

1 April 2022

Financial Advisers
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne, 3000

By email: fscp.submissions@asci.gov.au

Dear Ms Sciacca,

Consultation paper 359: Update to RG 263 Financial Services and Credit Panel

CPA Australia represents the diverse interests of more than 170,000 members, working in over 100 countries and regions around the world. We make this submission on behalf of our members and in the broader public interest

Following review of the Consultation Paper and the draft Regulatory Guide, we provide the following comments and responses to the consultation questions.

Purpose and composition

RG 263.5 discusses how a sitting panel may only consider and make decisions on matters that relate to a 'relevant provider'. It may be beneficial to also describe and provide an example of the ramifications of a financial adviser no longer being a 'relevant provider', for example their AFS licensee has withdrawn their authorisation before the matter goes before a sitting panel.

When ASIC may convene a sitting panel

CPA Australia supports ASIC having the discretion to convene a sitting panel of the Financial Services and Credit Panel (FSCP) in circumstances other than the defined 'convening circumstances'.

However, in the circumstances where there may be a regulatory benefit, for example sending a deterrent message to the industry (RG263.15-16), any advisers referred to a panel should be provided procedural fairness in that they should be able to expect to be treated the same as any other advisers under the same or similar circumstances.

That is, it would not be a fair carriage of justice if a financial adviser or group of financial advisers were subject to a particular process, treatment, or outcome because they appeared before a panel to be made an example of, if that treatment or process was not applied to all advisers under the same circumstances. This is particularly so where advisers may be subject to the public scrutiny of appearing before a panel, with a detrimental impact on their business, and yet may be able to appeal the decision of a panel and have that decision overturned.

Assessing material loss or damage or material benefit

CPA Australia supports the consideration of materiality when assessing the loss or damage experienced by a client or the benefit gained by a financial adviser. However, we recommend against considering these solely against the financial circumstances of the client or the relative benefit received by an adviser.

The nature of the penalty or reprimand determined by a sitting panel should not be determined solely by the level of loss or gain experienced. There will be examples of misbehaviour or contraventions that are unacceptable at any time, that should result in a commensurate or expected outcome for an adviser and should not be treated leniently simply because markets were performing strongly, as an example, at the time and any loss was absorbed by market gains.

What actions a sitting panel may take

RG 263.9 refers to procedural fairness. We would expect a financial adviser who a sitting panel proposes to warn or reprimand will typically be entitled to procedural fairness - why would they not be entitled? Can examples please be provided?

RG 263.35 refers to the application for a variation or revocation of a direction or order and ASIC being able to convene a sitting panel to consider the application. Can you please provide clarification as to whether it would or should be a different panel hearing the matter to avoid the treat of self-review or should a new sitting panel independent of the first panel be convened? It would also be beneficial to the reader if this section also referred to the right of review to the AAT outlined at RG 263.114.

Enforceable undertakings

We recommend ASIC provide examples of the type of enforceable undertakings a sitting panel may accept from a financial adviser.

If you have any queries regarding this submission, please contact [REDACTED] Senior Manager, Advocacy and Retirement Policy on [REDACTED] or [REDACTED]

Yours sincerely

[REDACTED]

Ms Keddie Waller
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CPA Australia