FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

28 March 2022

Financial Services and Credit Panel Consultation
Australian Securities and Investment Commission
GPO Box 9827
BRISBANE QLD 4001

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

Dear Sir / Madam,

Consultation Paper 359 – Update to RG 263 Financial Services and Credit Panel

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback on the Australian Securities and Investments Commission's (ASIC) Consultation Paper 359, Update to RG 263 Financial Services and Credit Panel.

The FPA is a professional body with more than 12,000 individual members and affiliates of whom over 9,300 are practicing financial planners and 5,207 are CFP professionals. Since 1992, the FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of the Future of Financial Advice reforms.
- The FPA was the first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices.
- We have an independent Conduct Review Commission, which deals with investigations and complaints against our members for breaches of our professional rules.
- We built a curriculum with 18 Australian Universities for degrees in financial planning through the Financial Planning Education Council (FPEC) which we established in 2011. Since 1 July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.

- When the Financial Adviser Standards and Ethics Authority (FASEA) was established, the FPEC 'gifted' this financial planning curriculum and accreditation framework to FASEA to assist the Standards Body with its work.
- We are recognised as a professional body by the Tax Practitioners Board.

Whilst the FPA is broadly supportive of the model of operation proposed in draft RG 263, we have made a number of recommendations aimed at improving the final model.

The FPA believes that the best outcomes for both financial planning profession and consumers come about when the Government, regulators and the profession work together on the issues that we are facing. We would welcome the opportunity to discuss with ASIC any matters raised in our submission. If you have any questions, please contact me on [redacted]

Yours sincerely,

[redacted]

Ben Marshan CFP® LRS®
Head of Policy, Strategy and Innovation
Financial Planning Association of Australia

FINANCIAL PLANNING
ASSOCIATION *of* AUSTRALIA

RESPONSE TO ASIC CONSULTATION PAPER 359

UPDATE TO RG 263 FINANCIAL SERVICES AND CREDIT PANEL

Financial Planning Association of Australia
28 March 2022

Summary

The Financial Planning Association of Australia (FPA) broadly supports the operation of a Single Disciplinary Body under the Financial Services and Credit Panel (FSCP). We recognise the significant work and consultation engaged in by the Government on this matter and have been an active participant throughout the process. Having considered Consultation Paper 359 and the proposals put forward by the Australian Securities and Investments Commission (ASIC), the FPA, whilst accepting a number of proposals, has made important suggested changes which aim to ensure procedural fairness for those who may face a sitting panel.

Whilst we also acknowledge the qualification and experience of those appointed as part-time FSCP members, the FPA seeks a commitment from ASIC that any sitting panel convened to consider a case should comprise of individuals who have demonstrable skills and knowledge in the conduct under review.

We provided the following responses to the questions posed by the regulator in relation to their proposals, which have been compiled with the prime considerations of ensuring the journey of professionalisation for financial planning continues as well as ensuring adequate protections are provided for Australian consumers.

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.

QUESTION **B1Q1**

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

FPA Response

Recommendation 2.10 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Hayne Royal Commission) was that "*a coherent system of professional discipline must be established for financial advisers*"[1].

This recommendation also outlined that "a *body dedicated to the investigation of matters concerning individual advisers could be expected to consider a broader range of cases than ASIC currently does.*"

Under reg 12N of the *Australian Securities and Investment Commission Regulations 2001* (ASIC Regulations), ASIC must convene a sitting panel in prescribed circumstances, otherwise known as 'convening circumstances' in draft RG 263.12. These convening

[1] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1, Page 212.

circumstances, among other things includes whether ASIC believes a relevant provider:

- is not a fit and proper person to provide personal advice to retail clients;
- has become insolvent under administration;
- failed to meet education and training standards; or
- has contravened a financial services law, which includes breaches of the *Financial Planners and Advisers Code of Ethics 2019* (Code of Ethics).

This provides for a wide range of circumstances under which ASIC **must** convene a sitting panel for the consideration of a case if it has chosen not to exercise it powers under corporations legislation.

To give effect to recommendation 2.10 of the Hayne Royal Commission, the FPA supports the proposal to allow ASIC to convene panels under other circumstances where there is a public benefit to the proceedings.

However, the FPA believes that it is important that this power be exercised judiciously and with fairness. It would not be appropriate or in-keeping with the principles of natural justice to refer individual cases to a panel, when others of similar conduct or containing similar facts exist, if the purpose of such a referral is to use the outcome for an individual as an example to the remainder of the industry and to apply the outcomes of a hearing in relation to one individual on others without the opportunity to defend themselves or provide them the opportunity to explain their relevant personal circumstances. Each case should be considered by a sitting panel and assessed on its merits to ensure individuals are not unfairly targeted whilst others escape this more public negative spotlight. If ASIC believe that certain unacceptable conduct has become widespread throughout the profession or has the potential to become problematic, it should be incumbent upon the regulator to issue guidance to lift standards rather than utilising punitive measures to make an example of an individual. The primary purpose of convening a sitting panel to hear a specific case should not be solely to send a deterrent message to the profession based on an individual case. Each case should be considered by a siting panel on its merits, with outcomes and any potential penalties determined accordingly. Scapegoats, and the search for such, should be avoided at all costs.

