

28 March 2022

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

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

Dear Sir/Madam

CP 359: Update to RG 263 Financial Services and Credit Panel

Chartered Accountants Australia and New Zealand (CA ANZ) has long advocated for industry reform to ensure that more consumers are able to access good quality, ethical and professional financial advice.

We therefore thank you for the opportunity afforded to CA ANZ to comment on the recommendations, proposals, and questions to CP 359 – an update to RG 263 relating to the Financial Services and Credit Panel (“the Panel”).

We will continue to advocate on behalf of our members and in the public interest and we therefore welcome ASIC’s Consultation Paper 359 to help ASIC further understand the current issues and impediments around delivering affordable, quality personal financial advice.

CA ANZ supports raising the standards of financial advice to better serve and protect consumers and overall we agree with ASIC’s proposals. However as detailed in this submission we believe there is a need for some adjustments to how the Panel is suggested to operate.

If you would like to discuss our submission, please do not hesitate to contact [REDACTED] on [REDACTED] or at [REDACTED].

Yours sincerely

**Tony Negline CA CA SMSF Specialist
Superannuation Leader
Advocacy & Professional Standing**

**Bronny Speed FCA CA FP Specialist
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Appendix

Background to the proposals

Key points

- The Panel is a pool of industry participants, appointed by the Minister
- ASIC draws upon these individuals when forming sitting Panels. Each sitting Panel comprises at least two members from the FSCP and an ASIC staff member as the Chair, with a majority vote determining the outcome
- The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (“Better Advice Act”) gives sitting Panels their own statutory functions and powers to address a range of circumstances and misconduct by financial advisers
- The superseded Panel ceased to operate from 1 July 2021 in anticipation of the reforms in the Better Advice Act. It is anticipated the earliest the Panel will sit is in Q2 in 2022.
- This legislation is supplemented by numerous additional statutes.

CA ANZ experience in conduct and discipline processes

CA ANZ has significant experience in running conduct and disciplinary processes through its Professional Conduct Committee (PCC), Disciplinary and Appeals Tribunals (Tribunals) and therefore supports a robust disciplinary system to be implemented for financial advisers via the Panel.

CA ANZ has considerable resources in relation to our conduct and disciplinary processes.

Please see the following links for greater detail:

1. <https://www.charteredaccountantsanz.com/about-us/complaints/complaints-about-a-member>
2. <https://www.charteredaccountantsanz.com/member-services/mentoring-and-support/dealing-with-a-complaint>

Changes to the Financial Services and Credit Panel

We have some issues with the changes outlined in CP359 that we have been asked to comment on. They can be summarized as follows:

1. From 1 January 2022, ASIC is obliged to either
 - a. Convene a sitting Panel if ‘convening circumstances’ exist or
 - b. Give a warning/reprimand if ASIC does not propose to convene a sitting Panel or exercise any of their powers other than a warning or reprimand

We would like to see clarity around what constitutes a ‘convening circumstance’ as this is unclear, thus providing uncertainty for Australian Financial Services License holders (AFSLs) and authorised representatives. Whilst Reg 12N of the Australian Securities and Investments

Commission Regulations provides some clarification, we believe the financial advice sector would benefit from ASIC providing more guidance around this issue.

An example whereby clarity would be appreciated is as follows:

How are inadvertent and minor breaches of the work and training requirements to be dealt with as there appears to be a requirement to convene a Panel where any contravention of the relevant education and training standards are breached?

Financial advisers have been through tumultuous change over the past five years, from the Financial Adviser Standards and Ethics Authority (FASEA) reforms as well as the ramifications of the findings made by Justice Hayne in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, to name a few. Stability is now required. Advisers must therefore be given clarity around which actions will see a warning or reprimand imposed and which actions will be referred to the Panel.

2. CA ANZ does not agree that ASIC should be able to convene a sitting Panel at any time, even if the convening circumstances are not present. If clarity is provided for actions that will necessitate a warning or reprimand and actions that will lead to a Panel being convened, and these are clearly articulated to financial advisers, there should be no need for a 'catch all' provision enabling ASIC to convene a sitting Panel at any time.
3. ASIC needs to clearly state how it will assess the materiality in relation to loss, damage or material benefit especially if Australian Financial Complaints Authority processes may be on foot, or are likely to be initiated or other actions such as client initiated civil actions are on foot or maybe pursued.

