



22 May 2017

**By email:** [policy.submissions@asic.gov.au](mailto:policy.submissions@asic.gov.au)

Breshna Ebrahimi  
Australian Securities and Investments Commission  
GPO Box 9827  
Sydney NSW 2001

Dear Ms Ebrahimi,

### **Consultation Paper 281: Financial Services Panel**

The Consumer Action Law Centre (**Consumer Action**) is pleased to provide a submission in response to Consultation Paper 281 (**the Consultation Paper**) regarding the proposal to establish a Financial Services Panel (**the Panel**).

Given the apparent success of peer review as a form of co-regulation in Australia and overseas, it seems that the Panel has the potential to improve the Australian Securities and Investments Commission's (**ASIC**) regulatory outcomes. However, we have a number of concerns about the proposed Panel and we remain hesitant about providing our full support.

Further information about the proposal, including the process and requirements for selection of Panel members and the process for referral of matters to the Panel for consideration, would assist us to provide more detailed comments.

We also note that we have no major concerns about ASIC's current administrative decision-making process. Single delegate decisions have been of high quality in complex, novel and significant cases without the use of panels. Our main concern about the ASIC administrative decision-making process to date has been that these matters are costly and time consuming, which restricts ASIC's capacity to take timely enforcement action. We anticipate the proposed Panel will only exacerbate this problem. We are not convinced that the benefits of having a Panel decision would necessarily outweigh the additional costs of doing so.

Our further views in response to each of the proposals and questions are outlined below.

### **About Consumer Action**

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian

consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

### **B1Q1: How would the Panel improve regulatory outcomes?**

We agree that the Panel would bring a broader range of experiences and perspectives into the decision-making process. Consumer representatives on panels in particular can be useful in ventilating relevant issues that may not be fully articulated in the 'areas of concern' provided by investigators to decision-makers. External input from industry and consumer representatives on panels can also be useful to ensure the decision-makers do not become 'stuck in their ways'.<sup>1</sup>

However, as noted above, we are not yet convinced that the benefits of the Panel would outweigh the additional costs and potential risks. Bringing a broader range of experiences and perspectives into the decision-making process can have a number of disadvantages. In particular, industry Panel members' actual or perceived conflicts of interest could seriously impact consumer outcomes, and reduce the significance of decisions, if not handled appropriately. Even in the absence of direct conflicts of interest, the experiences and perspectives of industry Panel members may result in bias towards protecting the interests of industry rather than improving consumer outcomes and following ASIC policy. If ASIC is to implement a peer review process, it is critical that consumer representatives are given representation equal to that of industry.

The selection of appropriate Panel members is crucial. Apart from actual or potential conflicts of interest, there is a risk that Panel members would not have the expertise required to deal with the complex questions of law and fact often facing ASIC's administrative decision-makers. As acknowledged by the Consultation Paper, a potential disadvantage of the proposed model is decisions being made by people who are less regularly engaged with the legal standards and concepts involved. This lack of expertise could result in inconsistent decisions, and reduce the impact and precedent value of banning decisions.

There is also a significant risk of increasing costs and delays due to more people being involved in the decision-making process. This relates not only to the decision-making process itself, but also additional time spent deciding whether to refer matters to the Panel for consideration in the first place. This will ultimately require additional staff and resources. We understand that ASIC administrative decisions are already quite costly and time consuming, which restricts the numbers of matters that can be dealt with at any one time. We anticipate the proposed Panel will only exacerbate this problem. The Consultation Paper itself noted that referring all banning matters to the Panel 'would increase the cost of the process and the demands placed on Panel members'.

The Consultation Paper is silent in relation to the minimum qualification and experience requirements for Panel members, the process for selecting Panel members, whether the roles

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<sup>1</sup> Some consumer organisations have made similar arguments in relation to the use of panels by the Financial Ombudsman Service: see Consumer Action Law Centre et. al., *Submission to the External Dispute Resolution Review Interim Report*, 3 February 2017, p. 31, available at: <http://consumeraction.org.au/edr-review-interim-report/>.

will be full-time or part-time, and the process for removing Panel members (including whether tenures will be fixed or variable). It is also unclear whether an ASIC staff member will be Chair of the Panel, and what their powers would be. For example, whether the Chair would be able to deal with procedural matters (such as requests for adjournments) without the approval of other Panel members. The Consultation Paper is also silent on the process for referral of matters to the Panel for consideration.

Given the concerns outlined above, we are hesitant about the proposed establishment of the Panel. We do not believe these concerns are insurmountable, but there are insufficient details in the Consultation Paper about how these issues will be dealt with for us to provide our full support. Further information about the process for selection of Panel members, and referral of matters to the Panel for consideration in particular would assist us to provide more detailed comments.

