



**ASIC**  
Australian Securities &  
Investments Commission

## REGULATORY GUIDE 263

# Financial Services and Credit Panel

February 2022

### **About this guide**

This guide sets out the principles and processes relating to the Financial Services and Credit Panel (FSCP).

The FSCP makes administrative decisions on matters referred to it by ASIC that relate to the conduct of financial advisers.

### 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 draft guide was issued in February 2022 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 263, issued November 2017

### Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the ASIC Act, Corporations Act and National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview of the Financial Services and Credit Panel

### 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 an ASIC staff member and at least two members from the FSCP.

A sitting panel will be convened by ASIC to consider certain suspected misconduct by, or circumstances relating to, a financial adviser.

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.

### Purpose and composition

RG 263.1 A pool of FSCP members is appointed by the responsible Minister. To be eligible to be appointed, a person must not be a member or staff member of ASIC and must have knowledge or experience in certain fields (e.g. financial products and services, law, business): see s141(2) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

RG 263.2 ASIC draws upon the FSCP to form sitting panels. When convening a sitting panel, ASIC must select:

- (a) a chair, who will always be an ASIC staff member (internal member); and
- (b) at least two external participants from the pool of FSCP members (external members).

Note: For most matters, we consider that a three-member sitting panel (with two external members) will be optimal.

RG 263.3 When selecting the members of a sitting panel, we take into account the nature of each matter and the relevant expertise and experience of the available pool of FSCP members. We will also take into account interests they have disclosed to us that could conflict with the performance of their duties in the matter.

Note: RG 263.58–RG 263.63 explain how conflicts of interest will be managed.

RG 263.4 The ASIC staff member (internal member) appointed to a sitting panel is the chair. The chair has a number of powers and obligations in relation to hearings and meetings that external members do not. Examples are the power to convene and preside at meetings (see s148 and 149 of the ASIC Act) and to determine how meetings and hearings are held (whether in person or using technology) (see s153 and 159 of the ASIC Act).

RG 263.5 A sitting panel may only consider and make decisions on matters that relate to a 'relevant provider'. A relevant provider is defined in s910A of the *Corporations Act 2001* (Corporations Act) as a person who is:

- (a) an individual who is:
  - (i) an Australian financial services (AFS) licensee;
  - (ii) an authorised representative of a licensee;
  - (iii) an employee or director of a licensee; or
  - (iv) an employee or director of a related body corporate of a licensee; and
- (b) authorised to provide personal advice to retail clients, as the licensee or on behalf of the licensee, in relation to relevant financial products.

Note: For the definition of 'relevant financial products', see the 'Key terms'.

RG 263.6 In this guide, we refer to relevant providers as 'financial advisers'.

## Legal framework

RG 263.7 Each sitting panel has a range of powers under the ASIC Act and the Corporations Act. These include powers to:

- (a) consider whether a financial adviser has contravened their obligations, or a circumstance exists which raises questions about their suitability to continue to provide personal advice to retail clients on relevant financial products; and
- (b) take action against financial advisers where prescribed circumstances exist.

Note: Sections B–C explain how sitting panels consider matters and the actions they can take.

RG 263.8 A sitting panel may also make a banning order under s920A of the Corporations Act and s80 of the *National Consumer Credit Protection Act 2009* (National Credit Act) following a delegation of those powers by ASIC.

Note: For the definition of 'banning order' in the financial services context, see s102(2)(f) of the ASIC Act and s920B of the Corporations Act. For the definition of 'banning order' in the credit context, see s81 of the National Credit Act.

- RG 263.9 Typically, ASIC will continue to exercise our own banning powers. However, we may consider delegating our banning powers to a sitting panel, for example, where we consider a matter is appropriate for review by a sitting panel including both industry participants and ASIC staff because of its significance, complexity or novelty, and the misconduct may warrant the imposition of a banning order.

Note: [Regulatory Guide 98](#) *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders* (RG 98) sets out how ASIC exercises our administrative powers, including our powers to make banning orders.

## Types of matters to be referred to a sitting panel

- RG 263.10 ASIC may convene a sitting panel at any time (s139(1) of the ASIC Act): see RG 263.15–RG 263.16.
- RG 263.11 However, ASIC *must* convene a sitting panel in prescribed circumstances set out in reg 12N of the *Australian Securities and Investment Commission Regulations 2001* (ASIC Regulations): s139(2) of the ASIC Act. In this guide, we refer to these prescribed circumstances as the ‘convening circumstances’.

### When ASIC must convene a sitting panel

- RG 263.12 ASIC must convene a sitting panel in the ‘convening circumstances’. The convening circumstances exist if:
- (a) one of the following circumstances exists:
    - (i) a financial adviser becomes an insolvent under administration and ASIC is aware of the insolvency;
    - (ii) a financial adviser is convicted of fraud and ASIC is aware of the conviction;
    - (iii) 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 (see RG 263.20–RG 263.21);
      - (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;
 

Note: This excludes contravention of the continuing professional development (CPD) requirements in s921BA(4) and 921BB(3) of the Corporations Act.
      - (C) has contravened s921F(4) of the Corporations Act (a supervisor must approve any Statement of Advice provided by a provisional relevant provider to a retail client);

- (D) has contravened s921Y of the Corporations Act (unregistered relevant providers are not to provide personal advice);
- (E) has contravened a financial services law and that contravention is serious; or

Note 1: A contravention of the *Financial Planners and Advisers Code of Ethics 2019* (Code of Ethics) constitutes a contravention of a financial services law.

