



ASIC
Australian Securities &
Investments Commission

REPORT 734

Response to submissions on CP 359 Update to RG 263 Financial Services and Credit Panel

August 2022

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 359 Update to RG 263 Financial Services and Credit Panel \(CP 359\)](#) and details our responses to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (Better Advice Act) and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see [Regulatory Guide 263 Financial Services and Credit Panel](#) (RG 263).

Contents

A	Overview	4
	Responses to consultation.....	4
B	Types of matters to be referred to a sitting panel	5
	When ASIC may convene a sitting panel	5
	Material loss or damage or material benefit	6
	Fit and proper person	8
C	Variation or revocation of FSCP directions and orders	10
	Matters ASIC will consider.....	10
D	Processes and procedures of the FSCP	12
	Hearings generally to be held using technology.....	12
	General publicising of decisions	13
	Appendix: List of non-confidential respondents	16

A Overview

- 1 In [Consultation Paper 359 Update to RG 263 Financial Services and Credit Panel](#) (CP 359), we consulted on 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).
- 2 The proposals included ASIC’s proposed approach to determining when to convene a sitting panel of the Financial Services and Credit Panel (FSCP), our proposal to generally hold hearings of sitting panels using technology, and our proposed approach to publicising decisions of sitting panels.
- 3 This report highlights the key issues that arose out of the submissions received on CP 359 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 359. We have limited this report to the key issues.

Responses to consultation

- 5 We received three confidential and eight non-confidential responses to [CP 359](#). The responses included feedback from financial services providers and industry associations, as well as a consumer group and other interested parties. We are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 359, see the appendix. Copies of these submissions are on the [CP 359](#) page on the ASIC website.
- 7 The main issues raised by respondents related to:
 - (a) the importance of procedural fairness in the context of the exercise of ASIC discretion and hearings of a sitting panel;
 - (b) the use of benchmarks, a financial adviser’s historical remuneration or dollar figures to assess the materiality of a benefit to a financial adviser;
 - (c) the absence of internal appeal rights under the Better Advice Act; and
 - (d) the publicising of names of financial advisers affected by decisions of a sitting panel in media releases.

B Types of matters to be referred to a sitting panel

Key points

In [CP 359](#) we proposed criteria that ASIC would apply in deciding when to convene a sitting panel at our discretion.

We also proposed criteria to apply to:

- 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.

This section outlines the responses we received.

When ASIC may convene a sitting panel

- 8 ASIC must convene a sitting panel in prescribed circumstances (known as 'convening circumstances') set out in reg 12N of the *Australian Securities and Investments Commission Regulations 2001* (ASIC Regulations): see s139(2) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and [RG 263](#) at RG 263.12, Table 1 and RG 263.50–RG 263.53.
- 9 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.
- 10 In [CP 359](#) we proposed that in determining whether to convene a sitting panel at our discretion under s139(1) of the ASIC Act, we will consider the regulatory benefit that may be derived from referring a matter to a sitting panel: see proposal B1. Examples included whether the 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.
- 11 We sought feedback on whether respondents agreed with our proposed approach to determining when to exercise our discretion.

Stakeholder feedback

- 12 Most respondents supported ASIC having this discretionary power, but some thought that this discretion was too broad and should be exercised with great care, in a discerning manner, within clearly defined parameters or only in a case of material misconduct not covered in the convening circumstances.
- 13 Some respondents submitted that 'regulatory benefit' will be subjective, and difficult to categorise and quantify. Another respondent considered that more guidance and examples were needed, including on how the discretion will be

exercised, the meaning of ‘regulatory benefit’ and when warnings or reprimands will be given instead of convening a panel.

- 14 Some respondents thought it important that the exercise of the discretionary power is subject to an overarching principle of fairness, that the disciplinary system is applied in a consistent manner, and that ASIC is seen to be fair, balanced and impartial. Financial advisers should be afforded procedural fairness and treated fairly, and ASIC should avoid the search for scapegoats and not use our discretionary power in test cases or new areas of law.

ASIC’s response

ASIC’s discretionary power to convene a sitting panel is conferred under s139(1) of the ASIC Act. However, ASIC will only exercise this power where we think that convening a sitting panel to consider the matter will result in some regulatory benefit. This is consistent with ASIC’s general approach to enforcement. That is, we are selective about the matters we pursue to ensure we use our resources to target misconduct effectively.

A sitting panel will make the decision it considers most appropriate in the circumstances, including whether to issue a warning or reprimand or take other action. It follows that the factors a sitting panel will consider in deciding on an action will depend on the matter it is considering.

