

14 May 2021

Director  
Adviser and Brokers Unit  
Financial System Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [SDBconsultation@treasury.gov.au](mailto:SDBconsultation@treasury.gov.au)

Dear Anna,

### Exposure draft legislation: Single disciplinary body for financial advisers

CPA Australia represents the diverse interests of more than 168,000 members, working in over 100 countries and regions supported by 19 offices around the world. We make this submission on behalf of our members and in the broader public interest.

The Government is seeking stakeholder views on the draft Bill and accompanying Explanatory Materials that would give effect to the establishment of a new disciplinary system for financial advisers implementing the Government's response to recommendation 2.10 of the Financial Services Royal Commission Final Report.

CPA Australia supports the intent to establish a single disciplinary body. We believe this is an important step towards the professionalisation of the financial advice sector.

However, we believe the system as proposed in the draft Bill and Explanatory Material will create additional red-tape and cost for the financial advice sector without clearly articulating how it will improve consumer trust and confidence as well as access to affordable advice.

Our detailed responses are contained in the Attachment.

If you have any queries about this submission, please contact Michael Davison, Senior Manager, Advocacy and Retirement Policy on 02 6267 8552 or [michael.davison@cpaaustralia.com.au](mailto:michael.davison@cpaaustralia.com.au).

Yours sincerely



Ms Keddie Waller  
Head of Public Practice and SME

## Financial Sector Reform (Hayne Royal Commission Response—A New Disciplinary System for Financial Advisers) Bill 2021

### Detailed commentary on exposure draft (ED) and explanatory materials (EM)

#### 1. Single disciplinary system

CPA Australia welcomes the government's proposed implementation of recommendation 2.10 of the Financial Services Royal Commission to introduce a single disciplinary system for financial advisers.

However, it is difficult to fully ascertain the effectiveness of the proposed Financial Services and Credit Panel (FSCP) process, including how it will improve consumer trust and confidence as well as access to affordable advice. This is because there is little detail or transparency around the mechanics of the process, such as how it will integrate or modify existing ASIC processes.

In the absence of that detail, we offer the following observations, comments and recommendations:

- The list of experience and knowledge of candidates for the list of eligible persons for the FSCP should be expanded to include financial advice and superannuation (section 141(3)).
- When a FSCP is convened it is important its composition contains the right mix of expertise to reflect the nature of the matters being heard. For credibility and to engender professionalism within the sector, peer to peer discipline is vitally important.
- Where a member of the FSCP is not entitled to be present at a meeting due to a conflict of interest, the remaining members and the panel including the chair will constitute a quorum. Depending on the number of industry representatives on the panel or the situation where more than one member is excused due to conflicts of interest, the end result may be a panel of the ASIC chair and one industry representative or worst case, only the ASIC chair being present. Section 151 should be amended to clarify that the minimum quorum should be the ASIC chair and no less than two industry representatives. If this quorum cannot be met, additional industry representatives should be selected for that panel.
- The proposed disciplinary process sees ASIC performing triage on all matters and only convening a FSCP to consider a matter if ASIC does not consider a banning order appropriate. Based on past experience, ASIC's investigation and review process can take a considerable period of time. Full transparency of ASIC's process will be required to manage community and industry expectations. Service level agreements should also be put in place and committed to by ASIC to ensure matters are dealt with in a timely manner.
- Details are also required of the process, expectations and timeliness of referrals from AFCA, the TPB and industry associations. With referrals from industry associations, consideration needs to be given to privacy constraints and the due process they will need to provide to their members.
- We note the FSCP will continue to be used for breaches of the National Consumer Credit Protection Act 2009. It is important that the ASIC processes mentioned above are consistent for financial advisers and credit advisers.
- The commencement of the new breach reporting requirements from 1 October 2021 may see the volume of matters that need to be considered by ASIC and the FSCP increase significantly. The severity of these breaches will range from minor or inadvertent disclosure issues through to matters that will cause significant detriment to consumers. We recommend that the FSCP develop a suite of standard responses for ASIC to use for minor or inadvertent breaches so that only the more serious or complex matters or those that exceed materiality thresholds, for example repeated minor breaches, are referred to the FSCP. This would assist in matters being considered in a timely manner.

Further, the FSCP process for finalising a matter could be quite lengthy and complex, particularly when you factor in an adviser's right to challenge or appeal a FSCP decision. Materiality thresholds and standard responses may go some way to minimise the cost and resources required to manage these processes. It is important to consider the cost of these process versus the outcome. An infringement notice for a single contravention of a restricted civil penalty is will be 12 penalty units (currently \$2,664) is unlikely to cover the cost of the process.