Note 2: A contravention is 'serious' if it:

- has resulted, or is likely to result, in material loss or damage to a client of the financial adviser;
- has resulted, or is likely to result, in a material benefit to the financial adviser; or
- involves dishonesty or fraud: reg 12N(4) of the ASIC Regulations.

Note 3: See RG 263.17–RG 263.19 for how ASIC will assess whether loss or damage, or a benefit, is 'material'.

- (F) has been involved in the contravention of a financial services law by another person and ASIC reasonably believes that the contravention is serious; or
- (iv) the following circumstances apply to a financial adviser:
- (A) the financial adviser has, at least twice, been linked to a refusal or failure to give effect to a determination made by the Australian Financial Complaints Authority (AFCA) relating to a complaint that relates to:
    - (I) a financial services business; or
    - (II) credit activities (within the meaning of the National Credit Act); and

Note: A financial adviser is linked to a refusal or failure to give effect to a determination made by AFCA if they are a party to the complaint (e.g. they are the AFS licensee) or if they are an officer or substantially or significantly involved in the management of the financial firm that is party to the complaint: see s910C of the Corporations Act.
  - (B) ASIC reasonably believes that the refusal or failure:
    - (I) has resulted, or is likely to result, in material loss or damage to a client of the relevant provider;
    - (II) has resulted, or is likely to result, in a material benefit to the relevant provider; or
    - (III) involves dishonesty or fraud; and
- (b) we have not exercised, and do not propose to exercise, any of our own 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 ASIC Act).

RG 263.13 As stated in RG 263.9, we are likely to exercise our *own* banning powers where we identify one of the circumstances in RG 263.12(a) and we consider that a banning order is the appropriate response. However, we may delegate our powers to a sitting panel if we consider it appropriate for the reasons outlined in RG 263.9. We will not, and are not required to, convene a sitting panel in circumstances where we seek to exercise our own banning powers.

Note: [RG 98](#) sets out how ASIC exercises our administrative powers, including our powers to make banning orders.

RG 263.14 Where ASIC, or ASIC's delegate, is satisfied that one or more of the convening circumstances in RG 263.12(a) exists and we do not propose to exercise our own powers, we will convene a sitting panel.

Note: For information about ASIC's process for referring matters to a sitting panel, see RG 263.52–RG 263.55.

### **When ASIC may convene a sitting panel**

RG 263.15 As stated in RG 263.10, ASIC may also convene a sitting panel in other circumstances. In determining whether we will convene a sitting panel in other circumstances (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.

RG 263.16 For example, we will consider 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.

### **Material loss or damage or material benefit**

RG 263.17 An assessment of whether loss or damage to a client, or a benefit to a financial adviser, is material for the purposes of assessing whether the convening circumstances exist is likely to involve considering a number of factors.

RG 263.18 When assessing whether loss or damage to a client is material, we will likely have regard to the broad circumstances of the client including their financial circumstances. This may include considering several factors such as the client's assets, income, liabilities and ongoing commitments, insurance arrangements, employment security and expected retirement age.

RG 263.19 Similarly, when we assess whether a benefit to a financial adviser is material, we will likely have regard to the broad circumstances of the financial adviser and the benefit itself. This may include assessing:

- (a) the size of the benefit relative to typical industry remuneration; and
- (b) the benefit the financial adviser would have received if they had not recommended the client take a particular course of action.



## **Fit and proper person**

- RG 263.20 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 prescribed matters in s921U(a)–(k) of the Corporations Act. Examples of matters in s921U(a)–(k) include whether the person has ever had an AFS licence or credit licence suspended or cancelled or had a banning order made against them, and whether a sitting panel has taken action against them in the last 10 years. ASIC may also have regard to any other matters we consider relevant: s921U(l).
- RG 263.21 We consider that the following matters may be relevant to an assessment of a financial adviser’s fitness and propriety under s921U(l):
- (a) whether they are 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) whether they have the attributes of good character, diligence, honesty, integrity and judgement.

## B Actions a sitting panel may take

### Key points

This section explains:

- when a sitting panel may take administrative action against a financial adviser; and
- the range of administrative actions that a sitting panel may take.

### When a sitting panel may take administrative action

- RG 263.22 A sitting panel may take a range of actions against a financial adviser who has contravened a restricted civil penalty provision or in relation to whom prescribed circumstances exist.
- RG 263.23 Table 1 sets out these actions along with the circumstances in which a sitting panel may take each action. The circumstances in which a sitting panel can make directions or orders in relation to a financial adviser under s921L of the Corporations Act or accept an enforceable undertaking under s171E of the ASIC Act largely mirror the convening circumstances set out in RG 263.12, except that the sitting panel:
- (a) does not need to believe that any contravention or circumstance is ‘serious’ to take action; and
  - (b) may also take action when a financial adviser has been an officer of a corporation unable to pay its debts in relation to two or more corporations.
- RG 263.24 A sitting panel may only give an infringement notice or recommend that ASIC issue civil penalty proceedings where a financial adviser has contravened a ‘restricted civil penalty provision’: s921Q and 1317E of the Corporations Act.

Note: For the definition of ‘restricted civil penalty provision’, see the ‘Key terms’.

