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Senate Standing Committees on Economics
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Senate Economics Committee Inquiry - Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 – Supplementary Submission

We thank the Senate Economics Committee for the opportunity to present at the hearing on 16 July 2021 and to provide further feedback on the Financial Sector Reform (Hayne Royal Commission Response - Best Advice) Bill 2021. The Senate Committee Inquiry process has been very beneficial in identifying a number of key issues and likely unintended consequences.

Introduction

Whilst we have expressed support for the intent of the Single Disciplinary body, we do believe that it needs to be an appropriate and cost effective solution that is focussed upon the more serious misconduct and not minor and administrative matters. In responding to this we are very cognisant of the significant cost pressure that financial advisers are under, which has increased substantially during the course of 2021 in the face of a 112% increase in the ASIC Funding Levy, the Annual Renewal obligations commencing and the additional costs of the Single Disciplinary Body and the Compensation Scheme of last Resort which are set to impact the profession in 2022. Licensees should remain responsible for addressing the minor and administrative issues.

This is a complex piece of legislation and we suspect that the impact of it is not fully understood by all stakeholders. We repeat our core point that the Bill will require all breaches of the law, no matter how minor or administrative to be considered by either ASIC or a Financial Services and Credit Panel (Panel). Section 139(2) of the ASIC Act only talks to what matters must be reviewed by a Panel. It does not exclude any matters from what could be considered by a Panel nor address the fact that any breaches of a financial services law must be considered by ASIC, if they are not referred to a Panel. There is no mechanism to treat minor and administrative matters, in bulk, through a no action pathway.

We believe that the single Disciplinary Body (SDB) should be focussed on serious misconduct, particularly where client detriment is involved. We also believe that it is essential that the SDB can prioritise serious matters and undertake timely investigations to quickly address the risk of systemic issues and further misconduct and client detriment. An SDB that is overwhelmed with minor and administrative matters will struggle to efficiently triage the more important matters.

Our Recommendations

We will take this opportunity to repeat our recommendations, which are as follows:

- Minor and administrative matters should not be reported to or considered by the FSCP.
- The inclusion of matters considered by the Single Disciplinary Body (SDB) should align with the scope of the new breach reporting regime, even though in our view there will inevitably be major issues with what is being captured under breach reporting.
- All FSCPs should have at least 3 members for all decisions.
- There needs to be greater certainty with respect to what the likely penalties might be for specific types of matters.
- Infringement notices should not be used for minor and administrative matters, nor for breaches of the Code of Ethics.
- The costs of operating the Single Disciplinary Body need to be sensibly controlled.
- The proceeds of any infringement notice penalties should be applied to offset the cost of the SDB scheme.
- There should be no additional education and training standard for tax (financial) advisers.

Recommended Changes to the Legislation

To address our key recommendations, we propose the following amendments to the legislation:

- Section 139(1) of the ASIC Act should be modified to be clear that a panel can only be convened where there are reasonable grounds to believe that one of the matters addressed in Section 921K has arisen.
- Section 921K(1)(d) of the Corporations Act should be amended to state “the panel reasonably believes that the relevant provider has contravened a financial services law that is reportable under section 912D (including a restricted civil penalty provision)”
- A similar limitation should be applied to Section 921K(1)(e).
- Section 921S(1) of the Corporations Act should be amended from “ASIC **must** give a written warning or reprimand”, to “ASIC **may** give a written warning or reprimand”.
- Section 921S(1)(a)(ii), should be amended to align with Section 921K(1)(d) and refer to matters that would be reportable under Section 912D.
- Remove Section 922Q(2)(ud) on recording infringement notices on the Financial Adviser Register (FAR), given the extent of disclaimers required.
- Remove Section 922Q(3)(b) and Section 922Q(3)(c) on recording warnings and reprimands on the FAR.

Tax (Financial) Adviser Legislative Changes

We recommend the removal of tax (financial) advice services entirely from the TASA, and therefore, by extension, from the ASIC Act and the Corporations Act. This will require broader changes, however key amongst our recommended amendments would be the following:

- Section 910A - remove the definition of “qualified tax relevant provider”.
- Remove Section 921BB on additional requirements for relevant providers who provide tax (financial) advice services.
- Remove Section 921R on notices to the TPB.

Tax Practitioner Considerations

We strongly recommend that tax related knowledge and training requirements be incorporated into the core obligations, and not be set up as additional and secondary requirements. We were pleased to see that the submissions from CPA Australia and the IPA supported this position, noting that much had changed since 2014, when financial advisers were incorporated into the TASA regime. With the support of these two major accounting bodies, this seems like an obvious option to reduce unnecessary complexity and cost. Given all the other consumer protection measures, there is no consumer downside in making this change.

