



FINANCIAL
SERVICES
COUNCIL

ASIC Consultation Paper 359: Financial Services and Credit Panel

FSC Submission

March 2022



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1. About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Executive Summary

The FSC welcomes the opportunity to submit to ASIC Consultation Paper 359 on proposals to update *Regulatory Guide 263: Financial Services and Credit Panel*.

The FSC broadly welcomes the proposed update and responds to ASIC's questions in the latter part of this submission. It makes several general recommendations to strengthen the effectiveness of Regulatory Guide 263 which include:

- Regular and transparent reporting of specific data relating to the Financial Services and Credit Panel's (**FSCP**) activity
- A requirement on ASIC to notify licensees when a proposed action notice has been issued
- Current and former licensees be notified of all outcomes and decisions of the FSCP
- Public availability of decisions to support best practice and prevent disciplinary issues arising

The disciplinary regime should be structured not only to manage disciplinary oversight but prevent disciplinary situations arising and allow for continuous improvement by the profession.

3. FSC Recommendations

1. ASIC should be required to publish quarterly data in the aggregate, relating to the:

- Number of matters referred to the Financial Services and Credit Panel
- Number of matters investigated
- Size of licensee where matter was investigated / not investigated
- Number of matters investigated and decision made to take no further action
- Amount spent on investigations

Outcome of decisions – number of reprimands, directions

2. To ensure regulatory certainty for all participants in the sector ASIC should update Regulatory Guide 263 to:

- Indicate the likely range of how long a suspension might be in place
- Include examples to support different suspension periods
- Give advanced notice of impending suspension of 28 days, in order to support licensees to make alternative arrangements
- Indicate how a suspension be recorded on the Financial Advisers Register (FAR) with consideration as to whether labels of 'current' or 'ceased' are sufficient
- Indicate ASIC's expectations as to how a suspension should be reflected in a fee disclosure statement
- Clarify what an adviser can or cannot do while suspended for example whether or not they can undertake continuing professional development (CPD)

Include guidance or examples on undertaking training, supervision, or receiving counselling in situations where a financial adviser is removed or not removed from the Financial Advisers Register.

3. Regulatory Guide 263 should be amended to require ASIC to notify the licensee that it has issued a proposed action notice.

4. Current and former licensees where the advice in question was provided by a former licensee or where the conduct occurred while the adviser was licensed by a former licensee, should be notified of all FSCP outcomes and decisions. The Regulatory Guide should require the licensee to keep records of all outcomes of a sitting panel notified to it, and that where requested, such records be shared with other licensees consistent with the reference checking protocol.

5. Key decisions or precedents of the FSCP should be publicly available to allow for continuous improvement and best practice by the profession.

4. General comment

4.1. Referring a matter to a sitting panel

Recommendation

ASIC should be required to publish quarterly data in the aggregate, relating to the:

- Number of matters referred to the Financial Services and Credit Panel
- Number of matters investigated
- Size of licensee where matter was investigated / not investigated
- Number of matters investigated and decision made to take no further action
- Amount spent on investigations
- Outcome of decisions – number of reprimands, directions

At RG 263.54, ASIC states that it has full discretion in deciding which matters referred to it will be the subject of investigation.

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.

Given the breadth of this discretion, and the impact it may have on advisers, licensees and consumers, it is important that there is transparency in respect of how ASIC has exercised this discretion. This will enable industry to identify areas for improvement to prevent situations giving rise to disciplinary proceedings being commenced.

Another area of ASIC discretion relates to circumstances in which it may convene a sitting panel (RG 263.15 and 263.16). One example used is whether the matter would send an effective and deterrent message to industry. While this discretion seems reasonable, this may have a disproportionate impact on individual adviser who becomes a scapegoat for similar issues that ASIC and the panel may have considered. By its nature, using an individual case to set an example typically means the penalty is sizable to have the necessary effect.

What controls or transparency should be in place to avoid the unlucky adviser from bearing the impact of numerous prior indiscretions committed by other advisers should be clear. It's important that a deterrent message may be needed, in a manner that is procedurally fair.

4.2. Suspension of registration

Recommendation

To ensure regulatory certainty for all participants in the sector ASIC should update Regulatory Guide 263 to:

- Indicate the likely range of how long a suspension might be in place
- Include examples to support different suspension periods

- Give advanced notice of impending suspension of 28 days, in order to support licensees to make alternative arrangements
- Indicate how a suspension be recorded on the Financial Advisers Register (FAR) with consideration as to whether labels of 'current' or 'ceased' are sufficient
- Indicate ASIC's expectations as to how a suspension should be reflected in a fee disclosure statement
- Clarify what an adviser can or cannot do while suspended for example whether or not they can undertake continuing professional development (**CPD**)
- Include guidance or examples on undertaking training, supervision, or receiving counselling in situations where a financial adviser is removed or not removed from the Financial Advisers Register.

The suspension of a financial adviser's registration has significant practical consequences, the most significant being the ongoing servicing of clients. For small advice firms, ASIC's expectations of how they expect the firm to be able to continue to meet the needs of its clients while an adviser has been suspended are not clear.

ASIC should ensure regulatory certainty and a level playing field for all participants in the sector by clarifying certain details around the appropriate procedure when a suspension occurs.

4.3. Notification to licensee of proposed action notice

Recommendation

Regulatory Guide 263 should be amended to require ASIC to notify the licensee that it has issued a proposed action notice.

