



Australian Government
The Treasury

TSY/AU

Single Disciplinary Body: Policy Paper

Financial Sector Reform (Hayne Royal Commission
Response—Better Advice) Bill 2021

August 2021

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Consultation Process

Request for feedback and comments

The purpose of this Paper is to seek feedback on the Government's proposals to implement Regulations under the *Financial Sector Reform (Hayne Royal Commission Response — Better Advice) Bill 2021* (the Bill), which was introduced into Parliament on 24 June 2021. The Bill implements Recommendation 2.10 of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Royal Commission) and establishes a single disciplinary body (SDB) for financial advisers.

Interested parties are invited to comment on the proposals in this Paper by **20 August 2021**. Stakeholder feedback will inform the development of exposure draft Regulations which will be released later this year for public consultation. It is intended that Regulations will come into force on 1 January 2022, subject to passage of the Bill.

Submissions in response to this Paper should be provided by close of business **20 August 2021**, electronically or by post. While submissions may be lodged electronically or by post, electronic lodgement via email to SDBConsultation@treasury.gov.au is preferred. For accessibility reasons, please submit responses sent via email in a Word or PDF format.

All information (including name and address details) contained in submissions may be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

Closing date for submissions: 20 August 2021

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Single Disciplinary Body

Background

Recommendation 2.10 of the Final Report of the Royal Commission called for the establishment of a single, central, disciplinary body for financial advisers.

On 19 April 2021, the Government released exposure draft legislation to establish the single disciplinary body for financial advisers. It established the Financial Services and Credit Panel (FSCP) within the Australian Securities and Investments Commission (ASIC) as the single disciplinary body.

Stakeholder feedback focussed on the potentially large number of matters that would be referred to the FSCP if ASIC was required to convene a panel for all breaches and misconduct; and whether all sanctions should be listed on the Financial Advisers Register (FAR), given the potentially negative effect the listing of a sanction may have on a financial adviser relative to the gravity of the misconduct.

The Bill was introduced into Parliament on 24 June 2021.

In response to stakeholder feedback, the Bill allows the Government to prescribe in Regulations (rather than the primary law) when ASIC must convene an FSCP and the types of administrative sanctions to be included on the FAR.

The purpose of introducing the regulation-making power is to allow for further consultation on the policy settings for these matters and provide flexibility to amend the Regulations as appropriate.

As the Bill is currently in Parliament, section references in this policy paper are to the new sections as inserted by the Bill, unless otherwise stated.

Purpose

The objective of this Paper is to seek feedback on:

1. the circumstances when ASIC must convene an FSCP to determine a disciplinary matter; and
2. the types of administrative sanctions made against a financial adviser that must be included on the FAR.

Treasury is seeking feedback from stakeholders which will then inform the development of Regulations. In particular, Treasury is seeking feedback on:

- the impact of the proposals on industry and stakeholders, including the cost to business and the best approach to minimise consumer harm; and
- whether there are alternative options which should be considered.

The Paper also sets out specific questions. Stakeholders are invited to comment generally on the proposals in this Paper and need not confine themselves to commenting in response to the specific consultation questions.

The Paper does not discuss the Government's proposal to extend the deadline for existing providers to complete the financial adviser exam. In their joint media release on 24 June 2021, the Treasurer and the Minister for Superannuation, Financial Services and the Digital Economy and Minister for Women's Economic Security, announced that the Government will use the regulation-making power to extend the exam cut-off date to 30 September 2022 for financial advisers who have attempted the exam twice prior to 1 January 2022. Exposure draft regulations on the exam deadline will be released later this year for public consultation.

When a Financial Services and Credit Panel must be convened

Operation of the Bill

New section 139 of the *Australian Securities and Investments Act 2001* (ASIC Act – item 12 of the Bill) will provide that ASIC may convene one or more Financial Services and Credit Panels (FSCPs) if a circumstance in new section 921K of the *Corporations Act 2001* (Corporations Act – item 49 of the Bill) exists or has occurred, or there has been a breach of a restricted civil penalty provision.

However, ASIC must convene an FSCP in circumstances prescribed by the Regulations (if any).

Where ASIC reasonably believes that a breach has occurred in specified circumstances set out in new section 921K and ASIC does not convene an FSCP or take other disciplinary action, ASIC must give the affected adviser a written warning or reprimand. This ensures that where misconduct has occurred, but no other disciplinary action is taken, the misconduct does not go unaddressed.

The Bill also implements Recommendation 7.1 of the Independent Review of the Tax Practitioners Board (TPB Review) so that tax (financial) advisers are only subject to one disciplinary system. Subject to the passage of the Bill, from 1 January 2022 financial advisers that provide tax (financial) advice services to retail clients will be subject to the disciplinary remit of the FSCP and may be subject to disciplinary action in relation to the provision of these additional services.

Attachment 1 sets out the disciplinary process provided for in the Bill. The first three stages in the flowchart (Complaints and Breach Reporting, ASIC Triage, Investigation) reflect ASIC's current operational processes when progressing a matter for which a banning order could be made under section 920A of the Corporations Act. That is, the Bill leverages ASIC's current processes when triaging and investigating matters and these established processes are not subject to stakeholder feedback as part of this Paper. The process flowchart is for demonstrative purposes only.