**Table 1: When a sitting panel may take administrative action**

Prescribed circumstances	Actions the sitting panel may take
<p>A financial adviser becomes an insolvent under administration.</p> <p>A financial adviser is convicted of fraud.</p> <p>A sitting panel reasonably believes that the financial adviser is not a fit and proper person to provide personal advice to retail clients in relation to relevant financial products.</p> <p>A sitting panel reasonably believes that the financial adviser has contravened, or been involved in the contravention of, a financial services law (other than a restricted civil penalty provision) regardless of whether that contravention is serious.</p> <p>The financial adviser has, at least twice, been linked to a refusal or failure (regardless of whether the refusal or failure is serious) to give effect to a determination made by AFCA relating to a complaint that relates to:</p> <ul style="list-style-type: none"> <li>• a financial services business; or</li> <li>• credit activities (within the meaning of the National Credit Act).</li> </ul> <p>Section 920A(1C) (when a person has been an officer of a corporation unable to pay its debts) applies to the financial adviser in relation to two or more corporations.</p> <p>Note: All section references in this table are to sections of the Corporations Act, except where otherwise specified.</p>	<p>Give a warning/reprimand (s921T)</p> <p>Direct the financial adviser to:</p> <ul style="list-style-type: none"> <li>• undertake specified training (s921L(1)(a)(i));</li> <li>• receive specified counselling (s921L(1)(a)(ii));</li> <li>• receive specified supervision (s921L(1)(a)(iii)); and/or</li> <li>• report specified matters to ASIC (s921L(2)(a)(iv))</li> </ul> <p>Suspend a financial adviser's registration (s921L(1)(b))</p> <p>Prohibit the registration of a financial adviser (s921L(1)(c))</p> <p>Note: Financial advisers will not be required to be registered until 1 January 2023 (see s1684L).</p> <p>Accept an enforceable undertaking from a financial adviser (s171E of the ASIC Act)</p>
<p>A sitting panel reasonably believes the financial adviser has contravened a restricted civil penalty provision, namely:</p> <ul style="list-style-type: none"> <li>• qualifications requirements (s921BA(1));</li> <li>• exam requirement (s921BA(2));</li> <li>• work and training requirements (s921BA(3));</li> <li>• CPD requirements for financial advisers (s921BA(4));</li> <li>• CPD requirements for financial advisers who provide tax (financial) advice services (s921BB(3));</li> <li>• requirement to comply with the Code of Ethics (s921E);</li> <li>• supervision requirements in relation to persons who are undertaking work and training (s921F(3), (4), (6) and (7)); or</li> <li>• the prohibition on unregistered financial advisers providing personal advice (s921Y).</li> </ul>	<p>Give a warning/reprimand (s921T)</p> <p>Direct the financial adviser to:</p> <ul style="list-style-type: none"> <li>• undertake specified training (s921L(1)(a)(i));</li> <li>• receive specified counselling (s921L(1)(a)(ii));</li> <li>• receive specified supervision (s921L(1)(a)(iii)); and/or</li> <li>• report specified matters to ASIC (s921L(2)(a)(iv))</li> </ul> <p>Suspend a financial adviser's registration (s921L(1)(b))</p> <p>Prohibit the registration of a financial adviser (s921L(1)(c))</p> <p>Accept an enforceable undertaking from a financial adviser (s171E of the ASIC Act)</p> <p>Give an infringement notice to the financial adviser (s1317DAM(1A))</p> <p>Recommend that ASIC issue civil penalty proceedings against the financial adviser (s921Q)</p>

## What actions a sitting panel may take

- RG 263.25 A sitting panel will make the decision that it considers to be most appropriate in the circumstances. It follows that the factors a sitting panel will consider in deciding on an action will depend on the matter it is considering.
- RG 263.26 Because each sitting panel exercises its own powers under the Corporations Act and ASIC Act and makes its decisions independently of ASIC, ASIC cannot anticipate the factors it will consider. Accordingly, we do not provide guidance about how sitting panels will decide what action to take.

### Warning/reprimand

- RG 263.27 A warning/reprimand can be given to a financial adviser by a sitting panel in any of the prescribed circumstances set out in Table 1: s921T of the Corporations Act.
- RG 263.28 While a warning/reprimand given by a sitting panel will not be displayed publicly on the Financial Advisers Register, the panel must give a copy of the warning/reprimand to ASIC and the financial adviser's AFS licensee at the same time it gives the warning/reprimand to the financial adviser: s921T(2) of the Corporations Act.

Note: See RG 263.107 and Table 3.

- RG 263.29 The sitting panel may be required to afford procedural fairness to the financial adviser before giving the warning/reprimand and providing a copy to ASIC and the financial adviser's AFS licensee. Whether this is required will depend on the circumstances.

### Directions and orders

#### Directions to undertake training, counselling or supervision or report matters to ASIC

- RG 263.30 Where a sitting panel directs a financial adviser to undertake training, receive counselling or receive supervision, the direction will specify what that training, counselling or supervision should entail.

Note: In the case of directions and orders and infringement notices, a financial adviser's right to procedural fairness is satisfied by the provision of a proposed action notice and the subsequent right to a hearing or to make submissions (see RG 263.64–RG 263.68).

- RG 263.31 Where a sitting panel directs a financial adviser to report matters to ASIC, the direction will state when and how these matters must be reported.

**Orders suspending or prohibiting an adviser's registration**

- RG 263.32 A sitting panel may:
- (a) suspend a financial adviser's registration under s921L(1)(b) of the Corporations Act, in which case the registration automatically recommences at the end of the suspension period; or
  - (b) prohibit a financial adviser's registration under s921L(1)(c) of the Corporations Act, in which case the financial adviser must go through the registration process again at the end of the registration prohibition period.
- RG 263.33 The order will specify the time period of the suspension or prohibition.
- RG 263.34 A person whose registration as a financial adviser has been suspended or prohibited must not provide personal advice to retail clients on relevant financial products: s921Y of the Corporations Act. An AFS licensee is also prohibited from continuing to authorise them to provide personal advice to retail clients on relevant financial products: s921Z of the Corporations Act.

