Stockbrokers and Financial Advisers Association

20 August 2021

Email: SDBconsultation@treasury.gov.au

Director
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

SINGLE DISCIPLINARY BODY: POLICY PAPER

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.

Thank you for the opportunity to provide feedback on the policy paper that will inform the development of exposure draft regulations under the *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021* (the Bill).

SAFAA provided a submission on the exposure draft of the *Financial Sector Reform (Hayne Royal Commission Response – A new disciplinary system for financial advisers) Bill 2021* and attended a Treasury roundtable with other industry associations on 28 April 2021 at which we provided member feedback. SAFAA provided evidence to the Senate Economic Legislation Committee on the Bill in June 2021.

Executive summary

In our previous submission SAFAA recommended that an expeditious method of dealing with minor contraventions of financial services laws be developed to ensure that the Panel only deals with material matters. Otherwise, we argued, the Panel would be overwhelmed by immaterial matters and not operate effectively. We also voiced our concerns that consumers would be overloaded with information if non-material contraventions were included on the Financial Adviser Register (FAR) which would defeat the FAR's purpose of providing a service assisting consumers to find an adviser to meet their needs.

We therefore welcome Treasury's consultation on the circumstances under which ASIC must convene a Panel and support criteria being introduced by regulation that will winnow out matters that are not material, and which would otherwise clog up the disciplinary system. We also support measures that will limit the contraventions that are included on the FAR to those that will provide meaningful information to consumers. This is important not only for consumers, but also for issues of cost and resourcing.

Recommendations

SAFAA makes the following specific recommendations:

- The regulations must clearly state whether ASIC must convene a Panel in certain circumstances or retains the discretion to do so. The proposal paper does not make this clear.
- Clarity is also required to ensure that ASIC will not convene a panel for a contravention of a financial services law or a person being involved in another's contravention of a financial services law unless the **proposed criteria** applies. Alternatively, rather than adopting an 'all in' approach, the contravention of a smaller number of specified sections of the Corporations Act could be included as a relevant circumstance instead.
- The Panel should not consider any disciplinary action arising from a possible breach of Standards 3 or 6 of the FASEA Code of Ethics until it has been reviewed by Treasury in its role as the standard setter for the Code. This is because, as currently worded, elements of the Code are unworkable and conflict with the corporations law.
- Additional education and training requirements for relevant providers who provide tax (financial) advice should be removed. Advisers providing tax (financial) advice are already captured under FASEA education requirements.
- Written warnings and reprimands issued by ASIC or the panel should not be included on the FAR.
- Subject to our other recommendations being adopted, we agree with the proposal that the following are to be included on the FAR, including first-time offences:
    - A written direction by the Panel to undertake specified training.
    - A written direction by the Panel to received specified counselling.
    - A written direction by the Panel to received specified supervision.
    - A written direction by the Panel to report specified matters to ASIC.
    - A written registration suspension or prohibition order by the Panel.
- The written directions sanctions should be automatically removed from the FAR after a period of five years.
- The professional membership field should be retained on the FAR.
- The implementation date of the Single Disciplinary Body should be delayed until 1 July 2022 in order to provide industry with adequate time to prepare for the scheme.

Our detailed feedback is set out below.

Detailed comments

When a Financial Services and Credit Panel must be convened

SAFAA does not consider that the list of restricted civil penalty provisions or relevant circumstances should be widened and agrees with the **proposed criteria**.

We have no comment on the other questions for stakeholders on the **proposed criteria,** but we make the following comments on other aspects of the proposal paper.

SAFAA considers that the current wording of the proposal as to when a Panel will be convened is confusing. It is unclear when ASIC *must* convene a panel and when it has the discretion to do so.

