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AFA Submission: CP359: Update to RG 263 Financial Services and Credit Panel

The AFA welcomes the opportunity to provide feedback on the Consultation Paper 359: Update to RG 263 Financial Services and Credit Panel.

Introduction

The AFA supports the operation of a Single Disciplinary Body that delivers a consistent approach to addressing issues of misconduct in the Financial Advice sector. We would want to ensure that financial advisers feel that they have access to a fair disciplinary regime and that where they have done the wrong thing, they are appropriately dealt with. In that sense, it is important that the process and the outcome is proportionate to the scale of any wrongdoing.

We are not comfortable with the suggestion that ASIC would issue a media release with respect to every sanction issued by a Financial Services and Credit Panel (FSCP) that is recorded on the Financial Adviser Register. We believe that this approach should be proportionate to the scale of the misconduct. At present, ASIC will issue media releases with respect to a financial adviser who is banned, and this is appropriate. An adviser who is given a direction to undertake further training, or to report specified matters to ASIC, should not warrant the issuing of a media release.

B1Q1 – Do you agree with our proposed approach to determining when to exercise our discretion to convene a sitting panel?

We believe that there should be clear and material grounds for when ASIC would convene an FSCP in the absence of the existence of "convening circumstances". Whilst we acknowledge that ASIC has broad powers to choose when to convene an FSCP, it was our understanding that panels would in the very vast percentage of circumstances, focus on matters covered in the convening circumstances. We find the reference to broad discretionary powers and the apparent willingness to utilise this on a frequent basis to be somewhat concerning. The simple fact that it is discretionary could readily mean that it is applied in an inconsistent manner. We would not like to see that a type of matter is pursued in one state, or with respect to one licensee, but not in another state, or with respect to another licensee.

We think that it is appropriate to consider the regulatory benefit, however, this is something that we believe would be very difficult to categorise and quantify. We are also concerned by the reference to "whether misconduct is widespread or part of a growing trend". This seems to imply that advisers might engage in misconduct as part of a concerted campaign. In reality, we expect that these cases are matters of conduct that is completely separate from other similar cases. How will an adviser know if a certain type of misconduct is widespread or part of a growing trend? It is important that ASIC is seen to be fair, balanced and impartial.

We envisage that it will be very problematic for one adviser, or small group of advisers, to feel that they have been singled out to make an example of, when supposedly that conduct is widespread or part of a growing trend.

If the objective is to "send an effective and deterrent message to industry", then we believe that there are other ways. This should not be the grounds to pursue individual cases of this type of conduct.

Overall, we believe that there is a lack of explanation of the circumstances under which these discretionary powers will be used and the explanation is relatively vague. There is no reference to client outcomes in this, which we would have thought would be an important consideration. The disciplinary system needs to be perceived to be applied in a consistent manner. Taking action to set examples, or in an indiscriminate manner, is not conducive to the development of a compliance focussed culture. We would prefer that these discretionary powers were used in a very discerning manner and only in the case of material misconduct, which is not covered in the convening circumstances.

We believe that examples of when ASIC might convene an FSCP where there are no convening circumstances would be beneficial.

B2Q1 – Do you agree that it is appropriate for ASIC to have regard to these factors in assessing the materiality of:
(a) damage or loss to a client; or
(b) benefit to a financial adviser?

In our view, draft RG 263.18, on whether loss or damage is material and draft RG 263.19 on whether a benefit to a financial adviser is material, lack sufficient detail to apply in practice. How does the reference to factors such as "the client's assets, income, liabilities and ongoing commitments, insurance arrangements, employment security and expected retirement age" assist in defining whether a matter is material or not? Equally how does "the size of the benefit relative to typical industry remuneration and the benefit the financial adviser would have received if they had not recommended the client take a particular course of action" provide the required level of specificity. In both cases, we are concerned that this will simply leave too much discretion in the hands of ASIC, and provide little basis to challenge.

We are uncertain about why paragraph 11 has included a specific focus on the refusal or failure to pay AFCA determinations.

