



ASIC
Australian Securities &
Investments Commission

Senate Economics Legislation Committee

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

Submission by the Australian Securities and Investments Commission

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A Introduction and background

- 1 ASIC welcomes the opportunity to make this submission to assist the Senate Economics Legislation Committee with its inquiry into the Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021 (the **Bill**).¹
- 2 This submission sets out how certain components of the Bill operate and how they will be implemented by ASIC. Those components are:
- (a) the expansion of the Financial Services and Credit Panel (**FSCP**) (see paragraphs 8-13);
 - (b) the powers that the FSCP will be able to exercise in performing its functions (see paragraphs 14-22);
 - (c) warnings and reprimands given by ASIC (see paragraphs 23-26); and
 - (d) annual registration for financial advisers (see paragraphs 27-30).

ASIC's role

- 3 ASIC is established under the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**). ASIC is Australia's corporate, markets, financial services and consumer credit regulator.
- 4 Relevant to the Bill, the ASIC Act requires ASIC to strive to:
- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
 - (b) promote the confident and informed participation of investors and consumers in the financial system.
- 5 ASIC also has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.
- 6 In this role, ASIC administers the *Corporations Act 2001* (**Corporations Act**) and the provisions of the ASIC Act which are proposed to be amended by the Bill.

Overview of the proposed reforms

- 7 In December 2020, the Government announced that it would give effect to recommendation 2.10 of the Royal Commission into Misconduct in the

¹ Note: all section references in this submission are to the Bill.

Banking, Superannuation and Financial Services Industry (**FSRC**). The recommendation called for a single, central disciplinary body to be established for financial advisers and that all financial advisers who provide personal advice to retail clients be registered. The Bill gives effect to this recommendation by:

- (a) expanding the role of the FSCP by giving it its own functions and powers, including powers to address less serious misconduct;
- (b) winding up the Financial Adviser Standards and Ethics Authority (**FASEA**) and giving its functions to the Minister responsible for the Corporations Act and ASIC:
 - (i) the responsible Minister will perform the standard setting functions; and
 - (ii) ASIC will take over administration of the financial adviser examination; and
- (c) requiring the registration of financial advisers (similar to the way that other professions require annual registration as a condition of practice).

B Financial Services and Credit Panel

Expansion of the FSCP

- 8 The FSCP, as it currently exists, consists of a pool of industry participants that ASIC draws upon when convening a panel to consider whether to make a banning order. Each panel is comprised of two members from the FSCP pool and an ASIC staff member. A convened panel can only make a banning decision following delegation by ASIC of its financial services and/or credit banning power. The FSCP has no powers of its own. Decisions made by the FSCP are decisions of ASIC. Historically, the FSCP has not been used frequently by ASIC.² ASIC has only used the FSCP for matters which it considers to be appropriate for peer review because of their significance, complexity or novelty.³
- 9 The Explanatory Memorandum to the Bill states that the role of the FSCP has been expanded ‘to ensure that less serious misconduct does not go unaddressed’ (see paragraph 1.1 of the Explanatory Memorandum). This picks up on a recommendation by the FSRC that ASIC’s banning powers be supplemented with additional powers that are better suited to addressing less serious misconduct.⁴
- 10 Each panel of the FSCP will be comprised of an ASIC staff member, who will Chair the panel, and no less than two industry participants. The pool of industry participants who ASIC may select to sit on a panel will be appointed by the Minister.

Requirement to convene panels

- 11 The Bill states that ASIC ‘must’ convene a panel ‘in circumstances prescribed by the regulations (if any)’. ASIC considers that the circumstances in which it will be required to convene a panel of the FSCP is an integral part of the SDB regime. As there is presently no publicly available information about the regulations, this submission does not address this aspect of the SDB.
- 12 ASIC is working with Treasury to ensure that any regulations will effectively and efficiently implement the Bill.

² ASIC typically exercises its banning powers under s920A of the Corporations Act and s80 of the *National Consumer Credit Protection Act 2009* by delegating the power to a single ASIC delegate. A brief is provided to the ASIC delegate who then provides the banning candidate with the opportunity to appear at a hearing. [Regulatory Guide 8 Hearings Practice Manual](#) sets out the principles and procedures ASIC adopts in conducting administrative hearings. Following a hearing and consideration of any submissions that may be made, the ASIC delegate will proceed to make a decision. Banning decisions made by ASIC are reviewable by the Administrative Appeals Tribunal.

³ In light of the proposed changes to the FSCP, ASIC has allowed its arrangements with members of the FSCP to expire on 30 June 2021. As at 1 July 2021, there are no members of the FSCP. For further details see: <https://asic.gov.au/regulatory-resources/financial-services/financial-services-and-credit-panel/>.

