



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 359

Update to RG 263 Financial Services and Credit Panel

February 2022

About this paper

This consultation paper sets out ASIC's proposals to update [Regulatory Guide 263](#) *Financial Services and Credit Panel* (RG 263) to reflect legislative changes in the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Better Advice Act).

A draft updated version of RG 263 (draft RG 263) is attached to this paper.

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.

Document history

This paper was issued on 28 February 2022 and is based on the legislation as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the principles and processes of the Financial Services and Credit Panel (FSCP) and ASIC's implementation of the FSCP provisions introduced by the Better Advice Act.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information on how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by **28 March 2022** to:

FSCP.submissions@asic.gov.au

What will happen next?

Stage 1	28 February 2022	ASIC consultation paper released
Stage 2	28 March 2022	Comments due on the consultation paper
Stage 3	May 2022	Regulatory guide released

A Background to the proposals

Key points

The Financial Services and Credit Panel (FSCP) is a pool of industry participants, appointed by the Minister, that ASIC draws upon when forming individual sitting panels (sitting panels). Each sitting panel comprises at least two members from the FSCP and an ASIC staff member.

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 new FSCP replaces the panel of external delegates established by ASIC in 2017 to make administrative decisions on financial services and credit matters (superseded FSCP). The superseded FSCP ceased to operate from 1 July 2021, in anticipation of the reforms in the Better Advice Act.

Changes to the Financial Services and Credit Panel

- 1 In December 2020, the Government announced that it would expand the operation of the FSCP to give effect to Recommendation 2.10 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which called for a single, central disciplinary body to be established for financial advisers.
- 2 The Better Advice Act gives effect to this recommendation by giving the FSCP its own legislative functions and powers. These functions and powers enable the FSCP to address a range of circumstances and misconduct, including less serious misconduct, by financial advisers.
- 3 The new FSCP replaces the superseded FSCP established by ASIC in 2017. The superseded FSCP could only exercise powers delegated to it by ASIC and was convened at ASIC's discretion. The superseded FSCP ceased to operate from 1 July 2021, in anticipation of the reforms in the Better Advice Act.

Note: The superseded FSCP was established following public consultation in [Consultation Paper 281](#) *Financial Services Panel* (CP 281) and the publication of [Report 551](#) *Response to submissions on CP 281 Financial Services Panel* (REP 551).

- 4 From 1 January 2022, after carrying out our usual triaging, investigatory work and referral processes, ASIC is obliged to do one of the following:
 - (a) *Convene a sitting panel*—ASIC must convene a sitting panel if the 'convening circumstances' exist. In particular, if:
 - (i) one of a list of prescribed circumstances exist—these circumstances are set out in reg 12N of the *Australian Securities*

and *Investments Commission Regulations 2001* (ASIC Regulations) and include circumstances where ASIC reasonably believes that the financial adviser:

- (A) is not a fit and proper person to provide personal advice to retail clients in relation to relevant financial products;
 - (B) has contravened the education and training standards in s921BA(1) (qualifications), 921BA(2) (exam) or 921BA(3) (work and training) of the *Corporations Act 2001* (Corporations Act); or
 - (C) has contravened, or been involved in the contravention of, a financial services law and that contravention is serious; and
- (ii) we have not exercised, and do not propose to exercise any of our powers under the corporations legislation (e.g. to impose a banning order under s920A of the Corporations Act or accept an enforceable undertaking under s93A and 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act)).

Note: For a full list of the convening circumstances, see draft RG 263.12.

- (b) *Give a warning/reprimand*—ASIC must give a warning or reprimand in other circumstances (e.g. where we reasonably believe that a financial adviser has contravened a financial services law and that contravention is *not serious*) if we have not, and do not propose to:
- (i) convene a sitting panel; or
 - (ii) exercise any of our powers (other than the warning/reprimand power) in relation to the circumstance: s921S of the Corporations Act.