We understand that ASIC *must* convene a Panel if:

- It reasonably believes that the relevant provider has contravened a restricted civil penalty provision, or a relevant circumstance exists or has occurred; AND
- It has not exercised and does not propose to make a banning order or pursue civil penalty action; AND
- The contravention or circumstance fits within one of the following **proposed criteria**, being that it:
    - Has resulted in, or is likely to result in material loss or damage to clients; OR
    - Has resulted in, or is likely to result in a material benefit to the relevant provider; OR
    - Affects the suitability of the person to provide personal advice to retail clients in relation to relevant financial products; OR
    - Involves dishonesty or fraud; OR
    - Involves the provision of financial product advice to retail clients without meeting the education and training requirements (other than CPD); OR
    - Involves the provision of a statement of advice by a provisional relevant provider that has not been approved by a supervisor; OR
    - Is a serious or repeated breach.

However, confusion arises as it is not clear if ASIC has the discretion to convene a Panel if one of the **proposed criteria** is not satisfied. If this is not the case, we recommend that the regulation clearly states that ASIC *can only* convene a Panel if one or more of **the proposed criteria** are satisfied, but not otherwise.

Also, the proposal paper states that certain civil penalty provisions and relevant circumstances *may not* result in a Panel being convened unless the breach meets the **proposed criteria**. Does this mean that ASIC *must not* convene a Panel unless at least one of the **proposed criteria** are met, or does ASIC retain a discretion? Again, SAFAA recommends that the regulation clearly states whether or not ASIC must convene a Panel or retains the discretion to do so.

The Single Disciplinary Body will be hearing matters against financial advisers and the findings will have significant impacts on individuals. This is why we consider the rules surrounding when a Panel will be convened must be clear and easy to understand.

Contravention of a financial services law

One of the relevant circumstances prescribed in section 921K of the Bill is the contravention of a financial services law.

As we noted in our previous submission, a financial services law is broadly defined in the Corporations Act and includes (amongst other things):

- Chapter 7
- Chapters 5C and 5D
- Chapters 6, 6A, 6B, 6C and 6D

- Division 2 of Part 2 of the ASIC Act that covers conduct relating to the provision of financial product advice
- Any other Commonwealth, state or territory legislation that covers conduct relating to the provision of financial services (whether or not it covers other conduct), but only in so far as it covers conduct relating to the provision of financial services.

We have previously pointed out that both ASIC and the Panel will become overwhelmed if all contraventions of a financial services law as defined are captured by the regime without a materiality threshold being applied to ensure that minor and administrative breaches are filtered out.

This issue is similar to the concerns SAFAA and many others in the advice industry raised about the new breach reporting regime, that a consequence of the new provisions 'deeming' a contravention of a civil penalty provision to be a significant breach will be a large increase in breach reports for minor, technical or inadvertent breaches. As a result, regulations have had to be passed carving out numerous civil penalty provisions from the regime.

We understand that the **proposed criteria** are intended to act as a filter. However we repeat our previous remarks that clarity is required to ensure that ASIC will not convene a Panel for a contravention of a financial services law or a person being involved in another's contravention of a financial services law unless the **proposed criteria** applies. There will need to be clear messaging about this aspect of the single disciplinary body to ensure that consumers, industry associations, AFCA and licensees are aware of this, otherwise there is the potential for all contraventions of financial services laws to be referred to ASIC for triage. This is a downside of a scheme where all contraventions are within scope, with certain carve-outs and threshholds being applied. SAFAA suggests that rather than adopting an 'all in' approach, an alternative be considered, with the contravention of a smaller number of specified sections of the Corporations Act to be included as a relevant circumstance instead. We consider this will make the scheme more workable and easier to understand by financial advisers, licensees, consumers and other relevant stakeholders.

SAFAA notes that one of the key messages coming out of the Australian Law Reform Commission's review of Chapter 7 of the Corporations Act is the complexity of Australia's financial services laws and how that complexity impacts on how people use and understand them. We consider that it is important that the rules of the Single Disciplinary Body are easily understood by users.

Breach of FASEA Code of Ethics

We note that a breach of the FASEA Code of Ethics is a restricted penalty provision which *may* not result in a Panel being convened unless the breach meets the **proposed criteria**.