- We understand the cost of the proposed FSCP process will be included in the ASIC industry funding model and registration fees will go to consolidated revenue. CPA Australia already holds serious concerns that the ASIC funding model is not fit for purpose and [needs to be reviewed](#). Adding the FSCP costs will add to the significant cost burden already faced by financial advisers and will make the provision of advice untenable for many.
- Ideally, we believe the triage process should be reversed seeing the FSCP being set up to triage all breaches, consider and impose sanctions where appropriate, and then only refer more serious matters to ASIC for banning orders or cancellation of registration. This would streamline the process, provide a level of efficient and importantly more closely align with Commissioner Hayne's intent.

## 2. Registration of financial advisers

### Professionalisation

The government is endeavouring to professionalise the financial planning sector through the professional standards regime for financial advisers and its implementation of the Financial Services Royal Commission recommendations.

However, a hallmark of professionalism is the individual willingly accepting their personal professional responsibilities and being accountable for their actions. Requiring an individual to be responsible for their own registration aligns with this premise. As Commissioner Hayne stated in his final report, "a requirement of individual registration as a condition of practice is common to most professions".

Given the increasing focus on individual responsibility through the FASEA framework and the efforts to move the sector towards professionalism, maintaining the status quo where the Australian Financial Services (AFS) licensees is instead responsible for the registration of individual financial advisers is a significant backwards step.

In fact, requiring the AFS licensee to obtain annual declarations from financial advisers that they are a fit and proper person and have met the education and training requirements will likely become nothing more than a tick the box exercise that will do little to engender individual accountability.

Rather, the responsibility to register should sit with the financial adviser. This ensures the onus is on the financial adviser to take personal responsibility by declaring they are a fit and proper person and have met the education and training standards and be held personally accountable if they do not meet the professional standards.

Individual registration by the financial adviser would still allow AFS licensees to maintain their existing oversight obligations.

This approach would also be consistent with Commissioner Hayne's intent that:

"The new system would not detract in any way from the existing obligations of AFSL holders who employ financial advisers or appoint authorised representatives. Rather, it would ensure that financial advisers who fail to adhere to the standards expected of them would face consequences that extend beyond their employment with or appointment by a particular licensee, and affect their capacity to provide financial advice more generally."

To this end, we would be supportive of the concept of individual registration being akin to a practicing certificate, where the adviser would be required to maintain their personal information, make the necessary declarations and meet the professional standards in order to keep providing advice.

### Creating efficiencies

The draft Bill proposes that the new registration system will commence from 1 January 2022 and AFS licensees will be required to register all financial advisers they authorise. However, a register of all financial advisers already exists in the Financial Adviser Register (FAR). It would be far more efficient and cost-effective to use the existing FAR as the foundation than to start again.

We acknowledge feedback from industry participants that the data on the FAR is unreliable and may be poorly maintained by AFS licensees at times for various reasons. Placing the responsibility of registration on the individual financial adviser would provide the opportunity for them to update their existing information, take responsibility for ensuring it remains current and make the necessary declarations they are meeting their professional obligations.

Individual registration would also streamline the current registration process by removing a layer of administration and duplication where the financial adviser provides information and makes declarations to their AFS licensee, who is then responsible for updating the FAR. Noting that both the financial adviser and AFS Licensee may be penalised for providing false or misleading information.

Further, under the proposed model the financial adviser is reliant on their AFS licensee to register and maintain their information on the FAR. However, it is the financial adviser who may be penalised or disadvantaged if this is not done in a timely manner or in fact at all. For example, if a financial adviser changes AFS licensee they are not permitted to provide advice, and may be penalised for doing so, until their new AFS licensee registers them on the FAR. If this is not done in a timely manner there may be serious ramifications for the financial adviser. Requiring the financial adviser to maintain their registration on the FAR would reduce the current inefficiencies and reduce these potential risks for the financial adviser.

Should the financial adviser move to a new AFS licensee, they would simply confirm their registration so they could be readily authorised to provide advice.

Individual registration could also reduce costs for the sector, and ultimately the consumer, while also avoiding potential duplicate payments.

For example, under the proposed model if an AFS licensee pays the full year's registration for a financial adviser who then moves to a new AFS licensee after a month, the new AFS licensee is also required to pay a pro-rated registration fee the same financial adviser. Individual registration by the financial adviser would effectively avoid duplicate payments.

Finally, streamlining the financial adviser registration process should be taken as an opportunity to rationalise the financial advice registers. Currently we have a register of AFS licensees, a register of authorised representatives and the FAR, noting there is considerably duplication across these registers. Individual registration on the FAR would ensure a financial adviser's authorisation details are accurate and current and may provide the opportunity to rationalise the ASIC registers towards a single source of truth.