Stakeholder feedback

As part of the public consultation on the exposure draft legislation for the single disciplinary body, a number of stakeholders noted that the mandatory convening of panels for alleged misconduct where ASIC does not take other disciplinary action may lead to a large volume of matters being referred to the FSCP.

Stakeholders raised a number of suggestions to limit the volume of matters that would require an FSCP to be convened and thereby reduce time and cost pressures on both ASIC and the FSCP. These suggestions primarily focussed on only significant or serious matters requiring an FSCP to be convened, with some stakeholders suggesting leveraging the 'significance test' in the new breach reporting regime commencing 1 October 2021.

Policy objectives

Commissioner Hayne set out broad parameters for the single disciplinary body but did not set out in detail how the new body should be established or the form it should take. Commissioner Hayne noted that ASIC has a limited set of powers that it can use to take action against individual advisers, such as banning individuals from providing financial advice. ASIC's power to ban advisers is a serious sanction which may not always be appropriate, leading to minor misconduct going unaddressed.

As Commissioner Hayne noted, “there is an important role for less serious sanctions in demonstrating that particular conduct is unacceptable...”

Commissioner Hayne envisioned a “body dedicated to the investigation of matters concerning individual advisers [that] could be expected to consider a broader range of cases than ASIC currently does.” If only the most serious of matters require ASIC to convene an FSCP, ASIC would continue to focus on matters that are serious enough to warrant a banning order and the FSCP would not be considering a ‘broader range of cases’.

Commissioner Hayne also saw a role for the single disciplinary body to ensure that disciplinary action goes beyond an employment relationship.

ASIC does not have the power to issue the administrative sanctions that are in the FSCP’s disciplinary toolkit other than giving written warnings or reprimands (in specific circumstances). This may result in circumstances where because a matter has not been referred to the FSCP, ASIC’s limited enforcement toolkit may not be the appropriate response to financial adviser misconduct.

Based on Commissioner Hayne’s recommendation and stakeholder feedback on the exposure draft legislation, the possible circumstances set out below seek to find a balance between lowering the number of matters that require an FSCP to be convened (thereby, reducing cost and time pressures on ASIC and the FSCP) while ensuring that the FSCP considers a broader range of matters so that minor misconduct does not go unaddressed.

Circumstances under which ASIC must convene an FSCP: Criteria to be prescribed in Regulations

The Regulations will prescribe the circumstances in which ASIC must convene an FSCP.

The following are the proposed criteria to set these circumstances. At the end of this section are questions for consultation on how some of these criteria could be implemented or amended to ensure the settings achieve the policy objectives. That is, managing the numbers of matters that go to the FSCP while ensuring that minor misconduct does not go unaddressed.

The criteria has been drawn from the key factors ASIC considers when deciding to suspend, cancel or vary an Australian financial services licence (see Regulatory Guide 98 *ASIC’s powers to suspend, cancel and vary AFS licences and make banning orders*) and from the ‘significance test’ in the new breach reporting regime (see section 912D in the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020*).

While introducing a threshold so that only the most serious matters require ASIC to convene an FSCP would limit the number of matters referred to the FSCP it would be contrary to Commissioner Hayne’s recommendation that minor misconduct should not go unaddressed.

Proposed criteria

ASIC must convene an FSCP if:

1. ASIC reasonably believes that the relevant provider has contravened a restricted civil penalty provision, or a circumstance prescribed in section 921K of the Bill exists or has occurred; and
2. ASIC has not exercised, and does not propose to exercise, any of its powers under the Corporations legislation (other than section 921S of the Corporations Act) against the relevant provider for the matter (such as making a banning order or pursuing civil penalty action); and
3. the contravention or circumstance:
 - a) has resulted in, or is likely to result in material loss or damage to clients;

- b) has resulted in, or is likely to result in a material benefit to the relevant provider;
- c) affects the suitability of the person to provide personal advice to retail clients in relation to relevant financial products;
- d) involves dishonesty or fraud;
- e) involves the provision of financial product advice to retail clients without being registered;
- f) involves the provision of financial product advice to retail clients without meeting the education and training requirements (other than the requirements for continuing professional development) in section 921B of the Corporations Act;
- g) involves the provision of a Statement of Advice by a provisional relevant provider that has not been approved by a supervisor required under subsection 921F(4) of the Corporations Act; or
- h) is a serious or repeated breach.

The following restricted civil penalty provisions in the Bill may not result in an FSCP being convened unless the breach meets the proposed criteria above:

1. a breach of the continuing professional development requirements;
2. a breach of the Code of Ethics;
3. a breach of the following provisional relevant provider requirements:
 - i. to ensure that appropriate supervision is provided to a provisional relevant provider;
 - ii. that a supervisor must ensure a retail client is informed about the provisional relevant provider;
 - iii. that a provisional relevant provider must not obstruct or hinder a supervisor of the provisional relevant provider in ensuring that appropriate supervision is provided to the provisional relevant provider.