B Types of matters to be referred to a sitting Panel

B1 When ASIC may convene a sitting Panel

Under s139(1) of the ASIC Act, ASIC has a broad discretionary power to convene a sitting panel to consider misconduct by financial advisers. In determining whether ASIC will convene a sitting panel using this power, we propose to consider the regulatory benefit that may be derived from referring a matter to a sitting panel—for example, whether misconduct is widespread or part of a growing trend, and whether referring the matter to a sitting panel will send an effective and deterrent message to industry: see draft RG 263.15–RG 263.16.

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

CA ANZ's position:

CA ANZ believes ASIC's power under s139(1) of the Act to convene a sitting Panel is too broad and that clearly defined parameters need to be put in place.

We understand ASIC has the power to convene a sitting Panel in certain circumstances, however, at a practical level these circumstances should clearly explained in RG 263.

We do not support the proposal that ASIC may convene a Panel in order to pursue a 'regulatory benefit' without further guidance being provided. ASIC should use its best endeavours to clearly explain in RG 263 when it intends to exercise this power. As circumstances evolve ASIC should seek to keep interested parties apprised of any changes it has made to when it will exercise this power.

The composition of the Panel, and each panellists background, may lead to self-interested groups within the sector having an undue negative influence on other parts of the sector in Panels established under this provision.

Listing the circumstances under which a sitting Panel may be convened will assist in reducing any friction between the two independent Panel members and the ASIC chair as to whether the Panel should have been convened in the first place.

There also needs to be reasonable timeframes involved for the Panel members to read relevant material and to ensure that timely decisions are made.

Lastly, as the definition of a 'fit and proper person' differs across various professional member organisations, we ask that ASIC has regard to the efficacy in which professional member organisations treat members who stray outside of guidelines.

We also believe that the clear explanation of how the system works, what advisers are required to do and the possible outcomes should be clearly explained to advisers, as this results in advisers properly participating in the process. We are aware from CA ANZ member feedback that a clear and transparent understanding best enables them to participate in a disciplinary process and can reduce the anxiety associated with the process.

B2 Material loss or damage or material benefit

B2

We propose that ASIC will likely have regard to the factors set out in draft RG 263.18– RG 263.19 in assessing the following:

- (a) Whether the loss or damage to a client is material—These factors include the client's assets, income, liabilities and ongoing commitments, insurance arrangements, employment security and expected retirement age.**
- (b) Whether a benefit to a financial adviser is material—These factors include 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.**

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?**

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?**

CA ANZ's position:

(a) Loss or damage to a client is material

Regarding material loss or damage to a *client*, there is a difference between 'permanent' loss and or 'quotational' loss, which maybe temporary in nature.

Therefore, aside from factors outlined in CP359 including the client's assets, income, liabilities and ongoing commitments, insurance arrangements, employment security and expected retirement age, we believe other factors should be taken into consideration. Some of these include:

1. Timing, as the price of a quality asset fluctuates over time, so at which point of a market cycle does a 'loss' actually occur? And is it reasonable for a client to claim a 'loss' when they have been out of growth markets with funds invested in cash?
2. The inappropriate use of leverage (margin lending, derivatives, contracts for difference] magnifies market price fluctuations. Magnification due to leverage can even deplete an investor's capital at low points in market cycles leading to permanent loss, even on quality assets, so leverage should be a factor in determining materiality.
3. Investors can panic sell at the low point in the share market/asset cycle, often against the advice of the financial adviser. Reminding clients of their long-term time horizon for investment can often have little or no effect. This self-harming behaviour realises permanent losses and denies the investor the benefit of the subsequent recovery.
4. Inflation erodes the real purchasing power of money. Therefore, investor knowledge of investment characteristics is important. Maintaining excessive funds in bonds, term deposits and cash could result in material damage to a client's purchasing power thus 'stability' can come at a high cost
5. Mental health and well-being should also be taken into consideration when assessing the materiality of losses
6. Relativity between impacted clients should also be taken into consideration. Is a loss of \$50,000 any different for clients with \$50,000, \$500,000 or \$5 million?

As noted above, any loss contemplated by ASIC must be considered in conjunction with any actions via the industry complaints body, Australian Financial Complaints Authority (AFCA). AFCA's role is to provide consumers and small businesses with fair, free and independent dispute resolution for financial complaints, so this should be the first pathway for the settlement of material loss or damage. Any investor initiated civil actions, including via class actions, should also be considered.