⁴ See Volume 1 of the Final Report of the FSRC at p 215-216.

- 13 In the absence of regulations, ASIC will continue to have its current discretion to determine which matters it refers to a panel.

Powers to be given to the FSCP

Civil penalty proceedings

- 14 The Bill gives the FSCP the power to recommend, by written notice, that ASIC commence civil penalty proceedings if a panel reasonably believes that a financial adviser has contravened a restricted civil penalty provision (see s921Q).
- 15 When considering whether to commence civil penalty proceedings recommended by the FSCP, ASIC will, in accordance with the *Legal Services Directions 2017 (LSDs)*, be required to obtain its own legal advice. The LSDs require agencies such as ASIC to obtain written legal advice indicating that there are reasonable grounds for starting the proceedings prior to commencing civil penalty proceedings.⁵ In addition to the advice, ASIC will also take into account the range of matters it generally considers when deciding whether to commence civil penalty proceedings: see [Information Sheet 151 ASIC's approach to enforcement](#) for a detailed outline of the matters ASIC takes into consideration when determining what, if any, enforcement action to take.
- 16 ASIC is required to include details in its annual report to the Minister of any decision it makes not to follow a recommendation made by the FSCP to apply for a civil penalty (see s136(1)(d)).

Enforceable undertakings

- 17 The FSCP has the power to enter into enforceable undertakings (EU) (see s171D).
- 18 In accordance with the Government's policy intent, ASIC will be providing resources to the FSCP, including resources to draft EUs entered into by the FSCP.
- 19 ASIC will endeavour to agree guidelines with persons who are eligible to be appointed to a panel of the FSCP on when the FSCP will enter into an EU. We anticipate that these guidelines will have regard to ASIC's existing policy on when it will consider accepting an EU: see ASIC [Regulatory Guide 100 Enforceable undertakings](#), Section C.
- 20 Requests for variations or withdrawals of any EU entered into by the FSCP, where ASIC does not refuse the request, must be considered by the FSCP

⁵ See [4.7] of Schedule 1 to the LSDs

(see s171E). Further, monitoring compliance with and enforcing breaches of any EU that the FSCP enters into is the responsibility of ASIC (see s171E(5)).

Infringement notices

- 21 The FSCP has the power to issue infringement notices in specified circumstances (see s1317DAM(1A)).
- 22 ASIC will endeavour to agree guidelines with persons who are eligible to be appointed to a panel of the FSCP on when the FSCP will issue an infringement notice. We anticipate that these guidelines will have regard to ASIC's existing approach to infringement notices.

Warnings and reprimands by ASIC

- 23 ASIC must issue a financial adviser with a warning or reprimand where ASIC reasonably believes that:
- (a) The financial adviser is not a fit and proper person to provide personal advice or has contravened a financial services law (including a restricted civil penalty provision) or a specified circumstance set out in s921K exists (e.g. the adviser is insolvent, is convicted of fraud, has failed to comply with a determination made by AFCA etc); and
 - (b) ASIC does not intend to convene a panel or use any of its enforcement powers (i.e. seeking that a court impose a civil penalty) in respect to the misconduct: see s921S.
- 24 The FSCP has a similar power, however, it will be at the discretion of a panel whether to issue a warning or reprimand (see s921T).
- 25 In the circumstances, ASIC may be required to issue many written warnings or reprimands.
- 26 If ASIC gives a financial adviser a written warning or reprimand, ASIC must give a copy of the warning or reprimand *and* a statement of reasons to the financial adviser and the licensee (see s921S(2) and (3)).

C Registration of financial advisers

- 27 The FSRC recommended that all financial advisers who provide personal financial advice to retail clients be registered in the same way that other professions require registration with a central body as a condition of practice.
- 28 The Bill implements this recommendation in two stages:
- (a) The first stage requires licensees to apply to ASIC to register their financial advisers. ASIC is required to use the information provided to it by licensees to update its Financial Adviser Register (**FAR**).
 - (b) The second stage, commencing not later than 4 years after the Bill receives Royal Assent, will be administered by the Australian Taxation Office using the new Australian Business Registry System (**ABRS**) and, notably, will involve individual financial advisers applying to register themselves.
- 29 The FAR will be decommissioned following its transition to the ABRS. Both stages require attestations to be provided concerning compliance by a financial adviser with the applicable training and education standards, and the fitness and propriety of the financial adviser to provide financial advice.
- 30 To implement the first stage, ASIC will undertake an IT build to ensure that the FAR has the capability required.