The following matters under section 921K may not result in a panel being convened unless the breach meets the proposed criteria above:

1. a contravention of a financial services law (other than those specified in the Regulations);
2. the person has been involved in another's contravention of the financial services law; and
3. being twice linked to a refusal or failure to give effect to an AFCA determination.

Questions for stakeholders

1. Should the criteria include other specified breaches of the law such as other restricted civil penalty provisions or circumstances prescribed in section 921K of the Bill?
2. Should the proposed criteria be linked to the 'significance test' in the breach reporting regime?
 - The effect of this would be that every breach reported by a licensee to ASIC would then be required to be referred to the FSCP, if ASIC does not take other action (such as banning).
 - Complaints received by the public would also be subject to the 'significance test' in the breach reporting regime.
3. Should the terms 'serious' and 'repeated breach' be defined in Regulations? if so, how should they be defined?
4. Should the proposed criteria in (a) and (b) above be included as part of the definition of 'serious'? For example, "the contravention is a serious breach taking into account:
 - the material loss or damage to clients;
 - the benefit gained by the relevant provider; and
 - repeated breaches of a similar nature."

5. Should a repeated breach be interpreted as similar breaches that have occurred on two or more occasions and in a specific timeframe, such as in a 12-month period?
6. Should the proposed criteria in c) specify breaches that may affect the suitability of a person to provide financial product advice? For example, the person is not a fit and proper person taking into account the fit and proper criteria in the Bill, or the person has been involved in conduct that is dishonest or fraudulent.

Sanctions to be listed on the Financial Advisers Register

Operation of the Bill

New subsection 922Q(3) of the Corporations Act (item 73 of the Bill) provides that Regulations may prescribe the types of administrative sanctions that are to be included on the FAR.

These types of administrative sanctions are set out in new sections 921L, 921S and 921T of the Corporations Act (item 49 of the Bill) and include:

1. a written warning or reprimand by the FSCP or ASIC;
2. a written direction by the FSCP to undertake specified training;
3. a written direction by the FSCP to receive specified counselling;
4. a written direction by the FSCP to receive specified supervision;
5. a written direction by the FSCP to report specified matters to ASIC; or
6. a written registration suspension or prohibition order by the FSCP.

Under the Bill, the following disciplinary action taken by the FSCP must be included on the FAR and is not subject to Regulations:

1. details of an infringement notice after an individual has complied with the notice, along with the following statements:
 - that the adviser has complied with the notice;
 - that compliance with the notice is not an admission of guilt or liability; and
 - the individual is not regarded as having contravened the provision specified in the infringement notice.
2. a declaration by a court that the adviser has contravened a restricted civil penalty provision; and
3. details of an enforceable undertaking given to ASIC (under existing section 93AA of the ASIC Act) or the FSCP (under new section 171E of the ASIC Act – item 12 of the Bill).

Stakeholder feedback

As part of the consultation on the exposure draft legislation for the single disciplinary body, there were mixed views on whether all, or some, sanctions should be included on the FAR or should be removed after a period of time. The FAR is a searchable database which is available to the public.

Some stakeholders noted that minor sanctions or first-time offences being included on the FAR may have a negative effect on advisers relative to the gravity of the sanction or conduct. Other stakeholders suggested that all disciplinary action (even where a sanction was not imposed) should be made public.

Policy objectives

Commissioner Hayne stated that the single disciplinary body should have a range of sanctions varying in severity, the most serious of which must be cancellation of registration. The sanctions the FSCP can impose are based on ASIC Regulatory Guide 269 *Approval and oversight of compliance schemes for financial advisers*, and the types of sanctions code monitoring bodies would have been able to impose on advisers for breaches of the Code of Ethics.

Similarly, as was intended for code monitoring bodies, sanctions imposed by the FSCP will be listed on the FAR subject to Regulations. As Commissioner Hayne noted, this will “ensure valuable information about financial advisers is made available to the public”.

Under the Bill, the FSCP does not have discretion to decide which sanctions are to be included on the FAR. Additionally, any disciplinary action or sanctions that are included on the FAR, will remain on the FAR unless they are subsequently revoked by the FSCP. There is no power in the Bill for sanctions that are included on the FAR to be removed after a period of time, unless the sanction is revoked.

The proposal below seeks to balance consumer protection and public transparency recommended by Commissioner Hayne against any adverse reputational harm that may impact financial advisers that is not in proportion to the gravity of the disciplinary action.

Proposal

Mandate the following sanctions that are to be included on the FAR, including for first-time offences:

1. a written direction by the FSCP to undertake specified training;
2. a written direction by the FSCP to receive specified counselling;
3. a written direction by the FSCP to receive specified supervision;
4. a written direction by the FSCP to report specified matters to ASIC; or
5. a written registration suspension or prohibition order by the FSCP.

Administrative sanctions prescribed in the Regulations will be included on the FAR at the time they are made and are not contingent on compliance. They will only be removed if the sanction has been revoked by the FSCP. This would result in written warnings or reprimands issued by ASIC or the FSCP not being included on the FAR.