In addition, in terms of the benefit relative to typical industry remuneration, this would need to be measured relative to the type of advice. For complex advice, it would be expected that the industry benchmark for complex advice would be the reference point, not the cost of simple advice.

In terms of "the benefit the financial adviser would have received if they had not recommended the client take a particular course of action", isn't this a matter of comparing whatever remuneration they were paid with the most likely other scenario of no remuneration for not providing any advice? Wouldn't it be more appropriate to compare the remuneration with what they could have expected to be paid for advice that was in the best interests of the client? This needs to be much clearer.

We do not disagree with many of these factors that have been proposed, however we feel that there needs to be substantially more clarity provided with respect to where matters could likely be assessed as serious. It is our view that there has been very little clarity provided.

We suggest that the use of examples would add significant benefit in the discussion of material damage/loss and material benefit.

B2Q2 Are there any other factors ASIC should consider in assessing the materiality of:
(a) damage or loss to a client; or
(b) benefit to a financial adviser?

We appreciate that the intent of a reference to materiality would normally be relative to a benchmark, such as the client's current situation. It could therefore be the amount of the loss relative to the client's overall investment portfolio, or the investment portfolio that the advice relates to. Thus, what is required is some measure of percentage and clarity on what the benchmark might be. It might be more difficult in a life insurance advice context, as often the complaints are that a benefit was not paid due to an issue with the disclosure as part of the underwriting process. These issues include matters related to complications with compliance with the disclosure obligations and the selection of a product that does not pay a benefit when the previous product would have. We envisage that the assessment of materiality is more difficult in the life insurance advice context.

In terms of the benefit to the adviser, this should presumably always be relative to the typical comparable cost for a client of similar complexity and in receipt of a comparable level of service. There would therefore need to be a percentage threshold above this comparable level, that would trigger an assessment of materiality and thus be deemed serious.

B3Q1 – Do you agree that it is appropriate for ASIC to have regard to these matters in assessing whether a person is fit and proper to provide personal advice to retail clients on relevant financial products?

We agree that it is appropriate for ASIC to have regard to competence, good character, diligence, honesty, integrity and judgement in the assessment of a fit and proper person.

We would like to note that the standard of assessment of competence needs to be carefully considered. A new adviser, who has only just completed their training, may not be so readily able to demonstrate competence, as will an adviser who has just commenced in a new area of specialty. Whilst in both cases they may have completed the required education and training, the real world often throws up practical challenges that were not covered in their study. Some flexibility in this assessment of competence exercise may need to be shown in these cases, where they are in their very early months of practice.

We do have concerns with respect to the consideration of whether someone has been the subject of an FSCP disciplinary action in the last 10 years. Firstly 10 years is a long time and secondly, if they have received a sanction from an FSCP, then is there a risk that a further

assessment of lack of fit and proper is a secondary penalty for the same matter. Equally, where the adviser has been the subject of a disciplinary sanction in the past, what opportunity do they have to demonstrate that they have addressed those issues and now operate at an appropriate level?

Section 921U also includes provision for where an adviser has paid an infringement notice, however it is elsewhere stated that the payment of an infringement notice is not an admission of guilt. Where the alternative is to fight a civil matter in a court, an adviser may choose to pay the infringement notice. This leads to questions about which matters should be considered in this context, and what weighting should be applied.

B3Q2 Are there any other matters ASIC should have regard to in assessing whether a person is fit and proper to provide personal advice to retail clients on relevant financial products?

We believe that the list of matters is appropriate, however as discussed above, we believe that it is appropriate to take into account in the assessment of competence the recent commencement of an adviser, the time since any sanction was awarded and the evidence of good conduct since that time.

C1Q1 – Do you agree that the proposed examples of matters in draft RG 263.37 are relevant to a decision by ASIC whether to convene a sitting panel to consider whether to vary or revoke the direction or order?

