

From the Desk of Director Marija Pajeska



22 May 2017

Ms Breshna Ebrahimi
Australian Securities and Investments Commission
By email: policy.submissions@asic.gov.au

Response to ASIC Consultation Paper 281 – Financial Services Panel

The Association of Securities and Derivatives Advisers of Australia (ASDAA) appreciates the opportunity to provide these comments to ASIC in respect of ASIC Consultation Paper 281 – Financial Services Panel.

ASDAA represents the interests of its members, who are from the Securities and Derivatives advisory profession. Its members are comprised of individuals who are either directors, or employees, of small to medium sized firms which hold an Australian Financial Services Licence (AFSL), but are not a Participant Member of the Australian Stock Exchange.

ASDAA believes that there is room for improvement in the regulatory framework adopted by ASIC and that establishing a Financial Services Panel to sit alongside ASIC's existing administrative processes will enhance the impact of ASIC's administrative decisions by way of peer review.

We acknowledge that ASIC has the staff to perform that functions required under its administrative processes however we feel that at times ASIC staff are lacking the industry experience (most importantly industry experience relating to current industry practice). It's not until you are required to perform the various duties expected of an AFS Licensee or Credit Licensee that you can get a true appreciation of the financial products made available to clients and the complexity involved in performing the duties expected of an AFS Licensee or Credit Licensee.

By establishing a Financial Services Panel, it will add value to the ASIC administrative process by bringing into the process the much needed experience and knowledge of current industry practices and requirements.

We wish to highlight the following matters that we believe require further consideration and/ or clarification:

- One disadvantage that was highlighted was the fact the decisions of the panel may not align with ASIC policy. This is a valid risk however it may also be a means by which ASIC can use to identify which of its policies are defunct or

work on paper but not in practice. It allow ASIC to be more practical when it comes to its policy development.

- In its initial phase of establishment the Panel should also be involved in the approval process for applications for an AFS Licences and Credit Licences and application to vary an AFS Licence or Credit Licence. This will add transparency to the process and possibly increase efficiencies as industry participants may have a better understanding of the intentions of the applicant and the experience acquired by the Responsible Manager. Initially, the focus should be on those applications that ASIC is of mind to refuse and if there is concerns regarding the costs and workload of the Panel maybe consider given the applicant the choice to accept the refusal, withdraw the application or seek review by the Financial Services Panel prior to final decision being made.

Our specific comments to each of ASIC's proposals in the Consultation Paper are detailed in Annexure A of this letter.

ASDAA appreciates the opportunity to provide this Submission to ASIC on these significant proposals. We would be happy to discuss any issues arising from our submissions on this issue, or to provide any further material that may assist. Should you require any further information, please contact Brad Smoling, Director of Communications, on (07) 5532 3930 or email brad@asdaa.com.au.

Yours Sincerely

Marija Pajeska
Compliance Director

Annexure A: Response to ASIC Questions

Establishment of the Financial Services Panel

B1 proposal: ASIC proposes that establishing the Panel may improve regulatory outcomes by:

- (a) assisting ASIC with making administrative decisions on certain matters relating to financial services and credit activities; and
- (b) enhancing the impact of ASIC's administrative decisions.

| ASIC Question | | Response |
|---------------|--|---|
| B1Q1 | How would the Panel improve regulatory outcomes? | <p>The Panel would improve regulatory outcomes by ensuring that the decisions made by ASIC are fair given the circumstances and that such decisions actually reflect current industry practices. The use of the Panel may result in increased costs initially but over time it may in fact reduce costs whereby the Panel is used to make decisions which previously needed to be made through the legal system.</p> <p>If used properly, the Panel can also be used to expedite matters that currently are stalled for whatever reason. This would give an assurance to industry that ASIC is being made accountable for its actions and is required to perform the duties it is obliged to perform within reasonable time frames.</p> |
| B1Q2 | How do you see the Panel, as a peer review mechanism, enhancing the impact of ASIC's administrative decisions? | <p>The Panel would add transparency to the process and therefore, arguably, result in a fairer process. Being subject to a peer review would most likely result in more information being communicated to industry therefore highlighting behavior that is not acceptable and also at the same time bringing to ASIC's attention that some actions on paper may not seem appropriate however in the real world that is how it operates.</p> |

Matters to be referred to the Panel

C1 proposal: ASIC proposes that when a matter is referred to the Panel, the Panel would be responsible for determining whether ASIC will make a banning order against an individual for misconduct in the course of providing financial services (as defined in s766A of the Corporations Act) and/or engaging in credit activities (as defined in s6 of the National Credit Act). Specifically, the Panel would consider banning orders for misconduct by financial services participants (excluding corporate AFS licensees) and participants in the credit industry.

| ASIC Question | | Response |
|---------------|--|---|
| C1Q1 | What are your views on the Panel initially only being referred matters to consider that relate to the making of banning orders? | We believe that the Panel should, upon establishment, also be involved in the approval process for applications for an AFS Licences and Credit Licences and application to vary an AFS Licence or Credit Licence. An area that lacks transparency within ASIC and requires assistance is the ASIC licensing team. A huge responsibility is given to the ASIC licensing team to make decisions on whether a person is qualified to be a Responsible Manager of an AFS Licensee or Credit Licensee and whether or not to grant the Licence. The members of the ASIC licensing team are not necessarily proficient in all industry models or practices and therefore allowing for peer review in this process will benefit industry as well as the ASIC licensing team. It may also assist in improving inefficiencies in the process. |
| C1Q2 | What other areas of regulatory priority should be included in the scope of the matters to be considered by the Panel (in addition to individual misconduct in the financial services and credit industries) either now or in the future? | |