We have released [Information Sheet 270 Warnings and reprimands](#) (INFO 270), which provides guidance about when ASIC will issue a warning or reprimand.

We agree that it is very important that hearings of a sitting panel afford procedural fairness by giving the financial adviser a proper opportunity to present their case. FSCP members conducting administrative hearings are under a statutory obligation to afford procedural fairness and will also follow ASIC’s processes and procedures as set out in [Regulatory Guide 8 Hearings practice manual](#) (RG 8) as closely as possible.

Note: See Section C of [RG 263](#) for more information about the processes and procedures of the FSCP.

Material loss or damage or material benefit

- 15 Certain circumstances will only be ‘convening circumstances’ if we reasonably believe they are ‘serious’. A circumstance is ‘serious’ if 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. A matter will also be ‘serious’ if it involves dishonesty or fraud: see reg 12N(3)(b) and (4) of the ASIC Regulations.

- 16 In [CP 359](#) we proposed factors we will likely have regard to in assessing whether:
- (a) loss or damage to a client is material (including the client’s assets, income, liabilities and ongoing commitments, insurance arrangements, employment security and expected retirement age); or
 - (b) a benefit to a financial adviser is material (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): see proposal B2.
- 17 We sought feedback on whether it is appropriate for ASIC to have regard to these factors and whether there are any other factors ASIC should consider.

Stakeholder feedback

- 18 Most respondents supported the proposed factors for assessing materiality of loss or benefit, although some respondents submitted that materiality should not be the only consideration in determining whether a circumstance in ‘serious’. That is, there will be examples of misbehaviour or contraventions that are unacceptable at any time regardless of the materiality.
- 19 Some respondents submitted that materiality of benefit to a financial adviser needs to be determined against either a benchmark or the financial adviser’s historical remuneration, or otherwise in a consistent manner using dollar terms or a set percentage.
- 20 One respondent submitted that ASIC should state how we will assess materiality while proceedings of the Australian Financial Complaints Authority (AFCA) or other actions such as client-initiated civil actions are on foot or are likely to be initiated, and that ASIC should not proceed with convening a sitting panel until all other processes are finalised.

ASIC’s response

We agree that some misbehaviour or contraventions are unacceptable at any time regardless of the materiality. If the prescribed circumstances involve dishonesty or fraud, they will be ‘convening circumstances’: see s139(2) of the ASIC Act and reg 12N(3)(b) and (4) of the ASIC Regulations.

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 or involve dishonesty or fraud—but we reasonably believe that the contravention occurred, we may choose to exercise our discretion to convene a sitting panel (see s139(1) of the ASIC Act) or give a warning or reprimand (see s921S of the Corporations Act).

We do not consider it is necessary to assess materiality against benchmarks, historical remuneration or using dollar terms, although a financial adviser's historical remuneration (for example) may form part of the financial adviser's broad circumstances.

We have considered the submissions on assessing materiality while AFCA proceedings or other client-initiated civil actions are on foot and note that ASIC's assessment of materiality of loss or damage has a very different purpose from the assessment of loss or damage in these proceedings. Regardless, it would not be appropriate to defer convening a panel under either s139(1) or (2) of the ASIC Act until all other processes are finalised, due to the protective function of directions and orders made by sitting panels.

Fit and proper person

- 21 ASIC 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 and we have not exercised, and do not propose to exercise, any of our own powers under the corporations legislation: see reg 12N(2)(c) of the ASIC Regulations and [RG 263](#) at RG 263.12.
- 22 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: see s921U(l).
- 23 In [CP 359](#) we proposed 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 proposal B3.

Stakeholder feedback

- 24 There was broad support for the additional proposed fit and proper considerations in paragraph 23, with the general consensus being that it is appropriate for ASIC to have regard to these matters in assessing a financial adviser's fitness and propriety under s921U(l) of the Corporations Act. One respondent noted that the considerations were consistent with the Financial Planning Association's Code of Ethics, while another thought they provide a further layer of certainty in assessing fitness and propriety. One respondent supported the considerations but thought they should be applied flexibly for new financial advisers.

- 25 Some respondents suggested clarification was needed about when ASIC was likely to use s912U(1) to assess a financial adviser's fitness and propriety. Another respondent recommended that ASIC provide further guidance on specific education standards for specific areas of advice such as self-managed superannuation funds, margin lending and aged care, to foster the expected competence in paragraph 23(a).

ASIC's response

Given the broad support received, ASIC intends to consider the matters proposed in [CP 359](#) in assessing a financial adviser's fitness and propriety under s921U(1) of the Corporations Act (see paragraph 23).

