



6 July 2021

Email: economics.sen@aph.gov.au
And via upload

Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senators

INQUIRY INTO FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE – BETTER ADVICE) BILL 2021

The Stockbrokers and Financial Advisers Association (SAFAA) is the professional body for the stockbroking and investment advice industry. Our members are Market Participants and Advisory firms that provide securities and investment advice, execution services and equity capital-raising for Australian investors, both retail and wholesale, and for businesses. Practitioner Members are suitably qualified professionals who are employed in the securities and derivatives industry.

SAFAA members represent the full range of advice providers from online brokers providing execution only services to full-service stockbroking and investment advice.

Thank you for the opportunity to provide feedback on the *Financial Sector Reform (Hayne Royal Commission Response – Better advice) Bill 2021* (the Bill).

SAFAA provided comprehensive feedback to Treasury on the exposure draft bill on 14 May 2021. A link to that submission is [here](#).

Overview

SAFAA welcomes the wind-up of FASEA.

FASEA's lack of understanding about how stockbroking and investment advice differs from financial planning has led to a 'one-size-fits-all' approach to financial advice that is negatively impacting the stockbroking and investment advice profession as well as retail investors. This lack of understanding is shared by Treasury, government and regulators.

The stockbroking profession has existed for many centuries and is highly regulated, governed by the ASIC Market Integrity Rules, the operating rules of the various market operators such as ASX, Chi-X and NSX and the Corporations Act. The profession has made an incredible contribution to Australia's economic strength, not only in terms of personal wealth creation, but also in all-important equity formation for Australian companies, ranging from CSL, BHP and CBA down to the smallest and smartest technology and science successes.

The financial planner provides an overall, holistic plan in relation to investment needs, superannuation and insurance. Stockbrokers and investment advisers provide advice, execution and management in relation to the investment component and this is largely in the listed equities and fund markets. The assumption that stockbrokers and investment advisers must provide full-scale financial planning style advice completely misunderstands that holistic advice is provided at a firm level rather than at an individual one. Generally, stockbrokers and investment advisers will work with a financial planner within their firm or externally if holistic advice services are required. Consumers want different advice for different needs and the regulatory environment needs to accommodate consumer preferences and requirements and not seek to shoehorn all consumers into one advice service.

FASEA's one-size-fits-all approach, which was to apply a financial planning lens to all aspects of financial advice, resulted in a requirement that stockbrokers and investment advisers must complete a financial planning degree before they can provide personal advice to retail clients. FASEA's refusal to recognise the existing qualifications of stockbrokers and investment advisers — degrees from top tier universities in subjects suitable to operating in markets — coupled with a mandatory exam, the content of which is largely irrelevant to their day-to-day business, is causing an accelerating exodus from the industry of experienced, retail advisers. It is one of the matters impacting the ability of SAFAA members to continue to provide good quality, affordable advice to retail clients. For the reasons set out above, SAFAA supports the wind-up of FASEA.

Executive summary

SAFAA calls on the government to make changes to the Bill to take into account the following key issues for SAFAA members:

Single Disciplinary Body

- Before imposing an administrative sanction, the written notice of the proposed sanction must also be sent to the licensee as well as the adviser. It is important that the licensee be aware of any proposed sanction that may be imposed on their adviser and the contravention to which it relates as it may impact a licensee's Professional Indemnity insurance.
- That the Panel not consider any disciplinary action arising from a possible breach of Standards 3 or 6 of the FASEA Code of Ethics until the Code has been reviewed by Treasury in its role as the standard setter for the Code.

Registration of financial advisers

- The obligation to register a financial adviser must sit for more than four years with the financial services licensee on whose behalf the adviser is authorised to provide personal advice to retail clients. This is central to how the stockbroking and investment advice industry is structured differently from the financial planning industry.
- Membership of a professional association must be retained as a field on the FAR. Membership of a professional or industry association is an important aspect of professionalism and an important signal to consumers.

Wind-up of FASEA and transfer of standard functions to the Minister and ASIC

- We support the wind-up of FASEA and transfer of standard functions to the Minister and ASIC.