In the absence of making this amendment to fully separate financial advice from the TASA regime, there are other important tax (financial) adviser issues that need to be addressed, including:

- Under the TASA/TPB regime, licensees and Corporate Authorised Representatives (CAR) are registered with the TPB. The changes to the law appear to address the partial removal of individual financial advisers from the TASA/TPB regime. It does not address the issue of licensees and CARs. Licensee and CARs are unlikely to qualify as tax agents, so this creates a material problem.
- Financial advisers who provide personal advice, that involves tax (financial) advice services to wholesale only clients, are not required to be registered on the FAR. Under this legislation they would not be able to continue to be registered with the TPB unless they qualified as tax agents.
- There are a large number of financial advisers who are not registered with the TPB, as they operate under the ‘sufficient numbers’ model, and are supervised by someone who is registered. The “qualified tax relevant provider” model does not allow for a similar supervision model, which would leave a gap for these advisers who are currently covered through ‘sufficient numbers’.

Licensee Controls and Other Consumer Protection Measures

We are conscious that some stakeholders will expect that the SDB will review all breaches of the law. We therefore believe that it is important that there is an adequate understanding of the level of minor and administrative matters that exist and the fact that there are other mechanisms that exist to address these minor and administrative matters. We spoke during the hearing about the complexity of financial advice and the ease with which compliance breaches might arise. Some examples include:

- An adviser not issue an updated Financial Services Guide (FSG) due to failing to recall when the client was last provided a FSG and when they last interacted with them. FSGs do change on a regular basis, and often the change is relatively minor.
- A similar issue could arise with respect to further investment advice and the need to provide an updated Product Disclosure Statement. When an adviser recommends a broad range of products, they may not recall when one was last updated.
- A calculation error or timing difference in the production of a Fee Disclosure Statement (FDS) that results in a minor error in the fees reported in an FDS, or a delay in the issue of an FDS.

It is important to understand that licensees do have processes in place to address issues that emerge through the audit process and those that are reported through other processes, such as the issues process that licensees employ. Where issues are identified through the audit process, remediation plans are developed and licensees will follow through to ensure that the necessary actions are taken in a timely manner. Licensees maintain a breaches register to monitor issues and a history of compliance problems with each adviser. These are some of the important control measures that operate at the licensee level, enabling them to take appropriate disciplinary action.

The Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 includes additional provisions to ensure that clients are notified, investigations are undertaken and remediation takes place. These provisions are due to commence on 1 October 2021. They provide another layer of consumer protections that are managed at the licensee level.

Clarification on Rights on Submissions, Hearings and Reviews

We note that there appears to be a lack of certainty about where an adviser has a right to make a submission or to attend a hearing or have the option of a review. We made the point during the hearing, that an adviser who was given a written warning or reprimand under section 921S of the Corporations Act, did not have a right to defend themselves. This is quite separate from matters that are considered by an FSCP, where these rights do exist. When this issue of a right to a hearing or fair process was discussed with ASIC later in the hearing, they did not provide the necessary clarity in the case of a matter dealt with by ASIC. Please see the relevant section below:

Senator WALSH: I think the concern is in two parts. One is an ability to be advised of a minor matter and be able to have access to some sort of fair process around it. The second is about the minor matter being recorded on the register.

Ms Bird: There is one part where ASIC will have to give warnings and reprimands if it reaches a certain state of conviction that misconduct has happened and it is not taking other matters. In those circumstances it will issue a warning or reprimand to the relevant adviser, and the panel will also do the same. The circumstances in which those minor warnings will appear on the actual register, honestly, I'm going to have to take that on notice or ask Martin if he knows.

Mr Stockfeld: The FSCP does not currently have discretion in matters that are put on the FAR and that will be left up to the regulations. Currently, much like the other regulations concerning the convening of panels, they are yet to be exposed. The second point I would make is that when the panel issues a proposed warning notice, it will set out whether or not it is proposed that the decision will be put on the FAR. So in that way the adviser would have an opportunity to either make submissions or appear at a hearing, including on whether or not the decision should be on the FAR. Treasury will need to work out how that interacts with the regulations which are to be made. I hope that answers your question.

ASIC did not answer this question with respect to the rights of defence and review under Section 921S. Evidently there are no rights or opportunity to respond or defend themselves. We highlight the following relevant points:

- Hearings and submissions only apply to matters addressed by a Financial Services and Credit Panel, not a warning or reprimand matter considered by ASIC under Section 921S.
- Section 921V on Review of decisions and the ability to appeal to the AAT, only applies to decisions made by an FSCP, and not decisions made by ASIC under Section 921S.