Note 1: As a result of carrying out our usual triaging, investigatory work and referral process, not all concerns about the conduct of financial advisers that come to ASIC's attention will result in ASIC convening a sitting panel or issuing a warning/reprimand. For information about how we decide which concerns to pursue, see draft RG 263.53–RG 263.54.

Note 2: We will shortly be releasing an information sheet explaining how we will exercise our new power to give warnings/reprimands under s921S of the Corporations Act.

- 5 ASIC may also convene a sitting panel at our discretion at any time, even if the convening circumstances are not present.
- 6 A sitting panel acts separately from, but alongside, ASIC's own administrative decision-making processes and has a range of powers to enable it to consider and respond to a range of misconduct by, and circumstances relating to, financial advisers.

B Types of matters to be referred to a sitting panel

Key points

The Better Advice Act and related regulations set out the circumstances where ASIC must convene a sitting panel. ASIC may also convene a sitting panel in other circumstances.

This section outlines and seeks feedback on the criteria we propose to apply to:

- decide when to convene a sitting panel at our discretion;
- determine whether loss or damage to a client or benefit to a financial adviser is material; and
- assess a financial adviser's fitness and propriety.

When ASIC may convene a sitting panel

Proposal

B1 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.

Your feedback

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

Rationale

- 7 As noted in paragraph 4 of this paper, ASIC *must* convene a sitting panel in prescribed circumstances (convening circumstances) set out in reg 12N of the ASIC Regulations: see s139(2) of the ASIC Act.
- 8 Additionally, ASIC *may* convene a sitting panel at any time (see s139(1) of the ASIC Act) even if the convening circumstances are not present. However, we will only do so where we think that convening a sitting panel to consider the matter will result in some regulatory benefit, having regard to the interests of investors and consumers in the financial system.

- 9 We consider that targeting misconduct that is widespread or part of a growing trend and matters that, if considered by a sitting panel, will send an effective and deterrent message to industry, is likely to result in regulatory benefit.

Material loss or damage or material benefit

Proposal

- 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.

Your feedback

- 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?

Rationale

- 10 Certain circumstances will only be 'convening circumstances' (i.e. circumstances where we must convene a sitting panel to consider taking action against a financial adviser as set out in paragraph 4) if we reasonably believe they are 'serious'.
- 11 These are circumstances where:
- (a) a financial adviser has contravened, or been involved in the contravention of a financial services law (see reg 12N(2)(e) and (f) of the ASIC Regulations); and
 - (b) the financial adviser has, at least twice, been linked to a refusal or failure to give effect to certain determinations made by the Australian Financial Complaints Authority (AFCA) (see reg 12N(3) of the ASIC Regulations).

- 12 A circumstance is ‘serious’ if, among other matters, it has resulted, or is likely to result, in material loss or damage to a client of the financial adviser, or a material benefit to the financial adviser: see reg 12N(3)(b) and (4) of the ASIC Regulations.
- 13 Where the convening circumstances do not exist—for example, because a financial adviser’s contravention of a financial services law does not cause material loss or damage—but we do have a reasonable belief that the contravention occurred, we may:
- (a) choose to exercise our discretion to convene a sitting panel (see Proposal B1); or
 - (b) give a warning/reprimand under s921S of the Corporations Act.

Fit and proper person

Proposal

- 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.

Your feedback

- 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?

Rationale

- 14 We must convene a sitting panel where we reasonably believe that a financial adviser is not a fit and proper person to provide personal advice to retail clients in relation to relevant financial products: reg 12N(c) of the ASIC Regulations.
- 15 To determine whether a person is fit and proper to provide personal advice to retail clients on relevant financial products, ASIC must have regard to the matters prescribed in s921U(a)–(k) of the Corporations Act as well as any other matters we consider relevant: s921U(l) of the Corporations Act.