The FPA agrees that ASIC should use its discretion to convene sitting panels in certain circumstances to ensure recommendation 2.10 of the Hayne Royal Commission is given full effect, however, any decision to use this discretion to convene a sitting panel should be exercised with great care, should avoid the search for scapegoats, and give due regard to fairness and natural justice.

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.

QUESTION **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?

FPA Response

Whether a financial planner has materially benefited from unethical or unlawful actions should be immaterial as to whether those actions should be considered 'convening circumstances' for the FSCP to empanel a sitting panel to consider their conduct. Likewise, a client who has experienced a material benefit as a result of a financial planner's unethical or unlawful conduct, does not excuse the conduct itself and should not have a bearing on whether the conduct is considered to reach that of 'convening circumstances'.

There are instances where a financial planner's unethical or unlawful conduct may result in either no or negative benefit for themselves or no or positive benefit for their client. This, however, should not prevent their conduct from being considered 'convening circumstances' for a sitting panel.

Whilst assessing the material loss or damage to a client, or the material benefit a financial planner may obtain from their conduct, may assist in 'triaging' cases for reference to a sitting panel, it should not be relied upon as the determining factor in the decision to refer of a case to the FSCP.

The FPA acknowledges that whilst the assessment of material loss or damage to a client or material benefit for a financial planner from their conduct, may be a substantial factor when considering penalties, the misconduct itself should be considered a sufficient 'convening circumstance' for reference of a case to a sitting panel.

As such, whilst the consideration of material loss or damage for a client, or material benefit to a financial planner as a result of their conduct, may be useful in triaging referrals to a sitting panel or a factor when considering potential penalties, the FPA believes that these considerations should not be relied upon as the justification for referral, or otherwise, of a case. The materiality of a loss or benefit is ultimately irrelevant as to whether the conduct in question is unethical or unlawful and warranting of referral to a sitting panel.

QUESTION **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?

FPA Response

As alluded to above, the FPA believes that the unlawful or unethical conduct itself should be justification enough for referral of a case to a sitting panel. Further, weight should also being given to the potential impact that certain conduct may have on the public confidence in the profession and whether action in such a case may assuage said impact.

Therefore, the FPA believes the regulator should consider a wide variety of factors when assessing whether 'convening circumstances' exist for a case outside the

materiality of loss or damage to the client, or benefit to the financial planner, of the which may have been caused by the conduct in question.

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.

QUESTION **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?

FPA Response

The considerations proposed by the regulator in this instance for determining whether a person can be considered fit and proper appears consistent with the requirements set out in a number of other financial services legislative and regulatory instruments, such as those outlined for responsible persons of authorised deposit-taking institutions in *Prudential Standards APS 520 'Fit and Proper'*.

Further, the proposed considerations align with the FPA's own Code of Ethics, with which each member must comply. The relevant principles of our Code of Ethics which align with those proposed for consideration of the regulator include:

Financial Planning Association of Australia
CODE OF ETHICS[2]

Principle 1: Client First

Place the client's interest first

*Placing the client's interests first is a hallmark of professionalism, **requiring the financial planner to act honestly** and not place personal/and or employer gain or advantage before the client's interests.*

Principle 2: Integrity

Provide professional services with integrity

Integrity requires honesty and candour in all professional matters. Financial planners are placed in positions of trust by clients, and the ultimate source of that trust is the financial planner's personal integrity. Allowance can be made for legitimate differences of opinion, but integrity cannot co-exist with deceit or subordination of one's principles. Integrity requires the financial planner to observe both the letter and the spirit of the Code of Ethics.

Principle 3: Objectivity

Provide professional services objectively

*Objectivity requires intellectual honesty and impartiality. Regardless of the services delivered or the capacity in which a financial planner functions, objectivity requires financial planners to ensure the integrity of their work, manage conflicts and **exercise sound professional judgment**.*

[2] Financial Planning Association of Australia Code of Ethics, https://fpa.com.au/wp-content/uploads/2015/09/FPA_CodeofPractice_July2013.pdf.

Principle 6: Competence

Maintain the abilities, skills and knowledge necessary to provide professional services competently

Competence requires attaining and maintaining an adequate level of knowledge, skills and abilities in the provision of professional services. Competence also includes the wisdom to recognise one's own limitations and when consultation with other professionals is appropriate or referral to other professionals is necessary. ***Competence requires the financial planner to make a continuing commitment to learning and professional improvement****.*

Principle 8: Diligence

Provide professional services diligently

Diligence requires fulfilling professional commitments in a timely and thorough manner, and taking due care in planning, supervising and delivering professional services.

