



7 July 2021

Senate Standing Committees on Economics
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Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

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Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the draft *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021*.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Our Financial Advice Disputes practice has represented hundreds of consumers, including through remediation schemes such as the CBA's Open Advice Review Program (OARp) as one of three Independent Customer Advocates, delivering compensation for hundreds of our clients. Our input to this consultation is based on their experiences.

Maurice Blackburn made a submission to the Treasury consultation process, applauding the prioritisation of the implementation of recommendation 2.10 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, and for the work that has gone into the development of the draft legislation.

While broadly supportive of the draft Bill and process, we have some concerns which we brought to the attention of Treasury.

Unfortunately, no substantive changes were made to the draft that would satisfy our concerns.

Our main feedback is that the system, as described in the draft documents, is not consumer-focused, and lacks consumer input.

Our submission appears below.

i. Consumer voice in the Financial Services and Credit Panel process.

Paragraph 1.15 of the draft Explanatory Materials (EM) document tells us that:

A Financial Services and Credit Panel is required to comprise at least two industry participants, which ASIC must select from a list of eligible persons appointed by the Minister. The Chair of the panel will always be an ASIC staff member.

We believe that the proposed make-up of the panels is not ideal. Having only ‘industry participants’ making such decisions, under ASIC’s chairmanship means that the system effectively only has industry figures judging the behaviours of other industry figures.

Paragraph 1.16 tells us that:

The list of eligible persons could include representatives from the financial services industry, such as financial advisers and financial services licensees, as well as people with experience in other fields, such as law, economics, accounting and tax.

Paragraph 1.38 elaborates on this, saying:

...To be appointed to the list, the Minister must be satisfied that the person has experience or knowledge in at least one of the following fields:

- *business;*
- *administration of companies;*
- *financial markets;*
- *financial products and financial services;*
- *law;*
- *economics;*
- *accounting;*
- *taxation; or*
- *credit activities and credit services*

We believe this list of eligible persons would be enhanced by having the consumer voice represented.

It would be difficult for consumers (including victims of poor corporate behaviours) to have confidence in a system where their voice is not imbedded in the decision making process.

We believe a simple adjustment could be made to the draft materials, to the effect that consumer voice such as from an appropriately qualified consumer representative (for example an employee of the Consumer Action Legal Centre (CALC), Financial Rights Legal Centre or Public Interest Advocacy Centre) is always required during these panel hearings.

When a consumer makes a complaint about the behaviour of a Financial Advisor, it is important that they are able to draw comfort that their complaint will be handled in a manner which meets their reasonable expectations.

Maurice Blackburn believes that the model, as described in the draft documentation, may not earn consumer confidence.

Aside from the lack of consumer voice in the process as described above, consumers would be right to be dubious about who is assessing the behaviours of Financial Advisors against agreed standards – especially if those assessors are drawn from within the industry.

CALC raised similar concerns in 2017, when ASIC was consulting on the establishment of the Financial Services Panel. They wrote:¹

.....if the Panel is established we recommend (at a minimum):

- *Ensuring the Panel has balanced membership, meaning that industry, ASIC and consumer representatives would have equal representation on the Panel;*
- *Minimum qualification and experience requirements for Panel members, including a fit and proper person test;*
- *Transparent processes for the selection of Panel members, and referral of matters to the Panel for consideration;*
- *Public guidance about ASIC's expectations of Panel members, including conduct requirements, tenure and whether their role will be full-time or part-time;*
- *Enabling ASIC to remove Panel members in the event of that member's misconduct or incapacity;*
- *Providing 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, rather than the livelihood of the licensee or person subject to investigation);*
- *Publishing clear conflict of interest guidelines, which ensures both direct and indirect conflicts of interest preclude Panel members from participating in relevant decisions; and*
- *Ensuring the Chair of the Panel is an ASIC delegate. At a minimum, the Chair should be able to deal with procedural matters (such as applications for adjournments and transferring matters to another Panel) without approval from the other Panel members*

We believe that these provisions could equally be applied to the enhancement of the membership, role and function of the Financial Services and Credit Panel.