Regulation of tax (financial) advisers

- Remove the requirement for additional education and training standards for tax (financial) advisers. Singling out tax (financial) advisers for additional education and training requirements is duplication of regulation.
- A solution must be found that enables advisers who don't provide advice to retail clients and are not on the Financial Adviser Register (FAR) to continue to provide tax (financial advice) to wholesale clients. This is a clear example of how our industry differs from financial planning and more context is provided below.

Our detailed feedback on the Bill is set out below.

Detailed comments

Single disciplinary body for financial advisers

What kinds of matters can be referred to a Panel?

SAFAA previously voiced our concern that both ASIC and the panel will become overwhelmed if all contraventions of a financial services law are captured by the regime without a materiality threshold being applied to ensure that minor and administrative breaches are either filtered out or dealt with expeditiously. It is important the system not become clogged with minor, technical or inadvertent breaches that would not otherwise be significant. SAFAA welcomes the change to the bill that provides ASIC must only convene a panel in prescribed circumstances. We hope that this ensures that the Panel only deals with material matters.

FASEA Code of Ethics

We note that a failure to comply with the FASEA Code of Ethics is a contravention of a restricted civil penalty provision that allows the Panel to issue an infringement notice, take other administrative action or recommend to ASIC that it seek a civil penalty.

SAFAA has consistently voiced its serious concerns that elements of the Code are unworkable and conflict with the law.

Standard 3 of the Code that imposes a blanket prohibition on any conflict of interest is impossible to comply with and conflicts with the law. The range of circumstances in which an adviser could be called upon to give advice; the range of factors that could potentially be viewed as a conflict (for example, an interest in the underlying securities such as when a broker provides advice while having a personal holding in the stock); and the fact that the Code is a legislative instrument drafted in black and white terms mean that the obligation to avoid any conflict of interest operates fundamentally differently in the financial services profession from how such a duty operates in other professions. The interests of a client must be given priority. However, giving priority to client interests will, on occasion, conflict with personal and other interests.

Avoiding any conflict of interest is impossible under the Code, given that the test in Standard 3 has no element of materiality or proportionality.

SAFAA has recommended in submissions to FASEA that the Code should utilise the wording of the Intent to the Standard as Standard 3, so that the Standard states: 'Advisers must not advise, refer or act in any other manner where they have a conflict of interest or duty that is contrary to the client's best interests.' This gives effect to the intent of the FASEA Board without conflicting with the corporations law. That is, it is only when a client's interests

cannot be prioritised that the conflict must be avoided. This is the correct legal position and achieves the outcome sought.

Standard 6 of the Code conflicts with the provision of scaled advice and is inconsistent with section 961B of the Corporations Act (the ‘best interests duty’). It requires a stockbroker to consider the ‘broader long-term interests’ of the client. Stockbroking involves the provision of scaled advice hundreds of times a day. A client may want to purchase 1000 BHP shares at a particular price, irrespective of whether it fits the weighting of the portfolio, or a client may want to trade in speculative stocks, or Exchange Traded Options, seeking short-term profits. They do not want consideration of their broader, long-term interests or likely circumstances. Standard 6 is tailored to the need to consider a client’s long-term interests and circumstances as required in financial planning, but does not accommodate clients wanting to access scaled advice.

While Standard 6 remains unchanged, stockbrokers and investment advisers providing scaled advice risk being found to be in breach of the standard and being subjected to disciplinary action.

SAFAA recommends that the Panel not consider any disciplinary action arising from a possible breach of Standards 3 or 6 until the Code has been reviewed by Treasury in its role as the standard setter for the Code.

How are matters considered?

SAFAA recommends that the quorum for Panel decisions comprise three panel members, including the Panel chair. This is important as the chair has both a deliberative and a casting vote to resolve deadlocks. If a Panel member is not entitled to be present at a meeting due to the disclosure of a conflict and has to withdraw, the current provision would allow a Panel of two members to exercise the Panel’s powers. In light of the chair’s deliberative and casting vote, the ASIC staff member would make the decision in the event the chair and the industry panel representative disagreed. This may not result in a fair outcome.

What actions can a Panel take?