We therefore re-state our point that matters that are reviewed by ASIC and result in a written warning or reprimand should not be recorded on the Financial Adviser Register. This also reinforces our view that ASIC should have the option to take no further action with matters that they choose not to refer to an FSCP.

Regulation Impact Statement

We noted the discussion with ASIC on the lack of additional resources that have been provided and the potential impact on the ASIC Funding Levy, that included the following exchange:

Ms Bird: ASIC's activities are largely funded by industry, and, under the industry funding model, they're funded by the industry to which the actual regulatory activity relates to. To the extent that this bill may mean that ASIC will spend more of its resources on the financial advice population, then the financial advice population will pay more under the industry-funding model.

Senator PATRICK: So we're going into this a little bit blind, and, in some sense, there are questions as to why Treasury haven't provided the necessary details or, indeed, the regulation impact statements. Alright, I might leave it there, Chair. I'll save my questions for Treasury.

The discussion with Treasury also addressed the lack of a Regulation Impact Statement:

Senator PATRICK: We heard from ASIC, and we heard concerns from industry, who noted that they generally end up having to pay the regulatory price. This may require additional resources. I'm just wondering why a regulatory impact statement wasn't produced.

Ms Zaheed: As the explanatory memorandum outlines, the bill is compliant with the requirements of the Office of Best Practice Regulation. This was a recommendation coming out of the royal commission, and the government's implementing that. The royal commission final report and the work that was done by Commissioner Hayne have been certified to meet the requirements of the OBPR. Similarly, the work that was done on the independent review of the Tax Practitioners Board has been certified to meet those requirements.

Senator PATRICK: Yes, I understand the rationale behind the bill. But isn't it the case that in theory there ought to be a statement of the costs to business? I'm just trying to understand how that's carved out of the systems.

We are amazed by the continuing suggestions from Treasury and Government with respect to the Royal Commission final report being certified to meet the requirements of a Regulation Impact Statement. It is appropriate to reflect back on exactly what the Royal Commission final report said about the Single Disciplinary body (page 216):

*In making this recommendation, I do not wish to be **overly prescriptive** about the form that the new disciplinary body should take, the powers that it should have, or (with the exception of the system of mandatory and voluntary notifications discussed below) the relationships that it should have with other bodies – in particular, ASIC and the code monitoring bodies. It may be that this new body is the most appropriate entity to perform the functions currently planned to be assigned to the code monitoring bodies under the Corporations Act.*

The reality is that the Royal Commission final report did not define how the Single Disciplinary Body should operate. Commissioner Hayne specifically used the words that he did 'not wish to be overly prescriptive'. The final report did not even put forward a potential solution; it was merely the recommendation of a high level policy intent. Therefore, how is it possible to assert that the Royal Commission final report could meet the needs of a regulation impact statement?

The Australian Government Guide to Regulatory Impact Analysis defines seven Regulation Impact Statement questions, including the following:

What is the likely net benefit of each option?

Policy interventions often come at a cost. The RIS obliges you to assess the benefit of your proposed intervention against the burden you impose. If that burden is greater than the benefit, you should look for alternatives or reconsider the need to intervene at all.

In the absence of any cost assessment by Government, we have had our own look at the possible cost of the Single Disciplinary Body, based upon the volume of matters that could potentially be considered by the SDB, the type of matters, the average number of hours involved in the assessment of each type of matter and the average full cost per hour. We have done this on the assumption of 18,000 financial advisers during 2022. The key variables that we have looked at include:

Attribute	Range
Number of breaches per adviser per year	0.5, 1, and 2
Percentage of breaches per type	Routine: - 70% Moderate: - 20%, 25% and 28% Major: 2%, 5% and 10%
Hours per type of Matter	Routine: - 1, 2, and 5 Moderate: - 25, 35 and 50 Major: 100, 125 and 150
Cost per hour of SDB activity	\$70, \$85 and \$100

Our analysis is set out in Appendix 1, suggesting that the cost could be anywhere between \$291 per adviser per year and \$5,700 per adviser per year. Obviously, ASIC and Treasury would be able to provide a much more meaningful assessment of the likely cost, however our point is that this needs to go back to a careful consideration of the benefits of each option and the alternatives that should be considered. The cost would be much less if the SDB was designed to focus upon more serious matters and licensees were left to deal with the minor and administrative matters. The Regulation Impact Statement is a very important exercise, and it should be undertaken based upon compliance with Government policy and due process.

FASEA and Education Standard

In our opening presentation and during the course of the hearing we referred to the issue of whether the FASEA Education standard met the expectations set out in the 2017 Professional Standards of Financial Advisers Explanatory Memorandum.