We believe that the matters listed in draft RG 263.37 are potentially relevant, however in some cases they require clarification. Our specific feedback is as follows:

- In which way would the seriousness of the circumstances influence the consideration of a variation or revocation? Is it suggested that where the matter is more serious that it is less likely to be considered, or alternatively where it is less serious, then it is less likely to be reconsidered? Seemingly all matters will fit somewhere on the spectrum of severity. The important consideration is whether the original decision fairly considered all circumstances and whether the outcome or sanction sat at a comparable point on the spectrum, which might be grounds for a review.
- In what context is the time since the direction or order was made influential in this consideration? Does an adviser need to wait for a period of time, or do they need to move quickly to call for a review, if they believe that there are grounds to do so?
- In what way should the action taken by an applicant to remedy any misconduct, be taken into account in the consideration of a variation or revocation? How might this help in the consideration of a matter?

We believe that greater clarity is required with respect to how these matters will be applied. We further suggest that some examples of matters that would be appropriate to be considered in the case of a an application for variation or revocation would be beneficial.

C1Q2 Are there any other matters we should include as examples?

Another potential consideration is whether matters of a similar nature, that have been resolved either before or since this matter was finalised, have been subject to a materially different sanction. Where more recent FSCPs have not taken such a harsh stance with respect to similar matters, then we believe that there are grounds to seek to vary an FSCP order. There should be consideration of the precedent created by the severity of sanctions.

D1Q1 – Do you agree with the proposed approach to holding hearings using technology? Why/why not?

We support the use of technology to minimise the cost of conducting hearings, subject to the ability of a financial adviser to defend themselves, not being materially impacted. We expect that this will be a consideration that emerges over time and thus we would support the use of technology wherever possible, however we would want to ensure that processes existed for feedback to be provided and for action to be taken, should it be resulting in sub-optimal outcomes.

D2Q1 – Do you agree with our proposed approach to publicizing decisions of a sitting panel?

We do not support the proposed broad approach to publicise all decisions of an FSCP. We accept that there is merit in publicising outcomes with respect to where an adviser is either suspended or the subject of a prohibition order. In this case, it is reasonable that there would be public notice of such an outcome, and this would be appropriate for impacted clients. This is consistent with the current approach that ASIC takes with respect to banning orders and enforceable undertakings.

At this stage it is unclear how many disciplinary matters are going to be addressed each year, and therefore how many media releases are going to be issued, however if ASIC is going to pursue such an approach, then we fear this will undermine ASIC's overall media strategy, by the addition of a larger number of matters, that in large part are not news worthy.

Achievement of Intended Objectives and Other Consequences

We appreciate the role that ASIC has with respect to improving the performance of the financial system and promoting confident and informed participation of investors and consumers. We are not convinced that the issuing of media releases with respect to relatively minor disciplinary matters will actually promote the achievement of this outcome. In fact, if there is a constant stream of media releases on these relatively minor matters, then it is likely to have a negative impact on consumer confidence.

We also need to consider the impact that it will have on those advisers who are the subject of a disciplinary outcome. This will take the form of a public humiliation, particularly if it is reported in the financial services trade media. We question how this can be beneficial to these advisers and the financial advice sector as a whole. We anticipate that this will cause huge levels of stress and anxiety. There must be a better way to impart a message on these advisers that they need to change their processes and practices to avoid a repeat outcome.

Factors Impacting the Convening of an FSCP

We note the lack of certainty with what will be assessed as "serious", and the likely inclusion of other matters under convening circumstances that might lead to relatively minor matters being considered by an FSCP. These matters could easily result in a disciplinary action, which could then result in a media release. We believe that the regulatory response should be proportionate to the misconduct. It appears to us that the regulatory response, in issuing media releases on such matters, would be excessive.

