relevant

- expertise, including lawyers and consumer representatives) to ensure a balance in representation.
- 35 Some respondents also suggested alternative approaches to the Panel's composition, including increasing the number of members depending on the type of matter referred to the sitting panel.
- 36 One respondent did not support an ASIC staff member being on the Panel because, in their view, this would not entail a strong enough peer composition.
- 37 Although we did not consult on the matter of who would chair the sitting panel, one respondent stressed that the chair should be an ASIC staff member to ensure procedural fairness.

ASIC's response

[RG 263](#) provides guidance on the composition of the Panel.

Members of the Panel have been appointed by ASIC and comprise a pool of industry participants with expertise in the financial services and credit industries.

ASIC will establish each sitting panel, which will include two members drawn from the Panel (external members) and an ASIC staff member (internal member)—Option 1 in CP 281. ASIC will take into account the nature of the matter and the relevant expertise and experience of the available pool of members when assembling each sitting panel.

The internal member on each sitting panel will be specialised and trained in the types of decisions to be made, but will not be from the areas of ASIC that investigate an affected person's misconduct. Their inclusion mitigates the potential disadvantages of a more peer-based model.

It is also important that the chair of each sitting panel has regulatory expertise, a thorough understanding of ASIC policy, and can adequately deal with procedural fairness issues (e.g. applications for adjournment). Therefore, the internal member of each sitting panel will be the chair.

E Other matters

Key points

This section outlines other matters, raised by respondents, on which we did not seek feedback in [CP 281](#).

These matters relate to:

- managing conflicts of interest;
- Panel processes and procedures; and
- reviewing the Panel's effectiveness.

This section also outlines our response to this feedback.

- 38 Some respondents provided commentary on matters relating to managing conflicts of interest, Panel processes and procedures, and reviewing the Panel's effectiveness.

Managing conflicts of interest

- 39 In CP 281, we stated that ASIC will establish a secretariat for the Panel. The secretariat will ensure thorough processes are in place to identify and manage conflicts of interest.
- 40 Where an external Panel member has an interest that could conflict with the proper performance of their functions in determining a matter they are scheduled to hear, or are hearing, they would be required to disclose that interest. Where an actual or perceived conflict of interest is determined, a Panel member would not be able to hear, or continue to hear, the matter.
- 41 Respondents raised some concerns about how conflicts of interest would be managed, although they acknowledged that this could be achieved through careful and rigorous processes. They emphasised the importance of this for maintaining the integrity of the Panel.

Panel processes and procedures

- 42 In CP 281, we stated that Panel members would be required to conduct hearings in accordance with Div 6 of Pt 3 of the *Australian Securities and Investments Commission 2001 Act* (ASIC Act) and Div 2 of Pt 6-5 of the National Credit Act and with the principles set out in [Regulatory Guide 8 Hearings practice manual](#) (RG 8).

- 43 Some respondents requested further details about how matters would be referred to the Panel and relevant procedures and processes more generally.

Reviewing the Panel's effectiveness

- 44 Some respondents suggested that ASIC review the effectiveness of the Panel within a few years of its establishment. This review could consider such issues as the composition of sitting panels, and the scope of the matters referred to the Panel, including whether other administrative powers could also be delegated to it.

ASIC's response

We have established a Panel secretariat that will be responsible for identifying and rigorously managing conflicts of interest. Where an actual or perceived conflict of interest is determined, a Panel member would not be able to hear, or continue to hear, the matter.

Secretariat personnel are also responsible for assisting Panel members with administrative tasks and with the Panel's ongoing operation.

We may conduct a review of the Panel's effectiveness in the future.

[RG 263](#) provides further details about the Panel's processes and procedures.

Appendix: List of non-confidential respondents

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- Association of Financial Advisers
 - Association of Securities and Derivatives Advisers of Australia
 - Australian Financial Markets Association
 - Consumer Action Law Centre
 - Finance Brokers Association of Australia
 - Financial Planning Association of Australia
 - Financial Services Council
 - Law Council of Australia
 - Mortgage and Finance Association of Australia
 - Rent the Roo Pty Ltd
 - Westpac
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