ASIC should not proceed with consideration of loss or damage until all other processes are finalised.

(b) Benefit to a financial adviser is material

In relation to assessing whether a benefit to a financial adviser is material, aside from factors outlined in CP359 including 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, we believe other factors should be taken into consideration. Some of these include:

1. Frequency of benefit to adviser – is it a once off, or do frequent small benefits when combined make a substantial benefit?
2. Nature of benefit – is it financial or is it 'in kind' and what is the quantum of both, either?
3. Is the benefit, if any, to the client's detriment and/or the industry at large?

B3 Fit and proper person

B3

We propose that in assessing a financial adviser's fitness and propriety, ASIC may consider whether the financial adviser:

- (a) is competent to provide personal advice to retail clients on the relevant financial products they are authorised to provide personal advice on (as demonstrated by their knowledge, skills and experience); and
- (b) has the attributes of good character, diligence, honesty, integrity and judgement: see draft RG 263.21.

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?

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?

CA ANZ's position:

ASIC may convene a Panel if it determines that an adviser is not a 'fit and proper person'. This concept of fit and proper is difficult to define and hard to apply in a prescriptive sense. Nevertheless, we ask ASIC to provide greater detail about when it is likely to consider using the catch-all clause in Sec 921U(l) of the *Corporations Act*. In any event, we believe that the publications of Panel decisions will assist AFSLs, authorised representatives and the financial advice industry on how the "fit and proper" test is being applied.

C Variation or revocation of Panel orders

C1 Variation or revocation of directions and orders

C1 We propose to provide a non-exhaustive list of matters as set out in draft RG 263.37 that ASIC may consider when deciding whether to convene a sitting panel to consider a variation or revocation application. These include:

- (a) the seriousness of the circumstances that resulted in the direction or order;
- (b) the period that has elapsed since the direction or order was made and whether the person applying for the variation or revocation (applicant) continues to pose a risk to consumers or to confidence in the financial system;
- (c) any action taken by the applicant to remedy any misconduct or the cause of the misconduct; and

(d) any information that, if it had been known to the sitting panel at the time, we think may have been relevant to its decision to give the direction or order

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?

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

CA ANZ's position:

CA ANZ generally accepts the list of matters as set out in draft RG 263.37 which ASIC will consider when deciding whether to convene a sitting Panel or to consider a variation or revocation application. ASIC must keep interested parties informed about any adjustments, including additions, it intends to the RG 263.37 list of matters.

Authorised representatives should be given the ability to request, with reasons, why the original Panel should or should not hear their matter again.

We also request that if a Panel is appointed for a variation or revocation, consideration should be given to the appointment of a new Panel.

We agree that

- (a) Seriousness of circumstances should be addressed
- (b) Time periods should be considered
- (c) Actions from applicants to remedy misconduct should be considered and
- (d) Any other relevant information should be considered

D Processes and procedures of the Panel

D1 Hearings generally to be held using technology

D1 We propose that hearings of a sitting panel will generally be held using audio-visual teleconferencing: see draft RG 263.100.

Note: The chair of a sitting panel (who will always be an ASIC staff member) may decide to hold all or any part of a hearing using technology: see s159(3)(b) of the ASIC Act.

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

CA ANZ's position:

- Technology should be preferred option
- Use face to face where:
 - Complicated case and need to read body language
 - Practicable.

CA ANZ agrees with sittings being held virtually, if the case is straight-forward. Where hearings are virtual, the sitting Panel should be empowered to ensure that the connection is good quality with good visibility of those attending. Further, the adviser and their relevant representatives should be able to be seen at all times. Information should be gathered about the quality of experience of such virtual hearings.

Face to face sittings are preferred where the case is complicated or not straight forward, as we believe it's much easier to read a person's body language when in person, including whether there is any insight into the conduct.

D2 General publicising of decisions text has been copied from SDB submission

D2 We propose that ASIC's general approach will be to publish a media release about actions taken by a sitting panel. However, we propose to only publicise names of financial advisers affected by decisions of a sitting panel in those media releases, if the sitting panel's decision must be displayed on the Financial Advisers Register: see draft RG 263.110–RG 263.113.

Note 1: A media release may relate to one or more decisions of a sitting panel.

