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Single Disciplinary Body for Financial Advisers

Super Consumers Australia welcomes the opportunity to provide a submission on the implementation of the single disciplinary body for financial advisers.

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.

ASIC has not had the resources to pursue the number of complaints it receives and when they do the process typically takes years. Out of self-interest, licensees have often been too soft on their advisers.

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 transition of education and ethical standards from FASEA to Treasury must not lead to any weakening of consumer protections.

Ensuring an efficient, timely and flexible process through the triage process

The design of the triage process is crucial to a successful disciplinary system. We are concerned that the current proposal lacks the efficiency to resolve complaints in a timely fashion.

It is proposed that when ASIC becomes aware of a potential breach it will confirm that the breach is within its jurisdiction. ASIC will then further investigate the matter. Where ASIC reasonably believes that a financial adviser has breached its obligations under the Corporations Act 2001 but a banning order is not appropriate, ASIC must convene members of the Financial Services and Credit Panel (FSCP) to consider the matter.

It is imperative that flexibility is imparted into this process so that action can be taken sooner and concurrently when appropriate. This should begin at the triage process. Treasury should consider if the following options would facilitate to this occur:

- The ability for an internal preliminary triage decision to be made which indicates where the complaint will most likely be finalised.
- The investigative process gathers evidence for both ASIC and FSCP with the preliminary decision in mind.
- The ability for the FSCP to be convened sooner while ASIC continues to gather evidence and determine if a ban is necessary.
 - For example, the FSCP may place supervisory requirements or suspend an adviser sooner than ASIC's banning investigative process.
- The ability for the FSCP to escalate matters back to ASIC if a ban is determined necessary.

Importantly, for consumers it does not matter if the triage and evidentiary investigation 'sits within' ASIC or the FSCP. Of most importance is that complaints are efficiently resolved to limit and prohibit advisers from continuing behaviour that breaches standards.

Currently, ASIC only undertakes banning orders for serious sanctions. Due to resource constraints ASIC tends to direct its investigation to the most serious cases. Commonly this process can take years to be finalised.¹ It may leave an adviser to continue poor behaviour during this time, causing further consumer harm.

For example, most recently on May 6 2021 ASIC banned a Sydney adviser for eight years due to the falsification of client documents. This was due to conduct that occurred as far back as 2010.² 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 process of investigation reduces the lag between notification and when an initial compliance order is made.

We would be concerned if the FSCP is only convened to make a determination at the end of a lengthy ASIC investigative process that didn't determine a ban. Additionally, if an adviser appeals their ban order this may also delay the FSCP from convening. This significant time lag between poor behaviour and resolution will not improve consumer outcomes.

Take for example, an adviser who has a complaint against them for poor advice and has also failed their professional standards by not meeting their CPD hours. The triage process could

¹ 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/EXHIBIT-2-247.pdf>

²<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-096mr-asic-bans-former-sydney-adviser-for-eight-years/>

convene the panel to efficiently reprimand the adviser regarding their CPD while the investigative process continues on the more substantive matters.

AFCA, in its case management process, determines if a complaint is a low value, single issue complaint as an initial decision.³ This can result in three categories:

- Fast track
- Standard & Complex; and
- Financial Difficulty

We recommend that Treasury consider how elements of this process have been effective in triaging complaints and can be imparted into ASIC and the FSCP.

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.

We understand that the regulatory cost in the advice space is a concern for the Government and industry. These costs are caused by other aspects of the advice provision process and they should not be used as an excuse to limit the implementation of the single disciplinary body.

As Commissioner Hayne stated, "a body dedicated to the investigation of matters concerning individual advisers could be expected to consider a broader range of cases than ASIC currently does." The FSCP can form an important part in this process by driving a compliance culture through resolving complaints efficiently. If the FSCP is going to deliver on this goal it needs to be appropriately resourced and utilised.

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 equal voting weighting. 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 or taxation to be appointed by the Minister.

The selection of Panel members would benefit from having individuals with consumer experience. This is a sector which has suffered in recent history from having a lack of consumer focus. This has included advisers charging fees-for-no-service and inappropriate advice that has left consumers worse off than they would have been if proper advice had been given. As

³ <https://www.afca.org.au/what-to-expect/the-process-we-follow>

highlighted by the Royal Commission these were treated as if it was no more than a series of inadvertent slips.⁴

The inclusion of individuals with consumer experience will also limit the Panel's potential for perceived and actual conflicts of interest by only having 'industry representatives' (as portrayed in Treasury documentation) judging industry.

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

- Ensuring the Panel has balanced membership, meaning that industry, ASIC and individuals with consumer experience would have equal representation on the Panel when it is convened;
- 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); and
- Publishing clear conflict of interest guidelines, which ensures both direct and indirect conflicts of interest preclude Panel members from participating in relevant decisions.
- Amend Treasury documentation and supporting material that refers to 'industry representatives' as Panel members. This should be clarified to detail that Panel members have industry expertise or experience and are not there to solely represent the industry.

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.

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.

⁴ P150, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Final Report

Legacy complaints as far back as 2008 have been considered under AFCA's jurisdiction.⁵ This would create a significant gap in the adviser professionalisation and consumer protection regime.

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 enforced by this body. If the obligation did not exist, then there would be no remit for the FSCP to convene. This arbitrary state date will lead to consumer harm going unaddressed.

Transfer of FASEA to the Minister

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

Before any changes are made to these standards, the Minister should ensure that relevant experts and consumers are consulted.

If you have any questions, please feel free to contact us.

Yours sincerely,



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⁵ 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>