ASIC will have regard to these matters in addition to the matters prescribed in s921U(a)–(k) when it assesses a financial adviser's fitness and propriety.

We do not consider that the competency requirements of new financial advisers should differ from those of existing providers. Additionally, we note that under the Better Advice Act, the Minister is responsible for setting the education and training standards for financial advisers, including any standards relating to specific areas of advice.

C Variation or revocation of FSCP directions and 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.

In [CP 359](#) we proposed a 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.

This section outlines the responses we received.

Matters ASIC will consider

- 26 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.
- 27 ASIC may also convene a sitting panel to decide whether to vary or revoke a direction or order at ASIC's initiative if we are satisfied that there has been a change in the circumstances that led to a sitting panel giving the direction or order to the financial adviser: see s921N(2) of the Corporations Act.
- 28 In [CP 359](#), we stated that when deciding whether to convene a sitting panel to consider a variation or revocation application from a financial adviser, ASIC will consider whether there has been a change in the circumstances that led to a sitting panel giving the direction or order to the financial adviser. We also consulted on a non-exhaustive list of matters ASIC may consider: see proposal C1. 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: see [RG 263](#) at RG 263.35.

29 We sought feedback on whether:

- (a) the examples of matters provided are relevant to a decision by ASIC whether to convene a sitting panel to consider whether to vary or revoke the direction or order; and
- (b) there are other matters we should include as examples.

Stakeholder feedback

30 Most respondents generally agreed that the examples of matters provided are relevant to a decision by ASIC whether to convene a sitting panel to consider varying or revoking a direction or order, although some respondents considered the examples are too subjective and that additional guidance or examples are warranted.

31 Some respondents voiced strong concerns that a true right of appeal was not provided under s921N of the Corporations Act and that it was important to provide an independent appeal process or right to internal review for all FSCP rulings that is timely, cost efficient and fair. This appeal or review process should consider whether the original decision fairly considered all circumstances and whether the outcome or sanction is at a comparable point on the spectrum of severity.

32 Another respondent considered that successful applications for a variation or revocation should be the exception rather than the rule to avoid undermining or second guessing the decision of the original sitting panel.

ASIC's response

Consistent with feedback received, we consider the examples of matters provided in [RG 263](#) at RG 263.35 are relevant to the matters we will consider when determining whether to convene a sitting panel to consider a variation or revocation application from a financial adviser.

These matters are also consistent with our approach to varying or cancelling ASIC banning orders: see [Regulatory Guide 98 ASIC's powers to suspend, cancel and vary AFS licences and make banning orders](#) (RG 98) at RG 98.67 and RG 98.69.

A right of review by the Administrative Appeals Tribunal (AAT) of sitting panel directions or orders is available under s921V of the Corporations Act. We have noted the availability of this independent review mechanism in RG 263 at RG 263.34.

D Processes and procedures of the FSCP

Key points

In [CP 359](#) we consulted on our proposal that hearings of a sitting panel will generally be held using audio-visual teleconferencing.

We also consulted on our proposed approach to publicising decisions of a sitting panel.

This section outlines the responses we received.

Hearings generally to be held using technology

- 33 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.
- 34 In [CP 359](#) we proposed that hearings of a sitting panel will generally be held using audio-visual teleconferencing: see proposal D1. We sought feedback on whether respondents agreed with our proposed approach.

Stakeholder feedback

- 35 There was broad support for our proposed approach to hold hearings using technology where appropriate, provided it does not affect a financial adviser's statutory right to be heard. However, some respondents considered that in-person hearings should be available if requested or in complicated matters where the panel needs to be able to read body language.
- 36 We also received submissions about the technology requirements for audio-visual hearings, including that:
- (a) the connection must be of good quality and visibility, and financial advisers and their representation should be visible at all times; and
 - (b) the hearing should not be recorded and must be secure.
- 37 Some respondents also recommended that ASIC should collect information about the quality of the experience of virtual hearings and take action if this approach is not working.

ASIC's response

We consider that, in most cases, it will be appropriate to convene hearings of a sitting panel using audio-visual teleconferencing to promote efficiency and manage costs, which are ultimately borne by the financial advice industry due to the industry funding model.

If the chair of a sitting panel decides to hold all or part of a hearing using technology, the chair will ensure that the technology provides each participant in the hearing with a reasonable opportunity to participate in or be represented at the hearing.

Consistent with our approach to ASIC administrative hearings, hearings of a sitting panel will generally be conducted in private and recorded. ASIC will endeavour to take all reasonable steps to ensure that the hearings are secure: see s161 of the ASIC Act for who may be present at a hearing.