**Applying for variation or revocation of a direction or order**

- RG 263.35 A person (applicant) may apply to ASIC for a variation or revocation of a direction or order: s921N(3) of the Corporations Act. Where an application is made, 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: s921N(4).
- 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.
- RG 263.37 Various matters may be relevant to ASIC's decision whether to convene a sitting panel to consider whether to vary or revoke the direction or order. Examples of such matters 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 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.

RG 263.38 ASIC may also, at our own initiative, convene a sitting panel to decide whether to revoke or vary a direction or order imposed on a financial adviser: s921N(2) of the Corporations Act.

### **Infringement notices**

RG 263.39 As noted in Table 1, a sitting panel may only give an infringement notice if it has a reasonable belief that a restricted civil penalty provision has been contravened. An infringement notice must be given within 12 months of the alleged contravention.

RG 263.40 An infringement notice represents the sitting panel's opinion about an alleged contravention of a restricted civil penalty provision. It does not represent a finding that the financial adviser has contravened a restricted civil penalty provision. Such a finding can only be made by a court.

RG 263.41 If a sitting panel gives a financial adviser an infringement notice, the financial adviser has 28 days after the day on which the infringement notice is given to pay the infringement notice, unless this payment period is extended by the chair of the sitting panel that gave the infringement notice: s1317DATB(1) of the Corporations Act.

RG 263.42 If an infringement notice is given and complied with (i.e. the penalty is paid), no further regulatory action can be taken by ASIC against the financial adviser for that alleged contravention. If the infringement notice is not complied with, ASIC is entitled to bring a civil penalty action against the financial adviser for the alleged contravention.

### **Recommendation to ASIC to issue civil penalty proceedings**

RG 263.43 Where a sitting panel reasonably believes that a restricted civil penalty provision has been contravened, and regardless of whether a sitting panel has also made directions or orders under s921L of the Corporations Act in relation to the alleged contravention, the sitting panel may recommend that ASIC make an application to a court for:

- (a) a declaration of contravention; and/or
- (b) a pecuniary penalty order: s921Q of the Corporations Act.

### **Enforceable undertaking**

RG 263.44 Under s171E(1) of the ASIC Act, a sitting panel may accept an enforceable undertaking from a financial adviser as an alternative to:

- (a) taking one of the actions described in s921K of the Corporations Act;
- (b) recommending that ASIC issue civil penalty proceedings; or
- (c) giving an infringement notice.

- RG 263.45 Where ASIC considers that the financial adviser who gave the undertaking has breached a term of the undertaking, ASIC may apply to the court for orders in relation to that undertaking. Examples include a court order directing the financial adviser to comply with the term of the undertaking or to compensate a person who has suffered loss or damage as a result of their breach of the undertaking: s171E(6) of the ASIC Act.
- RG 263.46 An enforceable undertaking can include a range of terms. Depending on those terms, it may be appropriate to address a range of conduct or circumstances.
- RG 263.47 Where an enforceable undertaking is accepted by a sitting panel, the financial adviser may apply to ASIC to vary or withdraw the undertaking: s171E(2) of the ASIC Act. In these circumstances, ASIC must decide to either refer this request to a sitting panel for a decision or refuse to do so: s171E(3) of the ASIC Act.
- RG 263.48 We will generally only consider a request to vary an enforceable undertaking if:
- (a) the variation will not alter the spirit of the original undertaking;
  - (b) compliance with the original undertaking is subsequently found to be impractical; or
  - (c) there has been a material change in the circumstances which led to the original undertaking being given.

## C Processes and procedures of the FSCP

### Key points

This section explains the role of the FSCP secretariat, and sets out the processes that a sitting panel will follow for:

- pre-hearing procedures;
- hearings; and
- making and communicating its decisions.

Key aspects of the FSCP's processes and procedures include:

- there is a specific, legislated approach to avoiding conflicts of interest and maintaining confidentiality;
- a sitting panel must provide a financial adviser with a 'proposed action notice' setting out the action it proposes to take before it takes certain actions;
- hearings will not always be required before a sitting panel makes its decision, but where they are, they will generally be conducted using technology; and
- decisions of a sitting panel are likely to be publicised by ASIC and may be required to be displayed on ASIC's Financial Advisers Register.

### Secretariat

- RG 263.49 The FSCP has a secretariat. The secretariat is responsible for:
- (a) implementing processes to assist in identifying and avoiding conflicts of interest (see RG 263.58–RG 263.63);
  - (b) helping FSCP members with administrative tasks; and
  - (c) maintaining the FSCP's ongoing operation.

### Confidentiality

- RG 263.50 Each member of the FSCP is required by law to keep confidential the information it obtains in connection with the performance of the FSCP's functions: s171D of the ASIC Act.
- RG 263.51 This requirement does not prevent the publication of instruments and ASIC media releases about outcomes of FSCP decisions: see RG 263.110–RG 263.113 for an explanation of how ASIC will publicise FSCP decisions.



## Pre-hearing procedures

### Referring a matter to a sitting panel

- RG 263.52 ASIC must refer a matter to a sitting panel where we, or our delegate, are satisfied that the convening circumstances exist: see RG 263.12. We may also convene a sitting panel in other circumstances: see RG 263.15–RG 263.16.
- RG 263.53 Not every situation brought to ASIC’s attention which indicates that a convening circumstance may exist for a financial adviser will result in a sitting panel being convened. For example, after investigating, we may conclude that no convening circumstance exists because we do not have a reasonable belief that the contravention of financial services law is serious in the manner described in reg 12N(2)(e) of the ASIC Regulations.
- Note: In this guide, we use the word ‘investigate’ in its ordinary sense, and it should not be construed as being limited to specific types of investigations such as those under s13 of the ASIC Act.
- RG 263.54 Further, ASIC has full discretion in deciding which matters we investigate. ASIC will carefully consider how to respond to reports of situations that may fall within the convening circumstances. However, we cannot investigate or take action in relation to every such report. Instead, we will be selective about the matters we pursue to ensure that we use our resources to target misconduct effectively and efficiently.
- RG 263.55 If investigatory work demonstrates to ASIC, or our delegate, that a convening circumstance exists, we will refer the matter to a sitting panel.