The note on conflicts of interest is particularly salient in establishing consumer confidence in any complaints process overseen by industry figures. We note that the only mention of conflicts of interest in the draft EM relates to circumstances where the Chair has a conflict of interest.² We suggest that conflict of interest provisions must apply to all panel members.

There is a parallel question about how respondents would feel about being judged by their competitors.

ii. The Triage Process

We note that under the revised model, the responsibility for triaging complaints will be the responsibility of ASIC, based on standards now set by the Minister.

Paragraph 1.259 of the draft EM tells us that:

The transition and application provisions in the Bill preserve the legislative instruments made by FASEA, by providing that these instruments will continue in force as if they were instruments made by the Minister. This means that financial advisers will need to continue to meet the education and training standards and the

¹ <https://consumeraction.org.au/wp-content/uploads/2017/05/ASIC-Financial-Services-Panel-CALC-submission-170522.pdf>: p.3

² Ref paragraph 1.72

Code of Ethics made by FASEA, until such time as the Minister amends these standards or makes new standards.

While this is important, Maurice Blackburn submits that it is also important that there is no *reduction* in standards from those set by FASEA, to those developed and implemented by the Minister. The robustness of the scheme should not be compromised by the proposed changes.

We urge the Committee to satisfy itself that the provisions are sufficiently robust to ensure that there will be no reduction in standards once the transition from FASEA to the Minister is complete.

The efficiency of the triage process by ASIC - deciding whether the matter is progressed to the Financial Services and Credit Panel - is important. An inefficient triage system would lead to a less efficient system as a whole.

An important question is whether the Financial Advisor should be permitted to continue to trade without restriction - and potentially continue their unacceptable behaviour or conduct - while the triage and investigation processes are occurring, which could take years.

Maurice Blackburn suggests that the Committee consider recommending the development of interim (or holding) actions that could be imposed until such time as the investigation is completed. These actions may include, for example:

- requiring disclosure to consumers on the part of the Financial Advisor's licensee that the investigation is taking place,
- placing limitations on their authorities including caps on the amounts of consumers' funds that may be traded/invested; or
- the placing of enhanced supervision requirements on the Financial Advisor's AFSL holder.

This would be particularly important where credible allegations of fraud or malfeasance are apparent.

We further note that various paragraphs in the draft EM³ indicate that the circumstances determining when ASIC may make a referral to a Financial Services and Credit Panel are to be prescribed in the regulations. This represents a major shift in thinking from the draft materials presented for consultation by the Treasury. It is important, from the consumers' perspective, that these circumstances are transparent and justified.

Maurice Blackburn further submits that it is important that ASIC be appropriately resourced to cover the additional time spent deciding whether to refer a matter to the Financial Services and Credit Panel, and to ensure this can be done expeditiously. There does not appear to be any allowance made for this in the 'financial impact' statement in the draft EM.⁴

iii. Time boundaries on Financial Services and Credit Panel investigations

³ See for example paragraphs 1.14, 1.35, 1.191

⁴ Page 8.

Various paragraphs⁵ in the draft EM seem to indicate that Financial Services and Credit Panel processes will only be able to deal with complaints about Financial Advisors that occur after 1 January 2022.

Maurice Blackburn sees this provision as unhelpful. Unless the complaint has already been dealt with, we believe that Financial Services and Credit Panels should be empowered to investigate complaints dating back 6 years.

Under the arrangements in the draft, it would appear that a consumer with a complaint from before 1 January 2022, who did not lodge the complaint before that date, would be locked out of the panel process.

Please do not hesitate to contact me and my colleagues on 07 3014 5051 or at JMennen@mauriceblackburn.com.au if we can further assist with the Committee's important work.

Yours faithfully,

Josh Mennen
Principal Lawyer
Maurice Blackburn

⁵ See paragraphs 1.129, 1.325, 1.326