We note that regulations may prescribe the kinds of instruments, which if made against a financial adviser, must be included by ASIC on the FAR, including warnings or reprimands given by a panel or by ASIC. SAFAA does not consider that details of a first offence or a breach of a minor, immaterial matter should be included on the FAR. Consumers will be overloaded with information if non-material contraventions are included on the FAR which will defeat the purpose of the FAR to provide a service assisting consumers to find an adviser to meet their needs. Moreover, the issue of detriment to the consumer should sit at the heart of the Panel’s work and the importance of determining sanctions in such cases could be lost in a welter of minor matters that have no financial impact on or harm to clients (for example, a Financial Service Guide being sent to the client three days late).

Before making an instrument taking administrative action or issuing an infringement notice, the Bill currently requires the Panel to give the financial adviser a written notice of the proposed sanction, including various details. SAFAA strongly recommends that the written notice of the proposed sanction must also be sent to the licensee. It is important that the licensee be aware of any proposed sanction that may be imposed on the adviser and the contravention to which it relates. The fact that an adviser may be subject to a sanction may impact a licensee’s Professional Indemnity insurance.

The licensee also needs to know if there has been a contravention of the law within its organisation as it may decide to:

- provide assistance to the adviser with their submission or appear with them before the panel

- take action against the adviser
- provide other training or support to assist the adviser with their compliance
- provide training more generally to its financial advisers if the matter so warrants.

We recommend that when making determinations, the Panel should have reference to actions taken by the licensee against the adviser relating to the conduct under investigation including:

- administrative sanctions
- other remedial action including training and supervision
- loss of financial benefit that the person directly or indirectly obtained
- compensation of any client that suffered loss or damage directly as a result of the breach.

What actions can ASIC take?

SAFAA is supportive of the changes to the bill that provide that ASIC must give a written warning or reprimand if it reasonably believes that the adviser is not a fit and proper person to provide financial advice to retail clients, has contravened a 'restricted civil penalty provision' or a 'specified circumstance' exists or has occurred without having to convene a panel or exercise its other powers.

We consider that this is a sensible way of triaging minor matters and ensuring that a panel is only convened for more serious contraventions.

Registration of financial advisers

What is the process?

SAFAA considers that the obligation to register a financial adviser must sit for more than four years with the financial services licensee on whose behalf the adviser is authorised to provide personal advice to retail clients.

SAFAA disagrees with the two stage registration approach adopted by the bill.

We accept that other professional associations have called for the adviser to be responsible for their registration, pointing to this model operating in other professions. However, individual registration by individual advisers does not take into account the diversity of the financial advice services sector.

AFSL holders are subject to the licensing obligations in section 912A of the Corporations Act including the obligations to:

- take reasonable steps to ensure that their representatives comply with financial services laws
- have adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements.

The obligation to register advisers falls within and is consistent with these obligations.

Importantly, the licensee undertakes active oversight of the adviser to ensure they are fulfilling their obligations in relation to the fit and proper declaration as well as education and CPD obligations. The process of checks that attends adviser registration by the licensee is an important aspect of securing Professional Indemnity insurance, as insurance firms need to confirm that licensees have active oversight of their advisers. SAFAA is concerned that obtaining Professional Indemnity insurance, which is already challenging, will become even more difficult if the licensee cannot provide evidence to the insurer of its active oversight of adviser registration.

We are also concerned that some member associations in the financial advice services sector are conflating individual registration of advisers with individual licensing. SAFAA strongly disagrees that licensing of individual advisers is appropriate for the stockbroking and investment advice industry. It is important that the government

recognises the differences between stockbroking and investment advice firms and many financial planning businesses and takes this into account when considering the role of the licensee.

The Minister is on record as stating that 90% of financial planning businesses are small businesses. Stockbroking and investment advice firms, on the other hand, are generally large businesses and becoming larger, given they operate in global markets and provide time-related advice, including reaching out to thousands of clients instantly for capital raisings and rights issues. The investment required for such firms is very different to the investment required for financial planning firms providing advice on taxation and superannuation law. Amalgamations are underway to provide scale in the stockbroking and investment advice industry to meet those investment requirements. Efficiency in larger firms is generated through active oversight by compliance departments.