Note: [Information Sheet 151](#) *ASIC’s approach to enforcement* (INFO 151) explains how we approach ASIC’s enforcement role and why we respond to breaches in different ways.

### Convening a sitting panel

- RG 263.56 Once we decide that a matter must or ought to be referred to a sitting panel, we will nominate one internal and at least two external members of the FSCP to form a sitting panel to consider that particular matter.
- RG 263.57 Where appropriate, we may convene the same sitting panel to hear a number of similar matters together to ensure that the sitting panel operates as efficiently as possible. However, even where the same sitting panel considers several different matters, each matter will be considered separately and on its own merits.

## Managing conflicts of interest

- RG 263.58 Each external member must give written notice to ASIC of all interests, pecuniary or otherwise, that they have or acquire that could conflict with the proper performance of their duties if they were to be appointed to a sitting panel: s142 of the ASIC Act.
- RG 263.59 Using the declarations provided by external members and other information available to ASIC, we will undertake checks for conflicts of interest before appointing external or internal members to a sitting panel.
- RG 263.60 When a matter is being considered or about to be considered by a sitting panel, each external member of that panel must disclose any interest that could conflict with their duties in that matter: s150 of the ASIC Act.
- RG 263.61 If the external member has disclosed an interest that does or could conflict with their duties, they must not be present during any deliberations of that panel and must not take part in any decision of the panel about the matter: s150(4) of the ASIC Act.
- RG 263.62 Similarly, the chair of a sitting panel must not convene a meeting of that panel if they have, or acquire, an interest that could conflict with the proper performance of their duties in a matter being considered, or about to be considered, by the panel: s148(3) of the ASIC Act.
- RG 263.63 The chair must disclose any such interest to ASIC: s148(4) of the ASIC Act.

## Proposed action notice

- RG 263.64 Once a sitting panel has been convened, it will meet to consider the matter on the basis of the information provided to it by ASIC. Based on that information, the sitting panel will determine what action it proposes to take in relation to the financial adviser, if any.
- RG 263.65 In most cases, the sitting panel must provide the financial adviser with a proposed action notice if it proposes to take action against them: s921P of the Corporations Act.
- RG 263.66 In particular, a proposed action notice must be given unless a sitting panel proposes to:
- (a) take no action;
  - (b) give a warning/reprimand under s921T of the Corporations Act; or
  - (c) recommend that ASIC issue civil penalty proceedings under s921Q of the Corporations Act.

- RG 263.67 The proposed action notice will:
- (a) inform the financial adviser:
    - (i) that their matter is being considered by a sitting panel; and
    - (ii) of the identities of the sitting panel members who have been nominated to determine the matter;
  - (b) set out details of the action proposed to be taken by the sitting panel and the circumstances or alleged contravention that the action relates to (this will include a list of documents that the sitting panel expects to rely on to make its decision);
  - (c) invite the financial adviser to do either of the following within 28 days of the notice being given (unless a longer period is approved by the sitting panel):
    - (i) make a written submission to the sitting panel in relation to the proposed action; or
    - (ii) request that the sitting panel hold a hearing in relation to the proposed action (the proposed action notice will ask the financial adviser to confirm an email address at which they consent to receive the notice of hearing);
  - (d) inform the financial adviser that if no submission or request for a hearing is made within the 28 days (or longer approved period), the sitting panel can take the proposed action; and
  - (e) inform the financial adviser that ASIC may be required to:
    - (i) enter details of any decision on the Financial Advisers Register; and/or
    - (ii) notify the AFS licensee that authorises them to provide personal advice of any decision made.

- RG 263.68 The sitting panel will send a proposed action notice electronically if ASIC has given the panel a nominated email address for the financial adviser (as permitted by s921W of the Corporations Act). Otherwise, the sitting panel will personally serve a proposed action notice on the financial adviser.

Note: See the definition of ‘nominated electronic address’ in s9 of the Corporations Act and the meaning of service of documents in s28A of the *Acts Interpretation Act 1901*.

## Notice of hearing

- RG 263.69 If a financial adviser requests a hearing in response to a proposed action notice, the sitting panel will send a notice of hearing to their nominated email address which will tell the adviser:
- (a) the purpose of the hearing;
  - (b) the hearing date, time and place (see RG 263.100–RG 263.101); and
  - (c) how to obtain further information about the hearing, if required.

## Hearing procedures

- RG 263.70 A hearing will only take place if:
- (a) a sitting panel provides the financial adviser with a proposed action notice because it proposes to take an action other than those listed in RG 263.66; and
  - (b) the financial adviser requests a hearing to be held.
- RG 263.71 Where a hearing is to be held, the FSCP hearing process follows the five stages in Table 2.