Therefore, the FPA agrees with the regulator's proposal for considerations when assessing a financial planner's fitness and propriety.

QUESTION 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?

FPA Response

The FPA believes the assessment of a financial planner's fitness and propriety by considering their competence, good character, diligence, honesty, integrity and judgment, as proposed by ASIC, to be sufficiently rigorous and in line with the standards set by other legislation and regulators for similar purposes throughout the financial services industry.

Given the regulator must also have regard to the significant matters prescribed in s921U(a)-(k) of the *Corporations Act 2001 (Cth)* when determining the fitness and propriety of a financial planner, the FPA does not propose any additional matters for ASIC's consideration.

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.

QUESTION 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?

FPA Response

For natural justice to be done, it is important that financial planners have available appropriate mechanisms to appeal the decisions of a sitting panel. The proposed process of application to vary or revoke a decision of a sitting panel may only be made on limited grounds and the progression of such an application beyond assessment by ASIC is at the discretion of the regulator. This process could not be described as a true right of appeal.

As such, the FPA does not support the current proposal which states in draft RG 263.36:

> *"ASIC will only convene a sitting panel to decide whether to vary or revoke a direction or order where it appears there has been a change in the circumstances that led to a sitting panel giving the direction or order to the financial adviser."*[3]

Further, the FPA considers the 'non-exhaustive list' proposed in draft RG 263.37 overly restrictive for grounds of appeal and contrary to proper process which should be afforded to applicants. Concerningly, the 'non-exhaustive list' does give consideration to the potential erring of a sitting panel on a point of fact or interpretation of law as grounds for appeal, or 'application for variation or revocation of a decision'.

Ultimately, these restrictive provisions would result in financial planners, who have taken umbrage with the determination of the FSCP and wished to appeal its decision on grounds outside the limited scenarios outlined in draft RG 263.37, would need to seek a merits review of the decision through the Administrative Appeals Tribunal (AAT). A financial planner who has made an application to ASIC for a review or revocation, which is subsequently rejected using its discretion, would also have no other option but to appeal this decision to the AAT.

This is not an ideal arrangement as an appeal mechanism should not be subject to the discretion of the regulator. Rather, internal review should be the right of any person who is subject to a decision by the FSCP.

Forcing financial planners and ASIC to engage in expensive court proceedings to resolve an appeal is not an option that should be encouraged and a genuine appeal option should be available to prevent this occurrence.

Further, it appears the regulator may refuse such a request and is under no obligation to provide any reasoning to the applicant for the refusal. This provision also applies to applications that make it as far as consideration by a sitting panel but are refused. Only written notice of the decision must be provided to the applicant, however, there is no requirement for any reasoning to be provided. The FPA strongly believes that outcomes should always be provided to the applicant at all stages.

This process raises a fundamental question of transparency and consistency of decision making of the FSCP. Without the recording of reasoning for decisions, either by ASIC or a sitting panel, it would appear that the establishment of precedent for rejection of applications over time will be difficult. It also makes understanding or acceptance of a rejection difficult for an applicant.

The FPA believes that ASIC should develop an appeals process in keeping with what the regulator prescribed in RG 269.149 – 157, Appeals and Dispute Resolution, Regulatory

[3] Page 13, Draft RG 263.36, Australian Competition and Consumer Commission, https://download.asic.gov.au/media/zkhezhyq/attachment-to-cp359-published-28-february-2022.pdf.

Guide for Approval and Oversight of Compliance Schemes for Financial Advisers[4], which states:

"***Appeals and dispute resolution***

A compliance scheme document must set out how a dispute is to be resolved between the monitoring body and a covered financial adviser: see s921G(5). We have set out a suggested high-level process to allow each monitoring body to determine its own, more detailed appeal and dispute resolution procedures.

Appeals process

We expect that the disputes that would most likely be raised would concern a financial adviser's disagreement with:

(a) a determination made by the governing body that the financial adviser has failed to comply with the code; or
(b) a sanction that a governing body has imposed on the financial adviser.

The monitoring body must therefore have a documented appeals process that sets out how it will:
(a) accept a complaint from a financial adviser about either of these matters (similar to a right of appeal);
(b) gather information from the financial adviser about the basis for its complaint; and
(c) allow the governing body another opportunity to consider the matters raised by the financial adviser's complaint. We expect the governing body to be empowered to resolve the financial adviser's complaint by either amending the determination or sanction it has imposed or upholding it.

Where possible, the governing body should appoint people who were not involved in making the original decision to consider the matters raised by the financial adviser's complaint.