We consider that it is important to retain the following benefits of the Australian Financial Services License:

- AFSL holders are required to have adequate resources to hold their licence and are more likely to have adequate resources to remediate consumers and viable models for supervising, monitoring and equipping advice professionals.
- Licensees are required to hold Professional Indemnity insurance that carries minimum capital requirements to finance excesses on claims.

We consider that the following are disadvantages of individual licensing:

- It is unreasonable for ASIC or or the Single Disciplinary Body to supervise and monitor 20,000 individual advisers.
- Individual licensing could create a moral risk for consumers if individual advisers exit the industry leaving consumers orphaned and unremediated for misconduct.
- The requirement to have and maintain an AFSL at an individual level lacks economies of scale and has high monetary and time costs. These costs will ultimately be passed on to the consumer.
- Self-licensing would mean that individual advisers are required to source their own Professional Indemnity insurance to cover individual risk.
- Financial services is a highly regulated industry with complex and onerous regulatory requirements that are difficult for individuals to manage.

SAFAA does not consider that the arguments put forward in favour of individual licensing by various industry bodies improve consumer protection. We remain concerned that the call for individual registration of advisers is frequently conflated with a call for individual licensing — hence our comments in this section.

What information will be available on the FAR?

We note that the FAR currently includes a section that contains details of an adviser's membership of professional bodies or associations relevant to providing financial advice services. However, the Bill does not include that this field be required on the FAR.

Membership of a professional association is an important aspect of professionalism and SAFAA strongly recommends that this part of the FAR be retained. It is an important signal to consumers. We note that no explanation has been provided as to why this field is not being retained.

Wind-up of FASEA and transfer of standards functions to the Minister and ASIC

SAFAA welcomes the winding up of FASEA and the transfer of standards functions to the Minister and ASIC.

FASEA's 'one-size-fits-all' approach to financial advice evidences its lack of understanding about how stockbroking and investment advice differs from financial planning and has negatively impacted the stockbroking and investment advice profession. FASEA applied a financial planning lens to all decisions concerning the exam, the education requirements and the Code of Ethics. We therefore hope that the transfer of standard setting will result in a move away from a 'one-size-fits-all' approach to one that recognises that consumers want different advice for different needs and the regulatory environment needs to accommodate consumer preferences and requirements and not seek to shoehorn all consumers into one advice service, with attendant increase in costs.

The FASEA Code of Ethics

As discussed previously in this submission, Standard 3 of the Code must be amended and Standard 6 removed. SAFAA has advocated for these changes for some time. SAFAA is of the view that the transfer of standards function is an opportune time to make these changes once the Bill comes into effect. We make further comment on the impact of FASEA's financial planning lens on education and exam requirements in **Appendix A**, to highlight why we are of the view that the transfer of standards function to Treasury and the Minister is an opportune time to not repeat the mistakes made by FASEA but implement professional standards geared to relevant professions.

What standards function will ASIC perform?

SAFAA welcomes the transfer of the administration of the financial adviser's exam that has been approved by the Minister to ASIC. One issue with FASEA administering the exam has been its lack of resources. Once ASIC is responsible for administering the exam there should be no excuse for tailored and bespoke scenarios not being provided in the exam that would make it fit for purpose for stockbrokers and investment advisers, including new entrants to the industry.

Tax (financial) advice services

SAFAA welcomes the elimination of the duplication imposed by the *Tax Agents Services Act* on financial advisers providing tax (financial) advice. Financial advisers providing tax (financial) advice are already captured under the FASEA education framework, requiring the adviser to have completed education in tax law, and tax (financial) adviser relevant CPD requirements for ongoing training in tax advice. Singling out tax (financial) advisers for additional education and training requirements is therefore duplication. Accordingly, SAFAA strongly recommends that the additional education and training standards set out in the bill be removed.

Providing tax (financial) advice to wholesale clients

SAFAA is an accredited professional association with the Tax Practitioners Board, and many of the advisers employed by our Principal Members and many of our Practitioner members provide tax (financial) advice. The tax (financial) advice provided by stockbrokers and investment advisers is incidental tax advice, primarily relating to franked dividends and capital gains or losses from the sale of listed investments.