In the absence of further information from ASIC about its approach, if the Panel is established we recommend (at a minimum):

- Ensuring the Panel has balanced membership, meaning that industry, ASIC and consumer representatives would have equal representation on the Panel;
- Minimum qualification and experience requirements for Panel members, including a fit and proper person test;<sup>2</sup>
- Transparent processes for the selection of Panel members, and referral of matters to the Panel for consideration;
- Public guidance about ASIC's expectations of Panel members, including conduct requirements, tenure and whether their role will be full-time or part-time;
- Enabling ASIC to remove Panel members in the event of that member's misconduct or incapacity;<sup>3</sup>
- Providing guidance to Panel members on the weight to be given to protecting consumers, ASIC policy and the public interest when making decisions (i.e. the primary purpose of banning orders is to protect consumers, rather than the livelihood of the licensee or person subject to investigation);
- Publishing clear conflict of interest guidelines, which ensures both direct and indirect conflicts of interest preclude Panel members from participating in relevant decisions;<sup>4</sup> and
- Ensuring the Chair of the Panel is an ASIC delegate. At a minimum, the Chair should be able to deal with procedural matters (such as applications for adjournments and transferring matters to another Panel) without approval from the other Panel members.

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<sup>2</sup> For example, the industry representative for the ASIC disciplinary committee for registered liquidators must have at least 5 years' experience: see *Insolvency Practice Rules (Corporations) 2016* (Cth) ss50-10 and 50-15, available at: <https://www.legislation.gov.au/Details/F2016L01989>.

<sup>3</sup> The Regulatory Decisions Committee in the United Kingdom has similar powers: see *FCA Handbook – DEPP 3 The nature and procedure of the RDC*, available at: <https://www.handbook.fca.org.uk/handbook/DEPP/>.

<sup>4</sup> For example, see the Ontario Financial Services Tribunal guidelines on conflicts of interest: Financial Services Tribunal, *Conflict of Interest Guidelines*, 4 April 2006, available at: <http://fstontario.ca/en/Pages/ConflictGuidelines.aspx>.

**B1Q2: How do you see the Panel, as a peer review mechanism, enhancing the impact of ASIC's administrative decisions?**

As noted above, a broader range of experiences and perspectives on the Panel could assist in ventilating otherwise hidden consumer issues, and improve regulatory outcomes.

However, we do not believe that the Panel will increase awareness of the decisions being made by ASIC and the standards they set, nor do we believe that the Panel's decisions are more likely to secure the cooperation of the regulated population. Indeed, we understand that some industry participants will consider this process to involve being unfairly judged by competitors. Increasing awareness of the decisions being made, and compliance with those decisions, ultimately relies on ASIC's enforcement and education activities, and industry attitudes, rather than decision-makers themselves.

As noted above, if the Panel has majority industry representation, or Panel members have actual or perceived conflicts of interests, inadequate expertise or there are additional costs and delays meaning less banning actions occur, there is a risk that the impact of ASIC's administrative decisions will actually be reduced. These concerns must be addressed in order for the Panel to have any chance of improving regulatory outcomes.

**C1Q1: What are your views on the Panel initially only being referred matters to consider that relate to the making of banning orders?**

We agree that the Panel should initially only be referred matters to consider that relate to the making of banning orders. The Panel should not be expanded to other matters until it is clear that regulatory outcomes have improved as a result.

We recommend ASIC review the effectiveness of the Panel within two years of implementation. This review should involve thorough consultation with industry and consumer representatives, and an assessment of whether the peer review system has improved consumer outcomes. The review should consider what other areas of regulatory priority should be included in the scope of the matters to be considered by the Panel (if any), and whether additional administrative powers should be delegated to the Panel.

**C1Q2: What other areas of regulatory priority should be included in the scope of the matters to be considered by the Panel?**

Please refer to our response to C1Q1.

**C2Q1: Is 'complexity, significance or novelty' an appropriate measure for the types of matters to be considered by the Panel?**

It is unclear from the Consultation Paper which kinds of matters will be considered 'complex', 'significant' or 'novel'. As a result, it is difficult for us to comment on whether this will be an appropriate measure for the types of matters to be considered by the Panel.

As such, we recommend ASIC publish guidance regarding what factors will be considered when determining whether a matter is sufficiently complex, significant or novel to justify referral to the Panel. The process for referring matters to the Panel, and the selection of Panel members, must also be transparent. If this process is not sufficiently transparent, there is a real risk that industry and consumer confidence in ASIC's administrative decisions will be diminished. If members with experience in consumer issues are to be appointed to the Panel, then we would recommend ASIC engaging a consumer body that has demonstrated experience in appointing consumer representatives, such as the Consumers' Federation of Australia.<sup>5</sup>

**C2Q2: What are your views on how ASIC should distinguish between 'complex' and 'simple' matters and which do you see as more appropriate to be considered by the Panel?**

The justification for distinguishing between 'complex' and 'simple' matters is unclear from the Consultation Paper. We query whether this distinction should be made, particularly when there is a risk of significant consumer impact (which can occur in even 'simple' matters).

In any case, we suggest that 'complex' matters will generally relate to complex, unique or untested questions of law or factual scenarios, and would involve consideration of whether there are existing precedents (both judicial and administrative) or established industry best practice.