**Table 2: Five stages of the hearing process**

Stage	Description
1 The financial adviser requests a hearing in response to a proposed action notice	If a financial adviser requests a hearing, the hearing will be arranged and the financial adviser will receive a notice of hearing.
2 The hearing is conducted by the sitting panel	If requested, the sitting panel will conduct a hearing to determine what action, if any, it should take in relation to the financial adviser. During the hearing, the financial adviser may provide material and make submissions.
3 A decision may be made by the sitting panel	The sitting panel will consider all submissions and material it receives. It will decide whether to take action against the financial adviser and, if so, what action to take. This may include an action other than that noted in the proposed action notice.
4 The decision of the sitting panel is communicated to the financial adviser	The decision is communicated to the financial adviser (see RG 263.104–RG 263.106) and their AFS licensee (see RG 263.107–RG 263.108).
5 ASIC updates the Financial Advisers Register and may publicise the decision	ASIC must update the Financial Advisers Register to display details of action taken by a sitting panel in specified circumstances: see RG 263.109.  In addition, we may publish a media release on our website regarding the action: see RG 263.110–RG 263.113.

### Guiding principles for conducting administrative hearings

- RG 263.72 FSCP members conducting administrative hearings will follow the processes and procedures of ASIC set out in [Regulatory Guide 8 \*Hearings practice manual\*](#) (RG 8) as closely as possible having regard to the requirements in Pt 9 of the ASIC Act. RG 8 explains the principles and procedures ASIC adopts when conducting administrative hearings to give a person their statutory right to be heard.

Note: RG 8 and this guide refer to some sections of the relevant laws. Sometimes their content is stated briefly and therefore readers should refer to the actual terms of the statute. Readers should not rely on these short summaries to state accurately or fully the effect of a section.

**Entitlement to a notice**

- RG 263.73 The requirements associated with a proposed action notice are outlined in RG 263.64–RG 263.68. The relevant provider will have 28 days (or a longer period approved by the sitting panel) to provide written submissions and/or request that the sitting panel hold a hearing: s921P(2)(b) of the Corporations Act.
- RG 263.74 Where a financial adviser requests a hearing, the sitting panel will provide them with a notice of hearing as outlined in RG 263.69.
- RG 263.75 Where a hearing is to be held, we expect that the sitting panel will decide to schedule the hearing as soon as the circumstances allow.

**Impartiality of decision makers**

- RG 263.76 To be impartial, a decision maker must be free from bias. This does not mean that each member of the sitting panel is not allowed to have any knowledge or view about particular issues in question. Rather, it means that they must approach the hearing with an open mind so that they can be persuaded to change any tentative opinion they may have formed.
- RG 263.77 The process for managing actual or perceived conflicts of interest is outlined in RG 263.58–RG 263.63.

**Burden of proof**

- RG 263.78 The concept of ‘burden of proof’ arises in court processes but has no place in administrative hearings. An administrative hearing gives the financial adviser an opportunity to provide the sitting panel with information which the financial adviser believes is relevant to the matter. Generally, the financial adviser does not have to prove or disprove anything.

**Rules of evidence and court practice**

- RG 263.79 The rules of evidence do not apply in FSCP hearings: s159(2)(a) of the ASIC Act. These hearings cannot, and should not, be compared with proceedings in a court of law. First, the FSCP is not a court of law and second, its purpose and nature are quite different.
- RG 263.80 A hearing by a sitting panel is an inquiry to determine the facts and help the panel determine what, if any, action it should take against a financial adviser based on those facts. The hearings are ‘inquisitorial’ in nature, rather than adversarial—that is, they serve as an inquiry to ascertain the relevant facts.

- RG 263.81 The sitting panel must be satisfied that:
- (a) all the issues relevant to the subject matter of the hearing have been clearly identified;
  - (b) the financial adviser has been given the opportunity to address the issues; and
  - (c) the statutory requirements for each sitting panel member are met.

### **Material presented at the hearing**

- RG 263.82 A financial adviser needs to decide:
- (a) what material or information they want to present at the hearing;
  - (b) the form in which they want to present the material or information; and
  - (c) whether they want to dispute the accuracy or adequacy of the material which ASIC has provided to the sitting panel.
- RG 263.83 A financial adviser should carefully consider how they present information they believe to be relevant to the sitting panel's decision. For example, they may choose to:
- (a) rely entirely on the material identified in the proposed action notice;
  - (b) provide the sitting panel with documents (e.g. written statements about the facts or copies of records) which are relevant to the hearing; and/or
  - (c) make submissions, either in writing or orally.
- RG 263.84 When deciding the form of their material, the financial adviser should remember that the sitting panel is not bound by the rules of evidence and that any relevant and credible material may be presented. For example, written statements from people with knowledge of relevant events and other circumstances will often be sufficient, and the adviser need not request that the person be required to give evidence in person.
- RG 263.85 The sitting panel will allow the financial adviser (or a witness) a reasonable opportunity to explain or give their own version of events. The sitting panel may ask questions to clarify any matters on which the financial adviser (or a witness) has made submissions or given evidence.
- RG 263.86 It is an offence to give evidence, at a hearing, which is false or misleading in a material particular.

Note: See s169(1) of the ASIC Act.

### **Financial adviser's right to be represented**

- RG 263.87 A financial adviser has the right to be represented by a barrister or solicitor of the Supreme Court of a state or territory or of the High Court at a hearing of a sitting panel: s164(4) of the ASIC Act.

### **Other people who may attend a hearing**

- RG 263.88 Section 161(1)(c) of the ASIC Act gives the chair of each sitting panel the discretion to allow, in addition to the financial adviser and their legal or approved representative, other persons to attend a hearing. For example, the sitting panel may allow the financial adviser to have a friend or a relative attend to provide practical or moral support. Central to the sitting panel's decision about whether to allow others to attend is the question of fairness to the financial adviser and whether the other person's presence will help in the conduct of the hearing.
- RG 263.89 If the financial adviser wants another person to attend the hearing, they should contact the chair of the sitting panel as soon as possible after receiving the notice of hearing.
- RG 263.90 The sitting panel may, subject to any appropriate conditions, allow a person to intervene in the hearing. A person who intervenes may be allowed to present additional material to the sitting panel or to make submissions on the matter, or both. Generally, the financial adviser will be invited to comment on whether another person should be permitted to intervene.