- 16 Examples of prescribed matters include whether the person has ever had an Australian financial services (AFS) licence or credit licence suspended or cancelled, or has had a banning order made against them, or a sitting panel has taken action against them in the last 10 years: see draft RG 263.20.
- 17 In our regulatory experience, concerns about competence and the attributes of good character, diligence, honesty, integrity and judgement often arise where we identify misconduct and poor outcomes for consumers. As a result, we think these concerns are highly relevant (within the meaning of s921U(1) of the Corporations Act) to our own determination of whether a person is fit and proper to provide personal advice to retail clients.

C Variation or revocation of FSCP orders

Key points

A financial adviser can apply to ASIC for a variation or revocation of a direction or order made by a sitting panel.

This section outlines and seeks feedback on the proposed non-exhaustive list of matters that ASIC may take into account when considering whether to convene a sitting panel to consider a variation or revocation application.

Variation or revocation of directions and orders

Proposal

- 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.

Your feedback

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?

Rationale

- 18 A financial adviser may apply to ASIC for a variation or revocation of a direction or order made by a sitting panel. ASIC must either:
- (a) convene a sitting panel to decide whether to revoke or vary the direction or order; or
 - (b) refuse to refer the matter to a sitting panel: see s921N(3) and (4) of the Corporations Act.

- 19 ASIC may only convene a sitting panel to decide whether to vary or revoke a direction or order where it appears that there has been a change in the circumstances that led to a sitting panel giving the direction or order to the financial adviser.
- 20 The proposed guidance in draft RG 263.37 has been provided to give industry an indication of the kinds of matters ASIC will consider in determining whether to convene a sitting panel to decide a revocation or variation application.

D Processes and procedures of the FSCP

Key points

This section outlines and seeks feedback on:

- our proposal that hearings of a sitting panel will generally be held using audio-visual teleconferencing; and
- our proposed approach to publicising decisions of a sitting panel.

Hearings generally to be held using technology

Proposal

- 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.

Your feedback

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

Rationale

- 21 ASIC considers it is appropriate to generally convene hearings of a sitting panel using audio-visual teleconferencing to:
- (a) manage costs (we consider that generally, it will be more cost effective to conduct hearings via audio-visual teleconferencing); and
 - (b) promote efficiency in conducting hearings.

Note: Due to industry funding arrangements for ASIC that became law in 2017, the costs of running FSCP matters will ultimately be borne by the financial advice industry.

General publicising of decisions

Proposal

- 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.

Your feedback

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

Rationale

- 22 In formulating this proposal, we have considered the following matters:
- (a) *ASIC's role*—ASIC must strive to maintain, facilitate and improve the performance of the financial system, and to promote the confident and informed participation of investors and consumers in the financial system: see s1(2)(a)–(b) of the ASIC Act and s760A of the Corporations Act.
 - (b) *The regulatory effect of transparency and disclosure about regulatory actions*—As a general principle, ASIC considers there is significant public interest in ensuring that investors and consumers and the broader community are aware of and informed about actions that ASIC and other regulatory bodies like the FSCP take. Transparency and disclosure are important factors in market integrity and investor and consumer confidence. They serve to educate, as well as deter misconduct and promote compliance, by demonstrating the regulatory consequences of engaging in unacceptable conduct.

Note 1: Sitting panels do not have the power to publicise their own decisions.

Note 2: For more information on how ASIC approaches decisions about publicising matters, see [Information Sheet 152](#) *Public comment on ASIC's regulatory activities* (INFO 152).

- (c) *The legislative framework*—Under the Better Advice Act and related regulations, the names of financial advisers affected by decisions of a sitting panel of the FSCP only need to be publicly displayed on the Financial Advisers Register in specified circumstances.