For example, if the matter was originally considered by an internal panel comprising a subset of members of the governing body, those members of the governing body who were not involved in making the original decision could consider the complaint. If the matter was originally considered by an external panel appointed by the governing body, the governing body or an internal panel comprising a subset of members of the governing body could consider the complaint.

The monitoring body should consider preparing a guide for covered financial advisers that summarises the appeal process and sets out the reasons and information that are and are not likely to lead to a governing body amending its previous decision.

The guide to the appeals process should enhance covered financial advisers' understanding of, and confidence in, the appeals process.

Process for dealing with other disputes

Other disputes (non-appeal disputes) may also arise between a covered financial adviser and the monitoring body that operates their compliance scheme. For instance, a financial adviser may object to a request for information made by the monitoring body.

The monitoring body should also have a documented process for dealing with these other kinds of disputes. The process should be specified in the compliance scheme document, along with the appeals process: see s921G(5). We would expect the monitoring body to provide a final response to the financial adviser within 45 days."

[4] RG 269 Approval and Oversight of Compliance Schemes for Financial Advisers, Australian Securities and Investments Commission, https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-269-approval-and-oversight-of-compliance-schemes-for-financial-advisers/.

Whilst these requirements were superseded by the Government's October 2019 announcement to accelerate the establishment of the Single Disciplinary Body, they were the standards that the regulator considered appropriate prior to the development of this new system. As such, the FPA believes that these obligations which were developed by the regulator for the profession, should equally be applied to the regulator mutatis mutandis.

Other examples of an independent review of decision-making also exist which could be adapted to serve as a satisfactory right of appeal. These include the option under the 'Food and Grocery Code', a voluntary code prescribed under the *Competition and Consumer Act 2010 (Cth)*, to seek a Reviewer to review the Code Arbiter's process in investigating and resolving a complaint, if a complainant is not satisfied with the outcome[5]. Each 'appeal' or 'review' process establishes an adequate pathway using proper process to ensure fairness and transparency, which the proposed model lacks.

Therefore, the FPA considers it essential for the successful operation of the FSCP that a true right of appeal of all decisions should be available to a financial planner without requiring ASIC's agreement to hear the review and reflect the same obligations prescribed by the regulator for the profession in RG 269.149 – 157.

QUESTION **C1Q2**

Are there any other matters we should include as examples?

FPA Response

As aforementioned, the FPA believes that a true right of appeal of all FSCP decisions should be available to a financial planner without requiring ASIC's agreement to hear the review.

Therefore, the FPA recommends that ASIC provide further grounds for review or revocation of a decision of a sitting panel and that applications proceed directly to the FSCP without requiring the consent of the regulator.

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.

QUESTION **D1Q1**

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

FPA Response

The FPA agrees with the proposal to enable hearings of a sitting panel to be held using audio-visual teleconferencing, whilst noting that this should not preclude ASIC from

[5] Food and Grocery Code, Australian Small Business and Family Enterprise Ombudsman, https://www.asbfeo.gov.au/food-and-grocery-code.

electing to hold hearings of a sitting panel in person at a suitable location, or a financial planner from requesting the same of the regulator.

Our support stems from our wish for the regulator to contain, as much as practicable, the costs of administering the FSCP. Therefore, with the understanding that taking advantage of the technological solutions available in the holding of sitting panels would improve the efficiency and reduce the costs associated with hearings, insofar as such an approach does not encroach on the natural justice owed to the accused, the FPA believes the regulator's proposal to be appropriate.

The FPA agrees that where appropriate, the chair of a sitting panel should hold hearings using audio-visual teleconferencing, however, this should not preclude the possibility of holding in-person hearings if requested by any party.

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.

QUESTION **D2Q1**

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

FPA Response

The FPA supports publication of details of disciplinary matters, as it would have two substantial benefits. Firstly, it would help foster a better understanding of the application of the principles of the Code of Ethics to real life situations and, in particular, to emerging issues in financial planning. Secondly, it would provide valuable transparency in the operation of the FSCP. Combined with the reporting of sanctions on the Financial Adviser Register (FAR), publishing a summary of each decision will boost confidence in the FSCP disciplinary model.

The FPA recommends that the FSCP publish a summary of each decision to apply a sanction (except for written warnings and reprimands), including a brief description of the facts of the matter, the reasoning of the sitting panel and the outcome. Any media releases should contain only factual information which does not unfairly malign a financial planner affected by a decision, but fairly informs the public about the actions taken by a sitting panel against that financial planner. As with convening sitting panels using ASIC's discretionary powers, media releases should not be a tool to make examples of certain individual cases, but be used as a tool of transparency for sitting panel decisions.

The FPA agrees that decisions of the FSCP should be transparent and published as, and where appropriate, noting that publication of relevant details should only be made after the period of application for review or revocation of the decision has expired.