Note: See s159(2)(b) of the ASIC Act.

- RG 263.91 Ordinarily, witnesses who the financial adviser has called to give oral evidence will not be allowed to be present during other parts of the hearing.

### **Witnesses**

- RG 263.92 If the financial adviser would like someone to give evidence on their behalf, a written statement by the witness will usually be sufficient.
- RG 263.93 On occasion, it may help the sitting panel for factual issues to be clarified by a person giving oral evidence.
- RG 263.94 When credibility is an issue and the sitting panel has asked for the financial adviser to call a witness, it is generally up to the financial adviser to have their witness available at the hearing.

### **Summoning a witness to attend**

- RG 263.95 Being required to attend to give evidence or to produce documents may involve substantial cost or inconvenience, or both. The sitting panel may only exercise the power to summon a witness or compel the production of documents when there is a demonstrated need for it.

- RG 263.96 Before issuing a summons, the sitting panel would need to be satisfied that:
- (a) the person can give relevant evidence or produce relevant documents; and
  - (b) there is a need for the person to do so.

### **Hearings generally to be held in private**

- RG 263.97 Hearings of a sitting panel will generally be held in private. However, a financial adviser may request that a hearing (or part of a hearing) be held in public: s163(1) of the ASIC Act.
- RG 263.98 If a financial adviser asks for the hearing to be in public, we expect that the sitting panel would generally agree to that request.
- RG 263.99 A sitting panel will consider the following factors when deciding whether a hearing, or part of the hearing, should be held in public:
- (a) whether evidence or matters that may arise during the hearing is of a confidential nature or relates to the commission of an offence;
  - (b) any unfair prejudice to a person's reputation that may be caused; or
  - (c) whether it is in the public interest to hold the hearing publicly.

### **Hearings generally to be held using technology**

- RG 263.100 Whether they are public or private, hearings of the sitting panel will generally be held using audio-visual teleconferencing. The notice of hearing will set out the technology that will be used for the hearing and how the financial adviser can access it.

Note: The chair of a sitting panel may decide to hold all or any part of a hearing using technology: s159(3)(b) of the ASIC Act.

- RG 263.101 If the hearing is to be held in person at a particular place, the notice of hearing will set out the physical place of the hearing.

### **Hearing adjournments**

- RG 263.102 Circumstances may arise when the sitting panel must consider whether to grant an adjournment. When doing so, a sitting panel must decide what is fair considering the circumstances of the matter. For example, if new information has come to light which may be adverse to the financial adviser, it may be appropriate for the sitting panel to adjourn the hearing to give the financial adviser time to consider the new information.
- RG 263.103 If the financial adviser seeks to have the hearing adjourned, they should contact the chair of the sitting panel as soon as possible.



## Decisions of a sitting panel

### Written reasons

- RG 263.104 A sitting panel must give a statement of reasons for its final decision if it decides to take one or more of the following actions:
- (a) give the financial adviser a warning/reprimand (s921T(3) of the Corporations Act);
  - (b) direct the financial adviser to undertake specified training, receive specified counselling, receive specified supervision or report specified matters to ASIC (s921M(2) of the Corporations Act); or
  - (c) suspend or prohibit the financial adviser's registration (s921M(2) of the Corporations Act).
- RG 263.105 ASIC will not publish the statement of reasons of a sitting panel. The information we publish when a sitting panel takes action in relation to a financial adviser is described in RG 263.109–RG 263.113.
- RG 263.106 If the sitting panel does not provide the reasons for its decision, the financial adviser may ask for a written copy of them. The request should be in writing and made within 28 days of being notified of the final decision.

### Notifying AFS licensees of decisions

- RG 263.107 At the same time as it notifies the financial adviser of the decision, a sitting panel must provide a copy of the following to the AFS licensee(s) that authorises the financial adviser to provide personal advice to retail clients on relevant financial products (s921M(1)(b) of the Corporations Act):
- (a) a direction under s921L(1)(a) of the Corporations Act;
  - (b) a registration suspension order under s921L(1)(b);
  - (c) a registration prohibition order under s921L(1)(c); or
  - (d) a warning/reprimand under s921T.

Note: A sitting panel's obligation to notify an AFS licensee applies regardless of whether the circumstances occurred during the course of the financial adviser's authorisation with that AFS licensee. For example, where the financial adviser is authorised by more than one AFS licensee, the sitting panel will notify each AFS licensee; and where the financial adviser becomes authorised by a new AFS licensee before the sitting panel makes its decision, the sitting panel must notify the new AFS licensee of the relevant decision.

- RG 263.108 Where ASIC considers it appropriate to do so, we may also give information to an AFS licensee about a person we believe is or will be authorised as a financial adviser by that licensee: s916G of the Corporations Act. This may include information about decisions made by the sitting panel in relation to the financial adviser.

Note: [Information Sheet 250](#) *Giving AFS and credit licensees information about their representatives* (INFO 250) outlines ASIC's approach to giving AFS and credit licensees information about their representatives.

## Publicising decisions

### Financial Advisers Register

RG 263.109 In specified circumstances, ASIC must display details of decisions made by a sitting panel on the Financial Advisers Register: see Table 3.