Note 2: ASIC's annual report must also include information about the activities undertaken by each sitting panel: s136(1)(da)(i) of the ASIC Act.

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

CA ANZ's position:

As CA ANZ has previously submitted, we would like to see the development of an efficient system for the notification of disciplinary decisions made by the Panel where appropriate to do so. We note the proposal to only publicise names of financial advisers affected by decisions of a sitting Panel and understand from RG263.110 – 113 that this means a decision which negatively impacts on the financial adviser (as set out in Table 3 of RG263). While it may be difficult to locate decisions in relation to individual financial advisers through reviewing the Financial Advisers Register, the publication of a media release by ASIC about the actions taken by the sitting Panel would remedy this issue. CA ANZ therefore agrees with the proposal and with the general principle of significant public interest to ensure broad awareness of the actions of ASIC and the FSCP.

CA ANZ also encourages ASIC to include a full description of the decision and reasons for the decision of the Panel, as this will provide greater understanding by investors, consumers and the broader community, serve an educative purpose for other financial advisers and assist professional associations with any further action they wish to take regarding their members who are financial advisers.

Proposed Panel warnings and reprimands

We note in proposed 263.66 that a Panel must issue a proposed action notice unless a Panel determines any three specific outcomes including issuing a warning or reprimand under Sec 921T of the *Corporations Act*.

We do not agree with this approach. We believe that if the issuance of a Panel warning or reprimand may have an adverse outcome on an authorised representative then that person must be afforded procedural fairness via the issuance of a proposed action plan.

About Chartered Accountants Australia and New Zealand

Chartered Accountants Australia and New Zealand (CA ANZ) represents more than 128,000 financial professionals, supporting them to build value and make a difference to the businesses, organisations and communities in which they work and live.

Around the world, Chartered Accountants are known for their integrity, financial skills, adaptability and the rigour of their professional education and training.

In summary:

Across the country, in local communities and large cities, CAs are seen as a trusted and educated group of financial professionals who are working every day to serve the interests of individual and businesses in the Australian economy.

Being highly qualified

As well as relevant degree-level study, all our members have completed a minimum of three years approved and mentored relevant work experience. CAs have an Australian or New Zealand approved degree at AQF7, or an overseas equivalent, and a TEQSA approved AQF8 post-graduate qualification which requires rigorous study.

Significant continuing professional development obligations

Significant ongoing professional development requirements ensure CAs skills and knowledge remain current and relevant. Members are required to complete a minimum of 120 hours of relevant training during a three-year period. This is monitored through audits for a selection of members as well as annual declarations from all members.

Broad experience

Our members are accountants who can offer far more than technical knowledge. CAs are broadly experienced in dealing with business and financial issues across a diverse range of management and advisory roles. This bigger picture, holistic perspective enables them to work flexibly to positively impact businesses, organisations and communities.

Fully accredited

Our members have all met, and are bound by, internationally recognised technical and ethical standards. CA ANZ is part of the Global Accounting Alliance - the coalition of the world's premier accounting bodies.

Future-focussed

Whether working in business or practice, CAs are uniquely positioned to offer advice that can be trusted. Through deep understanding they have the skills to examine the past and guide organisations into the future.

Highest ethical and professional standards

Members are required to adhere to a strict code of ethics included in the Accounting Professional & Ethical Standards Board's Code of Ethics for Professional Accountants (including Independence Standards) (APESB 110). They are also required to comply with detailed CA ANZ regulations which maintain high levels of professional standards.

Protection to consumers and members through the Professional Standards Scheme

All members in public practice must meet the requirements of the CA ANZ Professional Standards Scheme. This includes having minimum levels of professional indemnity insurance and appropriate disclosure of the limitation of liability under the scheme. This offers protection to both our members and their clients.

Quality Review Program

The CA ANZ Quality Review Program reviews practices on a cyclical basis and examines each practice's compliance with technical and professional requirements, including compliance with the professional standards scheme. The programme monitors whether our members in public practice have quality control systems in place to ensure they comply with the Code of Ethics, professional standards, and legal and regulatory requirements. All members offering services to the public are eligible for review. This helps maintain a consistently high standard of quality and service to their clients.

Conduct and disciplinary processes

There are robust disciplinary processes to hold members to account who may not comply with high professional and ethical standards. This includes investigating and resolving complaints made against members. Sanctions imposed on members can include termination or suspension of membership, a censure, training and costs.