Potentially examples of matters that could end up being the subject of a media release could include the following maters where the advice fell down in the documentation and not in respect to their broader approach:

- A client where they have invested in a margin lending arrangement that has resulted in a material loss due to a down-turn in the markets, and the client claims that they were never suitable for high growth investments. The adviser may have failed to adequately document the steps that they took to confirm the client's risk profile and to confirm that they understood the risks involved in a gearing strategy. There is client loss, and the adviser has not adequately documented the full advice process, however it is arguable as to whether this amounts to genuine poor advice.
- An adviser provides life insurance advice and recommends the establishment of a new insurance package and the cancellation of insurance within an existing super fund. The client fails to disclose an existing health condition and when they later make a claim, this previous medical history emerges, resulting in the claim being declined. The client claims that they were covered under their previous super arrangement and that they had explained this health condition to the adviser. The adviser failed to adequately document the discussion with respect to the existence of any relevant medical history and as a result might be considered to have been negligent in recommending the transfer of insurance from the existing arrangement. Once again, this is a documentation fault and not an advice failing if the client failed to disclose the health condition.

It is also appropriate to link this back to the fact that ASIC has broad discretion as to which matters they refer to an FSCP and they could consider to refer matters that are not convening circumstances to an FSCP, on the grounds that it is widespread or a growing trend. If this was the case, they would only be picking out a few example cases to investigate. Why should those advisers who have been selected for this exercise, experience being the subject of a media release, when they were simply picked out to set an example?

We should also reflect upon the statement in draft RG 263.79 that "the FSCP is not a court of law and second, its purpose and nature are quite different". If an adviser is the subject of a disciplinary outcome and the matter is the subject of a media release, then they will certainly appear to have been the subject of a process that is taken so seriously as to result in them being thoroughly discredited.

We note the statement that advisers who have received a written warning or reprimand would not be the subject of publicising by way of a media release, however this was never going to be the expected outcome, given that these matters are not being recorded on the Financial Adviser Register.

We would have expected to see some commentary on how long these media releases will be kept on the ASIC website. For how long is it reasonable to penalise these advisers?

Application in Other Professions and Other Circumstances

In terms of this proposal, we would like to have seen an explanation of what other professions do when it comes to disciplinary sanctions and the publication of outcomes. What happens to doctors, lawyers, accountants and engineers when they are the subject of disciplinary action? Is what ASIC has proposed consistent with what is applied in other professions? What evidence is there to suggest that the publishing of these outcomes is beneficial for the profession as a whole, for impacted professionals and for clients more broadly?

In a broader context, we should contrast this approach with the publication of information about other offences, such as speeding offences and other major traffic offences. There is

presumably a difference between what is publicly available information and what is the subject of a media release.

Other Feedback

We note the reference in draft RG 263.8 to how an FSCP could make a banning order under Section 80 of the National Consumer Credit Protection Act. Whilst this power may still exist, it seems to us that the design of the FSCP is entirely with respect to financial advisers. Thus, the reference in the key terms to basic banking products, credit, credit activity etc. may be unnecessary.

We are concerned by RG 263.54 and the explicit statement that ASIC has full discretion about what they investigate and that they cannot investigate every report of misconduct. This paragraph goes on to suggest that ASIC will be selective in what matters to pursue. This paragraph presents a picture that some advisers might find discomforting in that ASIC could choose to focus on them, rather than to fairly and consistently investigate all misconduct and wrongdoing. This also contributes to our concerns about the proposed approach to publicising disciplinary outcomes.

Concluding Comments

The AFA supports the provision of clear processes and procedures for the operation of the FSCP. We would like to ensure that advisers have a greater level of certainty with respect to the operation of an FSCP. We believe that the draft RG requires more specificity and would benefit from the inclusion of examples.

We strongly oppose a broad approach to issue media releases with respect to every sanction that is recorded on the FAR. This is a very significant step and the publication of a media release should be reserved for the more serious matters. This is an important issue as it could have very serious consequences for those impacted by such action. We would like to see much greater justification of the merits of this proposal.

We would be happy to discuss this matter further, or to provide additional information if required. Please contact us on [redacted].

Yours sincerely,

[redacted]

Phil Anderson
Chief Executive Officer
Association of Financial Advisers Ltd

About the AFA

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 75 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

With the exception of Independent Directors, the Board of the AFA is elected by the Membership and Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting their wealth.