**Table 3: Decisions that must be displayed on the Financial Advisers Register**

Type of decision made by a sitting panel	Must the decision be displayed on the Financial Advisers Register?
Give a warning/reprimand under s921T  Note: All section references in this table are to sections of the Corporations Act, except where otherwise specified.	No
Issue a direction under s921L(1)(a) to: <ul style="list-style-type: none"> <li>• undertake specified training;</li> <li>• receive specified counselling;</li> <li>• receive specified supervision; or</li> <li>• report specified matters to ASIC</li> </ul>	Yes, <i>but only</i> if a sitting panel has previously: <ul style="list-style-type: none"> <li>• given the financial adviser a direction under s921L(1)(a);</li> <li>• made a registration suspension order in relation to the financial adviser under s921L(1)(b); or</li> <li>• made a registration prohibition order in relation to the financial adviser under s921L(1)(c).</li> </ul> Note: See s922Q(2)(uc), and reg 7.6.06D of the <i>Corporations Regulations 2001</i> (Corporations Regulations).
Make a: <ul style="list-style-type: none"> <li>• registration suspension order under s921L(1)(b)</li> <li>• registration prohibition order under s921L(1)(c)</li> </ul>	Yes  Note: See s922Q(2)(uc), and reg 7.6.06D of the Corporations Regulations.
Give an infringement notice under s1317DAM(1A)	Yes, if the amount specified in the infringement notice is paid by the financial adviser  Note: See s922Q(2)(ud).
Accept an enforceable undertaking given by a financial adviser under s171E of the ASIC Act	Yes  Note: See s922Q(2)(q).

### General publicising of decisions

RG 263.110 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) and (b) of the ASIC Act and s760A of the Corporations Act.

RG 263.111 As a general principle, it is our view that there is significant public interest in ensuring that investors and consumers and the broader community are aware of and informed about action 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: For more information on how ASIC approaches decisions about publicising matters, see [Information Sheet 152](#) *Public comment on ASIC's regulatory activities* (INFO 152).

RG 263.112 Where a sitting panel has taken action against a financial adviser, we will generally publish a media release setting out the decision made and a brief explanation of the background to the sitting panel's decision. Depending on the circumstances, a media release may relate to one or more FSCP decisions.

RG 263.113 However, we will not generally publicise names of financial advisers affected by decisions of a sitting panel where the decision is not required to be displayed on the Financial Advisers Register: see Table 3.

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

### **Right of review**

RG 263.114 Some decisions of sitting panels are reviewable by the Administrative Appeals Tribunal (AAT). Financial advisers will be notified in writing of their right to have the AAT review the sitting panel's decision.

## Key terms

Term	Meaning in this document
AAT	Administrative Appeals Tribunal
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"> <li>• a basic deposit product;</li> <li>• a facility for making non-cash payments that is related to a basic deposit product; or</li> <li>• a facility for providing traveller's cheques: s961F of the Corporations Act</li> </ul>
Code of Ethics	<i>Financial Planners and Advisers Code of Ethics 2019</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, its 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

Term	Meaning in this document
external member	An industry participant appointed to the FSCP by the Minister and selected by ASIC as a member of a sitting panel
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 <i>Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021</i>
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
proposed action notice	Written notice given to a financial adviser of proposed action to be taken by a sitting panel in accordance with s921P of the Corporations Act
Pt 9 (for example)	A part of the Corporations Act (in this example numbered 9)
relevant financial products	Financial products other than basic banking products, general insurance products, consumer credit insurance, or a combination of any of these products

Term	Meaning in this document
restricted civil penalty provision	<p>Has the meaning given in s921Q(3) of the Corporations Act. Each of the following Corporations Act requirements is a restricted civil penalty provision:</p> <ul style="list-style-type: none"> <li>• qualifications requirements (s921BA(1));</li> <li>• exam requirement (s921BA(2));</li> <li>• work and training requirements (s921BA(3));</li> <li>• CPD requirements for financial advisers (s921BA(4));</li> <li>• CPD requirements for financial advisers who provide tax (financial) advice services (s921BB(3));</li> <li>• requirement to comply with the Code of Ethics (s921E);</li> <li>• supervision requirements in relation to persons who are undertaking work and training (s921F(3), (4), (6) and (7)); and</li> <li>• the prohibition on unregistered financial advisers providing personal advice (s921Y).</li> </ul>
RG 8 (for example)	An ASIC regulatory guide (in this example numbered 8)
s141 (for example)	A section of the ASIC Act, Corporations Act or National Credit Act, as the case may be (in this example numbered 141)
sitting panel	A panel of at least two external members and an internal member convened by ASIC to hear and determine a matter

## Related information

### Headnotes

AFS licence, AFS licensees, banning order, conflicts of interest, credit, Financial Services and Credit Panel, FSCP, hearing, notice of hearing, proposed action notice, restricted civil penalty provision, sitting panel

### Regulatory guides

[RG 8](#) *Hearings practice manual*

[RG 98](#) *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders*

### Legislation

*Acts Interpretation Act 1901*, s28A

ASIC Act, s1, 13, 93A, 93AA, 102, 136, 139, 141, 142, 148, 149, 150, 153, 159, 161, 163, 164, 169, 171D, 171E

ASIC Regulations, reg 12N

Corporations Act, s9, 760A, 910A, 910C, 913B, 916G, 920A, 920B, 921BA, 921BB, 921E, 921F, 921K, 921L, 921M, 921N, 921P, 921Q, 921T, 921U, 921W, 921Y, 921Z, 922Q, 1317DAM, 1317DATB, 1317E

Corporations Regulations, reg 7.6.06D

National Credit Act, s80, 81, Sch 1

### Information sheets

[INFO 151](#) *ASIC's approach to enforcement*

[INFO 152](#) *Public comment on ASIC's regulatory activities*

[INFO 250](#) *Giving AFS and credit licensees information about their representatives*