Some key sections from the Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 Explanatory Memorandum include the following:

6.8 These provisions are designed to allow flexibility for existing providers, ensuring that they only need to undertake adequate study to bring their qualifications in line with the new standard. It is not expected that existing providers will be required to complete a three year degree.

6.9 For the avoidance of doubt, the new law explicitly states that courses undertaken before the new law commences must be taken into consideration. The body may take into account diploma or degree courses, licensee training courses or CPD.

6.11 The length of time that the adviser has been in the industry is not itself a relevant consideration. The body may, however, take into account the fact that an adviser who has been in the industry for a longer period of time has completed more CPD courses.

Example 6.3: Appropriate bridging courses

Anastasia has been working as a relevant provider for over 20 years. Anastasia is a member of the Excellent Advisers Association and she holds the Excellent Advisers Designation. She has a bachelor degree in engineering and an advanced diploma in Financial Planning. She has also completed several CPD courses throughout her career.

The body may decide that the mathematics units in Anastasia's bachelor degree, together with her advanced diploma and CPD courses, give her knowledge and skills equivalent to the standard. In this case, Anastasia would not need to undertake any further study.

The reality has been very different. There has been no credit for diploma courses or for CPD, despite paragraphs 6.9 and 6.11. When assessed in terms of Example 3, the Engineering degree is worth one credit towards an eight subject Graduate Diploma. The Advanced Diploma in Financial Planning is worth two credits and the professional designation may be worth one or two credits. Anastasia would have between three and five subjects still to do, depending on the credits for the professional designation.

We also made the point that some adjustment to the CPD standard was appropriate. At present the CPD standard requires a financial adviser to do 40 hours per year, including a minimum of 9 hours on professionalism and ethics, however only 5 hours on technical competence. In the context of financial advisers being required to complete a graduate diploma level subject on ethics and ethics being a core component of the FASEA exam, we do not believe that there should need to be 9 hours of CPD devoted to ethics year in year out, when there is only 5 hours required for the core technical competence that is required of a financial adviser. The balance is skewed, and this should be corrected.

We note the option for the issues above to be addressed, either via changes to the FASEA Legislative Instrument in 2021, through changes by Treasury and the Minister in 2022 or via legislative changes. Each option, is a potential solution. From a legislative perspective, it might be as simple as the addition of a note to Section 1546B to confirm that relevant diploma courses and CPD should be taken into consideration.

Concluding Comments

The AFA supports the intent of a Single Disciplinary Body, however we believe that it is critical that it is permitted to be focussed on more serious misconduct and able to efficiently focus in a timely manner on issues that are systemic and generate a risk of client detriment.

We also strongly believe that the proposed position with tax (financial) advice services needs to be addressed, as the legislation still leads to significant additional complexity and cost and fails to address key issues in terms of the transition from the current regime for some participants. Financial advice should be fully removed from the TASA/TPB regime, with tax related education and training requirements built into the core obligations.

We would be happy to provide the Committee with any further information required for the consideration of this Bill.

Yours sincerely,



Phil Anderson
Acting Chief Executive Officer
Association of Financial Advisers Ltd

Cost Impact Assessment

Appendix 1

Scenario 1 - Lower

Number of Advisers	18,000
Number of Matters per Adviser	0.5
Total Number of Matters	9,000

Allocation of Matters

	Percentage	Number	Hours per Matter	Total Hours
Routine	70%	6,300	1	6,300
Moderate	28%	2,520	20	50,400
Major	2%	180	100	18,000
Total	100%	9,000		74,700

Cost per Hour	70
Total Cost	5,229,000

Cost per Adviser	291
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Scenario 2 - Middle

Number of Advisers	18,000
Number of Matters per Adviser	1
Total Number of Matters	18,000

Allocation of Matters

	Percentage	Number	Hours per Matter	Total Hours
Routine	70%	12,600	2	25,200
Moderate	25%	4,500	35	157,500
Major	5%	900	125	112,500
Total	100%	18,000		295,200

Cost per Hour	85
Total Cost	25,092,000

Cost per Adviser	1,394
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Scenario 3 - Higher

Number of Advisers	18,000
Number of Matters per Adviser	2
Total Number of Matters	36,000

Allocation of Matters

	Percentage	Number	Hours per Matter	Total Hours
Routine	70%	25,200	5	126,000
Moderate	20%	7,200	50	360,000
Major	10%	3,600	150	540,000
Total	100%	36,000		1,026,000

Cost per Hour	100
Total Cost	102,600,000

Cost per Adviser	5,700
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