ASIC will consider what data it can collect about the quality of the experience of virtual hearings to assess the efficiency, cost-effectiveness and fairness of this approach.

General publicising of decisions

38 In [CP 359](#) we consulted on our proposed general approach to publicising decisions, which was to publish a media release about actions taken by a sitting panel but only publicise in the media release the name of a financial adviser affected by a decision if the sitting panel's decision must be displayed on the Financial Advisers Register: see proposal D2.

39 We sought feedback on whether respondents agreed with our proposed approach.

Stakeholder feedback

40 Most respondents generally supported our proposal to publicise in media releases the name of a financial adviser affected by decisions of a sitting panel if the sitting panel's decision must be displayed on the Financial Advisers Register.

41 However, one respondent raised strong objections to this general approach of publicising the names of financial advisers. This respondent was concerned our approach was 'excessive' and would have a negative impact on financial advisers. They submitted that ASIC should consider this impact, especially if the financial adviser is singled out as part of a trend, and only publicise 'serious' matters, such as those warranting suspension or a prohibition order.

42 We also received submissions about publicising the names of panel members. One respondent considered it was important that names of sitting panel members remain anonymous when the statement of reasons is published, whereas another respondent thought it was important that the names of the panel members are freely available to allow public scrutiny.

- 43 Some respondents recommended that ASIC publish a summary of sitting panel decisions, including a brief description of the facts, the reasoning of the panel and the decision or outcome. It was submitted that this would foster improved industry and consumer understanding and support education, continuous improvement and best practice.
- 44 One submission recommended the following:
- (a) ASIC should notify:
 - (i) current AFS licensees of a proposed action notice issued by the FSCP in relation to a financial adviser authorised by the licensee; and
 - (ii) *both* current and former AFS licensees of all FSCP outcomes and decisions relating to a financial adviser who is currently or who was previously authorised by the licensee.
 - (b) AFS licensees should keep records of all FSCP outcomes they are notified of so that these outcomes can be shared, consistent with their obligation to comply with ASIC's *Reference checking and information sharing protocol* set out in [ASIC Corporations and Credit \(Reference Checking and Information Sharing Protocol\) Instrument 2021/429](#) (ASIC protocol).
- 45 One respondent also requested that ASIC publish quarterly data about sitting panel actions, including data about the number of matters referred, investigated and not pursued, the size of licensees, the cost of investigations, and the outcome of decisions.

ASIC's response

Our general approach to publicising decisions of a sitting panel:

- ensures that we will only name financial advisers where a decision made about them must be displayed publicly; and
- maintains the balance that Government has struck between transparency and the rights of financial advisers.

Consistent with our approach to ASIC administrative hearings, hearings of a sitting panel will generally be conducted in private and the names of members of individual sitting panels will not be published. We acknowledge that a summary of the reasons for decisions made by FSCP sitting panels may be useful for industry and consumers.

For this reason, we will publish and maintain an [FSCP Outcomes Register](#) on ASIC's website that will include a brief explanation of the background to each panel decision. The register will not identify the financial adviser involved in a matter unless the outcome is required to be displayed on the Financial Adviser Register.

We will generally not notify:

- current AFS licensees if a proposed action notice has been issued in relation to a financial adviser authorised by the AFS licensee; or
- former AFS licensees of all FSCP outcomes and decisions relating to a financial adviser who was previously authorised by the licensee.

However, where ASIC considers it appropriate to do so, we may give information to an AFS licensee about a person we believe is or will be authorised as a financial adviser by that licensee: see s916G of the Corporations Act, [Information Sheet 250](#) *Giving AFS and credit licensees information about their representatives* (INFO 250) and [RG 263](#) at RG 263.106.

In response to feedback, we are considering whether to amend the [ASIC protocol](#) and [Information Sheet 257](#) *ASIC reference checking and information sharing protocol* (INFO 257) to specify that certain decisions made by ASIC and sitting panels in relation to a financial adviser are covered by the ASIC protocol.

ASIC will not publish quarterly reports on sitting panel data. We will maintain the [FSCP Outcomes Register](#) on ASIC's website. In our annual report, we must report on 'the activities (if any), that have been undertaken by each [sitting panel] during the period': see s136(1)(da)(i) of the ASIC Act.

Appendix: List of non-confidential respondents

- Association of Financial Advisers Ltd (AFA)
- Australian Small Business and Family Enterprise Ombudsman
- Chartered Accountants Australia and New Zealand
- CPA Australia Ltd
- Financial Planning Association (FPA)
- Financial Services Council (FSC)
- Lee Forde, Forde Financial Planning Pty Ltd
- Stockbrokers and Investment Advisers Association (SIAA)