The Bill provides that that from 1 January 2022 a tax (financial) adviser will no longer need to be registered with the Tax Practitioners Board. The adviser will automatically be registered with ASIC on the FAR until the existing registration ends. The Bill provides that if a tax (financial) adviser provides tax financial advice they need to be either a tax agent or a tax relevant provider (that is, be subject to the FASEA regime).

We are currently engaged in discussions with Treasury and the Tax Practitioners Board about how the Bill will impact investment advisers who only advise wholesale clients and accordingly are not on the FAR and not

otherwise caught by the Bill. The Bill is not designed to cover advisers who only provide advice to wholesale clients and are not 'financial advisers' as defined by the Corporations Act.

We are of the view that the Bill was developed with the financial planning industry in mind rather than consideration of how our industry is structured differently because it provides a different financial advice service. It is important that a solution is found that enables advisers who don't provide advice to retail clients and are not on the FAR to continue to provide tax (financial advice) to wholesale clients. Without such a solution, wholesale investors will suffer.

Conclusion

SAFAA is happy to discuss any of these issues in further detail.

Kind regards

Judith Fox
Chief Executive Officer

Appendix A

The impact of the FASEA educational requirements

Unfortunately, the lack of understanding by the FASEA Board of how securities and investment advice, execution services and equity capital raising for Australian investors is a different service from financial planning, has led to educational standards being adopted that assume financial planning is the core education for all forms of financial advice. This has negatively impacted the stockbroking and investment advice industry as our members have been caught up in reforms aimed at financial planners. SAFAA supports high educational standards but disagrees with the way in which FASEA has interpreted and applied the education and exam provisions in the Corporations Act.

We have urged the government to step in and make changes to the Legislative Instruments implementing the education standard once FASEA has been disbanded in order to address the many issues FASEA has created through its implementation of the educational requirements and the manner in which FASEA's financial planning lens has negatively affected the stockbroking and investment advice, accounting and risk advice professions.

Approved degrees

SAFAA has long advocated for commerce, economics, business and finance degrees from established Australian universities to be included in the FASEA list of approved courses – financial planning qualifications must not be the only approved courses for financial advisers.

Currently, all FASEA-approved degrees are in financial planning or with financial planning majors (with one exception, being a wealth management degree from UNSW), notwithstanding that the Corporations Act does not require financial planning qualifications to be the only approved courses for financial advisers. The legislation provides that a 'degree equivalent' is required – it does not specify the narrowness of a financial planning degree, which are not awarded by universities ranked in the top 100. FASEA's Board, which included financial planning academics who had compiled the curriculum for the Financial Planning Association, simply adopted that same curriculum for FASEA, thus narrowing the scope of the approved qualification. The issuers of those degrees did not have to apply to FASEA for their courses to be approved.

Degrees in economics, finance, commerce and business from all Australian universities, particularly those from universities rated in the top 100 – qualifications which until now have been considered most suitable to a profession in investing – have not been approved by FASEA. Those working in the stockbroking and investment advice industry need to be able to read and understand the financial statements of companies, consider companies' balance sheets and digest considerable amounts of financial material, frequently provided in chart form. They need to be able to conduct due diligence on IPOs and capital raisings in order to assess if such offers provide an investment opportunity. This is why the degrees listed above are suitable for our industry. Financial planning degrees do not provide the appropriate educational qualification for working in stockbroking or investment advice.

However, the degrees suitable to our industry are only considered to be 'relevant' degrees by FASEA, the individual units of which counts towards a FASEA-approved degree equivalent. FASEA refuses to approve these degrees and has stated that universities must apply to FASEA for their degree to be considered as an approved course, despite the fact that the universities with degrees included in the Financial Planning Association curriculum did not need to apply for approval. Our members have informed us that some of their advisers have approached an established university and asked for their economics and business degrees to become FASEA-

approved. The university concerned advised that it would not go through the accreditation process. This highlights that it should not be up to the universities to apply to FASEA for approval, particularly in light of the legislation requiring a 'degree equivalent' and not a financial planning degree.

