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

Financial advisers must be accountable for the advice they provide. As the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry found, too often financial services entities that broke the law were not properly held to account.¹

Out of self-interest, licensees have often been too soft on their advisers.² ASIC has not had the resources to pursue the number of complaints it receives³ and when it does, the entire process from breach to penalty typically takes years.

The single, central disciplinary body must resolve these issues. It must be consumer focused, efficient, timely and flexible to ensure all adviser complaints are received, triaged and resolved before long-term consumer detriment occurs.

The Financial Services and Credit Panel (FSCP) can form an important part in this process by driving a compliance culture through resolving complaints efficiently.

It is also important that ASIC and the FSCP are resourced to sufficiently investigate the number of complaints they will receive. ASIC's resources should be boosted so it can enforce bans quicker than they have in the past.⁴ For example, on May 6 2021 ASIC banned a Sydney adviser for eight years due to the falsification of client documents.⁵ This was due to conduct that occurred as far back as 2010. This may be due to a number of factors, such as becoming aware of the issue some time after the poor behaviour. But all endeavours must be made to ensure that once a complaint is made to ASIC, the decision to further investigate and the investigation reduces the lag between notification and when an initial compliance order is made.

¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report, p3

² Ibid, p201

³ Ibid, p216

⁴ Witness statement of Senior Executive Leader of ASIC's Financial Advisers Team to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

<https://financialservices.royalcommission.gov.au/public-hearings/Documents/exhibits-2018/27-april/EXHIB IT-2-247.pdf>

⁵<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-096mr-asic-bans-former-sydney-adviser-for-eight-years/>



We understand that the regulatory cost in the advice space is a concern for the Government and industry. The costs to effectively implement the FSCP are necessary to ensure consumers are adequately protected and will assist in restoring customer faith in the financial advice sector.

Super Consumers Australia and CHOICE support the passage of the Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 with appropriate amendments.

We make three recommendations to the Committee in relation to this Bill:

- Ensure the Panel has at least one member with consumer experience.
- Widen the scope to consider adviser misconduct prior to 1 January 2022.
- Continue to uphold the current FASEA standards as they are transitioned to the Minister.

Selection of panel members

The FSCP is to consist of an ASIC appointed Chair and at least two 'industry representatives' and each will be given an equal vote. This means the selection of appropriate panel members is crucial.

Currently, a person must have experience or knowledge in at least one of the following fields: business, company administration, financial markets, financial products and services, law, economics, accounting, taxation or credit services to be appointed by the Minister.

There must be a better balance of interests and voices, recognising that this panel serves to lift industry standards in the interests of consumers.

The selection and convening of panel members requires an individual with consumer experience. In recent history this sector has been plagued by a lack of consumer focus, with consumers charged approximately \$1bn in fees for no service.⁶ This behaviour has caused the industry significant and ongoing reputational damage. A renewed consumer focus, including on its disciplinary body will help the industry overcome this damage and restore customers' faith in the system.

Consistent with recommendations made by consumer advocacy bodies in 2017 when the Financial Services Panel was proposed, we recommend:

⁶<https://www.businessnewsaustralia.com/articles/fees-for-no-service-payouts-and-offers-approach--900m.html>



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- Ensuring the panel has balanced membership, meaning that industry, ASIC and individuals with consumer experience would have representation on the panel when it is convened;
- Minimum qualification and experience requirements for panel members, including a fit and proper person test;
- Treasury provide a transparent process for the selection of panel members by the Minister, and referral of matters to the panel for consideration by ASIC;
- ASIC give public guidance on expectations of panel members, including conduct requirements, tenure and whether their role will be full-time or part-time;
- Treasury to provide 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)
- ASIC publish clear conflict of interest guidelines, which ensure both direct and indirect conflicts of interest preclude panel members from participating in relevant decisions.
- Treasury amend any finalised 'Ready Reckoner' or FAQ consultation documentation which refers to 'industry representatives' as panel members. This documentation should be clarified to explain that panel members are to have industry expertise or experience and are not there to represent the industry.

Key amendment:

Proposed legislative amendment for Division 1 of the Bill - ASIC to convene panels:

- s139(3) to include 'at least 1 member to have consumer experience'.

Conduct before 1 January 2022

It is proposed that the single disciplinary body will not consider matters to the extent that they relate to the period on or before 1 January 2022.⁷

We see no justification for this restriction. Advisers are aware of the current legal framework that applies to them and there are no proposals to change these standards.

Financial providers have historically been very slow in identifying misconduct. ASIC analysed the breach reporting data from 2014 to 2017 of major financial services groups. They found it took over four and a half years after a significant breach occurred before it was identified by the

⁷ 1684H Application—action against relevant providers



institution.⁸ There is a significant lag between the occurrence of misconduct, the investigation and eventual resolution of that misconduct. If the body only considers matters on or before 1 January 2022, then misconduct is likely to be missed by this system and justice denied. This would create a significant gap in the adviser professionalisation and consumer protection regime.

Legacy complaints as far back as 2008 have been considered under AFCA's jurisdiction.⁹

AFS licensees have also been required to take reasonable steps to ensure that their financial advisers comply with the Code of Ethics from 1 January 2020, and financial advisers are still obliged to comply with the Code of Ethics from this date onwards.

Advisers should be held accountable to the standards that have been set for this industry. AFCA provides a legacy model which should be adopted. As such, if an obligation existed at the time that is within the FSCP's remit, and the breach has not been previously addressed, then it should be considered by this body. If the obligation did not exist, then there would be no remit for the FSCP to convene. This arbitrary start date will lead to consumer harm going unaddressed.

Key amendment:

Proposed amendment for s1684H - action against relevant providers:

- Replace '1 January 2020' with '1 January 2008' in relation to an act or omission by a relevant provider where a breach existed.

Transfer of FASEA to the Minister

The transfer of FASEA functions to the Minister must continue to uphold the educational and ethical standards that currently exist. A transitional period is not an opportunity for the advice industry to alter current FASEA functions.

If any changes are made to these standards because of industry advocacy during transition, the Minister should ensure that relevant experts and consumers are consulted.

For example, on June 24 the Minister announced that the Bill will give the Minister the power to extend the cut-off date for certain existing financial advisers to pass the exam. The Government

⁸ [18-284MR ASIC review finds unacceptable delays by financial institutions in reporting, addressing and remediating significant breaches](#)

⁹ Rules changes to consider Legacy complaints dating back to 1 January 2008, <https://www.afca.org.au/news/consultation/rules-changes-to-consider-legacy-complaints-dating-back-to-1-january-2008>



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will use a regulation power to extend the cut-off date to 30 September 2022 for advisers who have attempted and failed the exam twice prior to 1 January 2022. This has allowed advisers who have failed the professional standards exam of this industry to continue to advise consumers. We understand that the impact of the pandemic on advisers sitting exams needs to be taken into account, but equally there are impacts on consumers which also need to be weighed. Consultation on these issues is valuable, so that the impacts on consumers can be fully understood.

We recommend the Government take the following approach:

- FASEA standards are upheld during transition. Any necessary material change should require consultation with all relevant stakeholders.