Key terms

Term	Meaning in this document
AFCA	Australian Financial Complaints Authority
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
applicant	A person applying for a variation or revocation of a direction or order made by a sitting panel
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC Regulations	<i>Australian Securities and Investments Commission Regulations 2001</i>
banning order	A written order by ASIC that prohibits a banned person from providing financial services or engaging in credit activities
basic banking products	Means: <ul style="list-style-type: none"> • a basic deposit product; • a facility for making non-cash payments that is related to a basic deposit product; or • a facility for providing traveller's cheques: s961F of the Corporations Act
Better Advice Act	<i>Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021</i>
convening circumstances	The circumstances set out in reg 12N of the ASIC Regulations in which ASIC must convene a sitting panel if ASIC has not exercised, and does not propose to exercise, our own powers
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
external member	An industry participant appointed to the FSCP by the Minister and selected by ASIC as a member of a sitting panel

Term	Meaning in this document
financial adviser	Has the same meaning as relevant provider in s910A of the Corporations Act
Financial Advisers Register	The register of financial advisers that ASIC is required to maintain under s922Q of the Corporations Act
financial service	Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act
financial services business	A business of providing financial services Note: This is a definition contained in s761A of the Corporations Act. The meaning of 'carry on a financial services business' is affected by s761C.
FSCP	The Financial Services and Credit Panel established by the Better Advice Act
internal member	An ASIC staff member selected by ASIC to chair a sitting panel
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
notice of hearing	Notification in writing to the affected person by a sitting panel of the date, time and place (including a virtual place) for the hearing of a matter by a sitting panel
prescribed circumstances	The circumstances set out in s921K of the Corporations Act in which a sitting panel may take certain actions
Pt 7.1 (for example)	A part of the Corporations Act, the ASIC Act or National Credit Act, as the case may be (in this example numbered 7.1)
relevant financial products	Financial products other than basic banking products, general insurance products, consumer credit insurance, or a combination of any of these products
RG 263 (for example)	An ASIC regulatory guide (in this example numbered 263)
s139(1) (for example)	A section of the Corporations Act, the ASIC Act or National Credit Act, as the case may be (in this example numbered 139(1))
sitting panel	A panel of at least two external members and an internal member convened by ASIC to hear and determine a matter
superseded FSCP	The Financial Services and Credit Panel established by ASIC in 2017 Note: The superseded FSCP ceased to operate from 1 July 2021 in anticipation of the reforms in the Better Advice Act.

List of proposals and questions

Proposal	Your feedback
<p>B1 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.</p>	<p>B1Q1 Do you agree with our proposed approach to determining when to exercise our discretion to convene a sitting panel?</p>
<p>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:</p> <p>(a) <i>Whether the loss or damage to a client is material</i>—These factors include the client's assets, income, liabilities and ongoing commitments, insurance arrangements, employment security and expected retirement age.</p> <p>(b) <i>Whether a benefit to a financial adviser is material</i>—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.</p>	<p>B2Q1 Do you agree that it is appropriate for ASIC to have regard to these factors in assessing the materiality of:</p> <p>(a) damage or loss to a client; or</p> <p>(b) benefit to a financial adviser?</p> <p>B2Q2 Are there any other factors ASIC should consider in assessing the materiality of:</p> <p>(a) damage or loss to a client; or</p> <p>(b) benefit to a financial adviser?</p>
<p>B3 We propose that in assessing a financial adviser's fitness and propriety, ASIC may consider whether the financial adviser:</p> <p>(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</p> <p>(b) has the attributes of good character, diligence, honesty, integrity and judgement: see draft RG 263.21.</p>	<p>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?</p> <p>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?</p>

Proposal	Your feedback
<p>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:</p> <ul style="list-style-type: none"> (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. 	<p>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?</p> <p>C1Q2 Are there any other matters we should include as examples?</p>
<p>D1 We propose that hearings of a sitting panel will generally be held using audio-visual teleconferencing: see draft RG 263.100.</p> <p>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.</p>	<p>D1Q1 Do you agree with the proposed approach to holding hearings using technology? Why/why not?</p>
<p>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.</p> <p>Note 1: A media release may relate to one or more decisions of a sitting panel.</p> <p>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.</p>	<p>D2Q1 Do you agree with our proposed approach to publicising decisions of a sitting panel?</p>