C2 proposal: In deciding whether to refer a matter to the Panel, ASIC would consider whether it is appropriate for peer review because of its significance, complexity or novelty. Whether a matter is appropriate will depend on the facts of each matter. In addition, we would take into account:

(a) the objects of Ch 7 of the Corporations Act, that is to promote:

(i) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and

(ii) fairness, honesty and professionalism by those who provide financial services; and

(b) the objects of the National Credit Act, that is to better inform consumers and prevent them from being in unsuitable credit contracts.

| ASIC Question | | Response | |
|---------------|--|---|--|
| | | Allegations relating to misconduct | Other matters |
| C2Q1 | Is 'complexity, significance or novelty' an appropriate measure for the types of matters to be considered by the Panel | <p>Complexity and significance are generally accepted terms to define potential breaches or misconduct. So, we agree that complexity and significance are appropriate terms to be used to measure the types of matters to be considered by the Panel.</p> <p>We see the benefit of including 'novelty' within the scope however feel that further clarity would need to be added as to what actually ASIC means by novelty.</p> | Complexity, significance and novelty may not be relevant in determining whether or not the Panel should assess a particular matter. The governing criteria should be determined by the nature of the matters to be referred to the Panel. |
| C2Q2 | What are your views on how ASIC should distinguish between 'complex' and 'simple' matters and which do you see are more appropriate to be considered by the Panel? | <p>At a minimum complex matters should definitely include matters which relate to what ASIC deems to be complex financial products or credit activities.</p> <p>Other things that should be considered are:</p> <ul style="list-style-type: none"> • the complexity of the delivery of the financial services or credit activities; and • where the product or activity is not deemed complex by ASIC, however the structure of the product makes it complex. | <p>In relation to other matters this would be assessed based on whether 'complex' as an assessment tool is relevant and then the nature of the matter.</p> <p>For example, if the Panel were to consider any applications for a licence or licence variation that the ASIC licensing team is of mind to refuse, then complexity, significance and novelty would not form part of the decision process. The mere fact that ASIC is of mind to refuse would be the governing factor.</p> |

| ASIC Question | | Response | |
|---------------|---|--|---------------------------------|
| | | Allegations relating to misconduct | Other matters |
| C2Q3 | What alternative or additional criteria should be used to assist in determining which matters would be referred to the Panel? | <p>Additional criteria that may be considered are:</p> <ul style="list-style-type: none"> • the impact on the general population; • the recourse sought by ASIC; and • whether or not ASIC has staff with the relevant knowledge and industry experience to understand the services and products offered. | Refer to response given to C2Q2 |

C3 proposal: ASIC proposes that only matters that are contested by the notice recipient (Recipient) would be referred to the Panel.

| ASIC Question | | Response |
|---------------|---|---|
| C3Q1 | Should uncontested matters also be referred to the Panel? | <p>If the approach adopted by ASIC is for the Panel to consider matters which are complex, significant or novel then all such matters should be heard by the Panel. In circumstances where ASIC makes the decision for matters which are not complex, significant or novel then the recipient of the penalty notice should be given right of appeal.</p> <p>The question that arises is whether the appeal should be heard by the Financial Services Panel or the Administrative Appeal Tribunal.</p> <p>Furthermore, what needs to be considered is whether decisions made by the Panel are final or will the recipient have a right of appeal and if so will such appeal be heard by the Administrative Appeal Tribunal or by another body.</p> |

Other administrative powers

C4 proposal: ASIC may consider expanding the Panel's powers and/or the scope of the matters to be referred to the Panel in the future. Some examples of powers that it may delegate to the Panel in the future include the power to:

- (a) issue infringement notices;
- (b) refuse an AFS licence or credit licence application;
- (c) impose conditions on an AFS licence or credit licence; and/or
- (d) cancel or suspend an AFS licence or credit licence.

| ASIC Question | | Response |
|---------------|--|--|
| C4Q1 | What other administrative powers should we delegate to the Panel (in addition to the power to make banning orders) now or in the future? | Industry would benefit greatly if the right ASIC has to refuse an application for a licence or licence variation were delegated to the Financial Services Panel to add transparency to the process and increase the efficiency of the process. Other matters that could be delegated to the Panel in the future (in addition to those proposed by ASIC) would be the consideration and approval of requests for relief. Applying industry knowledge and experience to the process of making decisions relating to requests for relief would add value to the process. |

Membership of the Panel

D1 proposal: ASIC proposes that one of the three options set out in Table 1 would form the basis for selecting members of the Panel.

| ASIC Question | | Response |
|---------------|---|---|
| D1Q1 | Of the options for the Panel's composition that we have set out in Table 1, which is the most suitable for the Panel's purpose? | Option 1 – Industry participants only (ie. Up to two members to be drawn from a pool of industry participants. The third member would be an ASIC staff member). |
| D1Q2 | Are there other options for the Panel's composition that we should consider? Please explain | There is possibly an infinite number of options however, we feel Option 1 is the most suitable. |