The Draft Regulatory Guide does not refer to ASIC notifying the relevant licensee in respect of a proposed action notice issued to an adviser of that licensee. Such a notice is evidence that there is concern that a financial adviser may have engaged in misconduct or should otherwise be the subject of disciplinary proceeding.

Financial advisers might not notify their licensee of the receipt of such a notice, and where the licensee is not aware of the information that resulted in the notice being sent, it will not be in a position to consider what additional monitoring and supervision activities should be undertaken, if any. As such ASIC should notify a licensee of a decision to issue a proposed action notice.

4.4. Notifying AFS licensees of decisions

Recommendation

Current and former licensees where the advice in question was provided by a former licensee or where the conduct occurred while the adviser was licensed by a former licensee, should be notified of all FSCP outcomes and decisions.

The Regulatory Guide should require the licensee to keep records of all outcomes of a sitting panel notified to it, and that where requested, such records be shared with other licensees consistent with the reference checking protocol.

RG263.107 sets out the circumstances when ASIC will notify a licensee of a decision of a sitting panel. Licensees will be notified where a sitting panel issues a warning or reprimand. These will not be recorded on the Financial Adviser Register (**FAR**). They are, however, relevant in terms of performing background checks on a financial adviser.

Notifying all licensees of panel decisions will enable them to know whether or not an adviser has received one or more warnings or reprimands from the FSCP, to ensure their services remain compliant while equally ensuring consumers are not unduly impacted in the event a financial adviser is removed from the advice process. This will also assist former licensees to determine if they need to investigate or remediate advice provided by the adviser.

The parameters for notifications should be set on:

- when the former licensee should be notified;
- the advice relevant to the matter the FSCP is considering was provided by a former licensee; or
- if the conduct being considered occurred when the adviser was licensed by a former licensee.

This will also assist former licensees to determine if they need to investigate or remediate advice provided by the adviser.

4.5. Continuous feedback to support best practice

Recommendation

Key decisions or precedents of the FSCP should be publicly available to allow for continuous improvement and best practice by the profession.

Making information or the relevant context to decisions publicly available, and deidentifying information where appropriate, will provide a resource for the sector to improve compliance systems and best practice and ultimately avoid situations that give rise to appearances before the FSCP.

This will also assist ASIC in achieving its aim of using referrals to the FSCP as a deterrent message for industry. RG 263.16, establishes that ASIC 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.

5. Responses to questions

5.1. Proposal B1

B1Q1) When it should exercise its discretion to convene a panel:

RG 263.12 (a) (iv) (A) and (B) suggests ASIC can exercise its discretion to convene a panel where the adviser has at least twice been linked to a refusal or failure to pay an Australian Financial Complaints Authority (**AFCA**) determination, and ASIC reasonably believes this is likely to result in material loss or damage to a client or a material benefit to the adviser. In the event the materiality threshold is not met, for example, because the amount of the determination is not material to the client (yet they were sufficiently vexed to bring a claim to AFCA), it should be clarified whether or not the FSCP would in this instance take action or no action.

5.2. Proposal B2

B2Q1) Do you agree that it is appropriate for ASIC to have regard to these factors assessing the materiality of:

- damage or loss to clients or**
- the benefit to an adviser;**

Yes. These factors seem reasonable to take into account when assessing materiality.

Factors should be considered in aggregate not as individual silos so that the overall circumstances of the case are considered.

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?

In assessing value to the adviser, the assessment should consider:

- that the benefit derived by the adviser may be limited if they are an employee on a fixed salary. Benchmarking relative to average remuneration would seem inconsistent in those examples.
- what action has been taken to make good any loss to the consumer or benefit received.

Further clarity may be needed on how the panel will assess materiality.

5.3. Proposal B3

Response to questions B3Q1 and B3Q2

These matters seem appropriate to be taken into account. It should be clarified whether these characteristics form the framework that ASIC uses to determine whether a financial adviser meets the requirements of a fit and proper person or not.

Licensees are expected to consider whether an adviser is fit and proper to provide advice when registering that adviser. In relation to adviser registration, licensees rely on an attestation process in respect of the matters ASIC has listed that may be considered when assessing fitness and propriety.

ASIC should consider whether the Regulatory Guide should include a statement to the effect that ASIC does not expect licensees to conduct inquiries to make an assessment as to the matters listed in RG263.21(b) (good character, diligence, honesty, integrity, and judgement) in completing the adviser registration process, unless information became known to the licensee that indicated such inquiries were warranted.

FSCP members should have suitable background or experience to determine application of determining when a relevant provider is a fit and proper person.

5.4. Proposal C1

Response to C1Q1 and C1Q2

The examples proposed are satisfactory.

5.5. Proposal D1

D1Q1 Whether panel hearings should be conducted using audio-visual technology;

We are supportive of using audio-visual technology. We agree that using technology to hold hearings is the most efficient and cost-effective approach. However, we think some financial advisers may prefer to have an in-person hearing. ASIC should consider giving financial advisers the option to request an in person hearing.

5.6. Proposal D2

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

Yes, with regards to publishing the adviser's name we agree it is a good approach to align this with information published on the FAR.

The panel should also publish the context to its decisions to provide greater opportunity for industry improvement (eg referencing solely that Best Interests Duty was not met is not

useful – it would be more helpful to understand the principle failures in order to support improvement).