We recommend ASIC consider guidance provided by the Regulatory Decisions Committee in the United Kingdom about determining whether a decision is 'straightforward'. This guidance suggests that in determining whether a decision is 'straightforward', regard will be had to all the circumstances, which may include:<sup>6</sup>

- The significance of the decision to those who would be affected by it;
- Its novelty in light of stated policy and established practice;
- The complexity of the relevant considerations, including whether representations have been made;
- The range of alternative options; and
- The extent to which the facts relating to the decision are or may be disputed.

**C2Q3: What alternative or additional criteria should be used to assist in determining which matters would be referred to the Panel?**

In our joint submission to the External Dispute Resolution Review Interim Paper, we suggested that referral to the Financial Ombudsman Service's (**FOS**) panel could be a result of a series of triggers, such as:

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<sup>5</sup> For further information, see the Consumer Federation of Australia's policy on appointing consumer representatives: Consumers' Federation of Australia, *CFA Representatives Policy*, available at: <http://consumersfederation.org.au/representing-consumers/cfa-representatives-policy/>.

<sup>6</sup> *FCA Handbook – DEPP 3 The nature and procedure of the RDC*, available at: <https://www.handbook.fca.org.uk/handbook/DEPP/>.

- Complexity;
- Where requested by a consumer;
- Where the dispute raises a systemic issue;
- Where the matter has been flagged by consumer groups as an issue of concern; and/or
- Where the value of the claim is over a certain threshold.<sup>7</sup>

It is unclear from the Consultation Paper what kinds of alternative or additional criteria would be considered (for example, whether requests from the accused for a Panel hearing would be taken into account). However, we suggest that similar triggers to those referred to above could be considered by ASIC when determining which matters would be referred to the Panel.

**C3Q1: Should uncontested matters also be referred to the Panel?**

There is no explanation in the Consultation Paper about why uncontested matters would not be referred to the Panel. However, as noted in our response to C2Q2, ASIC could consider the extent to which the facts relating to the decision are or may be disputed in determining whether a matter is ‘complex’ or ‘simple’, and therefore appropriate for referral. We would prefer this approach to a blanket rule excluding uncontested matters, particularly when the matter involves significant consumer detriment.

**C4Q1: What other administrative powers should we delegate to the Panel now or in the future?**

Please refer to our response to C1Q1.

**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?**

If ASIC is to adopt a peer review system, the Panel membership must be balanced between consumer, industry and regulator interests. As such, we support Option 2 for the Panel’s composition that ASIC has set out in Table 1. However, the ‘non-industry participants’ referred to in Option 2 should be limited to lawyers, academics and consumer advocates that represent consumer interests.

Consumer representatives must have genuine consumer experience. In a joint consumer submission to the External Dispute Resolution Review Interim Report, contributors (including Consumer Action) noted that it was apparent that FOS has had some difficulty in recruiting suitably qualified panel members with consumer experience for its panel. There have been, on occasion, situations where the career and experience of the consumer representative would be more accurately described as industry experience.<sup>8</sup>

We expect any representative on ASIC’s proposed Panel who purports to represent consumer interests will have appropriate and genuine consumer experience. As noted above, we encourage ASIC to engage an appointment process of a recognised consumer body.

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<sup>7</sup> Consumer Action Law Centre et. al., *Submission to the External Dispute Resolution Review Interim Report*, 3 February 2017, p. 31, available at: <http://consumeraction.org.au/edr-review-interim-report/>.

<sup>8</sup> Ibid.

**D1Q2: Are there other options for the Panel's composition we should consider? Please explain.**

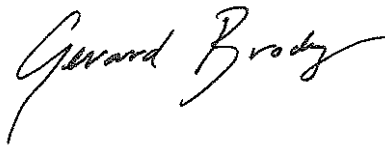
In the United Kingdom, the composition and size of panels of the Regulatory Decisions Committee may vary depending on the nature of the particular matter under consideration. In particularly complex cases, or those raising novel points of law or practice, sometimes a larger panel will consider the case.<sup>9</sup> The Ontario Financial Services Tribunal (**FST**) also has a flexible approach, with most cases heard by a three-person panel but only one person in some circumstances.<sup>10</sup>

We suggest ASIC have the flexibility to vary the composition and size of panels depending on the circumstances. The process for referring matters to the Panel, and determining the composition and size of the Panel, should remain transparent.

Please contact Katherine Temple, Senior Policy Officer on 03 9670 5088 or at [katherine@consumeraction.org.au](mailto:katherine@consumeraction.org.au) if you have any questions about our comments on the review.

Yours sincerely

**CONSUMER ACTION LAW CENTRE**



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Chief Executive Officer



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<sup>9</sup> *FCA Handbook – DEPP 3 The nature and procedure of the RDC*, available at: <https://www.handbook.fca.org.uk/handbook/DEPP/>.

<sup>10</sup> Financial Services Tribunal, *Frequently Asked Questions*, September 2016, available at: <http://financialservicestribunal.on.ca/en/Pages/faq.aspx#Q16>.