## Registration date

The EM proposes that ASIC may determine the 'registration year' of a AFS licensee or a class of AFS licensees, which could result in a range of different registration dates for the sector to manage. To ensure accountability, efficiency and to streamline payment obligations, we recommend one registration date, such as 1 January or 1 July, is set for all financial advisers.

## Self-regulation

Ultimately, for the financial advice sector to be truly recognised as a profession it needs to transition away from the model of AFS licensee oversight to one of individual responsibility.

A common theme identified in financial adviser responses to ASIC's consultation on promoting access to affordable advice<sup>[1]</sup> is the constraints placed on financial advisers to provide affordable, accessible and timely advice by conservative AFS licensee policies and procedures that require compliance above what is required by law. This is a considerable impediment to the sector and a possible barrier to accessible financial advice.

The increased focus on individual responsibility through the FASEA professional standards is a positive first step towards professionalism and we believe that individual registration by the financial adviser could be the next significant step.

The final step would require moving away from AFS licensee oversight by introducing an audit and peer-review framework.

This could be achieved by introducing a co-regulatory model, where membership of a professionally association could be utilised to take advantage of oversight of professional obligations supported by discipline processes.

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<sup>[1]</sup> [ASIC CP332 Promoting access to affordable advice to consumers](#)

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

CPA Australia supports the wind-up of FASEA and the transfer of the standard setting powers to the Minister and the foreign qualification approvals to ASIC.

However, while the standard setting powers may sit with the Minister, we question who will perform the work of maintaining the existing FASEA standards and Code of Ethics, ensuring they remain current, fit for purpose and developing any new standards that may be set by the Minister. Currently, this expertise sits with FASEA. Our consultation with Treasury suggests this function will transition to sit within Treasury. However, we question whether the necessary skill set and expertise to perform these functions currently exists within Treasury.

To support Treasury in this role, CPA Australia recommends the establishment of an independent advisory panel, consisting of an appropriate cross-section of experts and professionals to provide the necessary analysis, expertise and advice to Treasury.

Further detail is also required regarding the practicalities of the wind-up of FASEA's functions such as where information currently on its website will sit, if a separate website is maintained where it will be hosted, where the FASEA databases will go, and if there is any work in progress on standards and guidance, how will that be continued?

### 4. Requirements for Tax (financial) advisers

CPA Australia supports the removal of the requirement for tax (financial) advisers (TFAs) to be registered with the Tax Practitioners' Board (TPB) under the Tax Agent Services Act 2009 (TASA). This removes a layer of duplication between the requirements of the TASA and the requirements of the Corporations Act which is welcomed.

However, recognising the provision of tax (financial) advice under the Corporations Act effectively renders the concepts of tax (financial) advice and TFAs redundant from 1 January 2022. Tax advice is inextricably linked with the provision of financial advice. Practically, a tax (financial) advice service is not provided in isolation but as a component of financial advice.

The concept of tax (financial) advice was only introduced in 2014 in response to concerns that financial advisers may have been providing tax advice incidental to the financial advice they were providing without having adequate education and training. Instead of ensuring the appropriate requirements were introduced under the Corporations Act the regulation of tax (financial) advice was placed under the TASA.

Under the FASEA Code of Ethics, financial advisers are already required to maintain and apply a high level of relevant knowledge and skills (Standard 10). Further, study in taxation/tax law (as defined by the TPB) is recognised by FASEA as prior learning.

If having the relevant education and training is already a requirement under current FASEA standards and continues under any future standards set by the Minister, there is no need to separately define the requirements for tax (financial) advice under this Bill or define tax (financial) advice beyond what is needed for any transitional recognition of TFA registration under TASA that continues beyond 1 January 2022.

Further, this approach would reduce the transitional requirements required as instead of recognising the continuation of TFA registration from 1 January 2022, all registered TFAs, regardless of their pathway to registration, could be deemed to have met the education and training standards given their registration with the TPB.

### 5. Other matters

The single disciplinary system as proposed will only apply to financial advisers providing personal financial product advice to retail clients.

However, there is anecdotal evidence that there is an increasing shift to advisers providing advice to clients as wholesale clients to avoid the burden of increasing compliance and disclosure requirements, meeting the professional standard requirements, and the spiralling costs under the ASIC funding model when providing advice to retail clients. This has significant implications for ensuring adequate consumer protection.

Treasury [consulted](#) on the appropriateness of the distinction between wholesale and retail clients as part of the Future of Financial Advice (FOFA) reforms in 2011. We strongly suggest the government finalise this review to determine the appropriate distinction between wholesale and retail to ensure the appropriate types of advice and covered by the single disciplinary system and the maximum protection is provided to consumers.