The outcome of the decision by the FASEA Board not to approve economics, finance, commerce and business degrees from all Australian universities is that an individual holding a Bachelor of Economics or Finance from Melbourne University is considered less qualified to provide stockbroking or investment advice than one with a Bachelor of Property (majoring in financial planning) from Central Queensland University. The individual in this example who completed the Central Queensland University course need only complete the Ethics unit of study to become FASEA-qualified. Those with 'relevant' degrees in other subjects from universities (such as a Bachelor of Commerce or a Masters of Finance) must at a minimum do three additional subjects (plus ethics) as they only receive four credits, when all 'approved' financial planning degrees receive seven credits.

This has created an uneven playing field which favours financial planners over investment advisers.

We have numerous case studies of advisers from a range of different firms who have significant undergraduate and postgraduate education qualifications in commerce, economics, finance and business from Australia's most established universities who are required by FASEA to undertake a minimum of three additional units of study (plus ethics) because their qualifications are not approved by FASEA. To summarise, the unaccountable body FASEA has decreed that degrees from our top tier universities which have been approved by TEQSA, the national education regulator, do not 'make the cut' as a 'degree equivalent' as required by the legislation. We query why FASEA should be considered as a more suitable judge of educational qualifications than the national education regulator to which all universities are accountable.

SAFAA has called on FASEA to include commerce, economics, business and finance degrees from established Australian universities to the approved list of courses. FASEA has refused. FASEA maintains its belief that financial planning is core education for all forms of financial advice, rather than recognising that financial planning is itself a specialisation. We note that the FASEA Board comprised financial planning academics and representatives from financial planning, as well as consumer groups, but did not include expertise in either the retail stockbroking and investment advice industry or the educational qualifications best suited to that sector. Executive staff responsible for recommendations on education came from a financial planning education background.

Financial planning degrees and postgraduate diplomas are not the foundation education for the entire advice industry. Financial planning is already a specialist area of advice. In medical terms requiring stockbrokers and investment advisers to undertake financial planning degrees is akin to making orthopaedic surgeons undertake training in pathology. We strongly support the financial planning profession and education qualifications to enter it. We note that the impetus for legislating education requirements for financial advisers was due to salespeople with no formal education in financial advice calling themselves financial planners, which resulted in harm to consumers.

The discriminatory approach from FASEA has another serious consequence, which is that top graduate talent is being deterred from entering the stockbroking and investment advice profession, to the detriment of investors. A graduate with a finance, economics, commerce or business degree from a top globally ranked university will essentially have to 'start from scratch', that is, they will have to complete an unrelated second Graduate Diploma in financial planning before they can remain in or enter the stockbroking industry. The lack of current Professional Year provisional advisers in the stockbroking and investment advice sector clearly demonstrates this. In a recent SAFAA member survey we found nine Professional Year candidates in the stockbroking and

investment advice industry and only 20 are expected to enter in 2022 (with one firm bringing on the majority of candidates). The supervision program for any aspiring new entrant to the industry will be extremely difficult. There will be lower numbers of remaining advisers, and those who do remain will have higher client numbers, therefore having less time to mentor and be involved in supervision.

This indicates that the number of advisers leaving the industry will not be replaced. It is further anticipated that more mature advisers who complete and pass the exam and continue to work thereafter will decide not to complete further education resulting in even greater numbers of advisers departing the industry in the lead up to the 2026 education deadline.

SAFAA members report that the loss of experienced advisers due to the FASEA educational requirements is a top risk on their risk registers. Stockbrokers who have been providing advice for many decades, with longstanding clients who are deeply satisfied with the service they receive, find it incomprehensible that they should have to undertake educational qualifications in financial planning in order to retain their livelihood. They will therefore retire from the industry rather than face the humiliation of being required to train for a financial advice service so different from the one they provide and which they have no desire to offer.

Furthermore, highly experienced advisers who leave the industry as well as those who remain but do not complete the educational requirements will be unable to supervise the next generation of advisers. This will be a huge loss to the industry as those people who would normally act as senior mentors will effectively be unable to supervise the next generation coming through. The task of mentoring will fall to a smaller pool of advisers. Mentoring requires the mentor to take time out from providing advice, thus placing more pressure on advice costs and availability.