If this means that a breach of the Code is a restricted penalty provision that *must* not result in a Panel being convened unless the breach meets the **proposed criteria**, we agree with that approach; however, we make the following comments that we hope are taken into account.

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 test in Standard 3 has no element of materiality or proportionality. For example, in any payment mechanism (commission, hourly rate, asset-based fee etc), there will be potential conflicts between the interests of the adviser and/or of their licensee and the client.

SAFAA has recommended in submissions to FASEA that the Code should utilise the wording of the Intent 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.

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'). The Minister and ASIC have strongly supported the provision of scaled advice. Stockbroking involves the provision of scaled advice. While Standard 6 remains unchanged, stockbrokers and investment advisers providing scaled advice risk being found to be in breach of the standard by failing to take into account a client's broader, long-term interests and likely circumstances. SAFAA has called for Standard 6 to be removed from the Code.

Until these changes are made, advisers risk contravening a restricted penalty provision and being subjected to disciplinary action.

SAFAA continues to recommend 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.

Tax (financial) advisers

Breach of additional requirements for relevant providers who provide tax (financial) advice services

We note that a breach of additional requirements for relevant providers who provide tax (financial) advice services is a restricted penalty provision that results in ASIC being required to convene a Panel if it meets the **proposed criteria**.

While SAFAA has welcomed the elimination of the duplication imposed by the *Tax Agents Services Act* on financial advisers providing tax (financial) advice, we have strongly recommended that the additional education and training requirements for relevant providers who provide tax (financial) advice be removed. Advisers providing tax (financial) advice are already captured under FASEA education requirements. Singling out tax (financial) advisers for additional education and training requirements is duplication.

SAFAA is concerned that the Bill retains reference to additional requirements for relevant providers who provide tax (financial) advice. We are particularly concerned that a breach of this provision results in ASIC being required to convene a Panel as the industry is not yet aware of what those additional educational and training requirements are.

Additional issues regarding tax (financial) advisers

SAFAA has recently brought to Treasury's notice some additional issues arising from the Bill regarding tax (financial) advisers.

SAFAA is a recognised professional association, with members who are tax (financial) advisers. We are unclear about what will happen to tax (financial) advisers who don't provide personal advice to retail clients and are not on the FAR as they only advise wholesale clients.

We have provided Treasury with feedback on how many tax (financial) advisers would be impacted by the proposed changes to the TASA regime contained in the Bill as they only advise wholesale clients and are not on the FAR.

SAFAA has identified about 1600 tax (financial) advisers thus far who would be affected – these numbers reflect both our members and members of one other association. Not all firms who employ tax (financial) advisers who would be affected by these changes are members of SAFAA so we do not have access to information about the entire industry. Accordingly, we consider that the numbers are likely to be greater when you take into account the industry as a whole. SAFAA also has members who have indicated that the matter may impact on them more in future depending on the decisions their advisers make around the FASEA exam and educational requirements and whether they remain on the FAR.

The issues facing tax (financial) advisers of wholesale clients were referred to in submissions lodged by various professional associations to the Senate Economics Legislation Committee inquiry into the Bill. We understand that Treasury is considering this matter and we look forward to consulting with Treasury on how this issue can be resolved.

Sanctions to be listed on the FAR

SAFAA has previously recommended that details of a first offence or a warning for a breach of a minor, administrative matter should not be included on the FAR. SAFAA was concerned that an adviser could have an administrative sanction imposed by a Panel as a result of a contravention of a financial services law, which as we have pointed out is broadly defined in the Corporations Act and may include a minor breach. We have pointed out that an essential aspect of a professional disciplinary system is to protect consumers and prioritise the interests of the community. 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 the welter of minor matters that have no financial impact on or harm to clients (for example, a FSG being sent three days late).

Accordingly, SAFAA welcomes the proposals that specify that written warnings and reprimands issued by ASIC or the panel are not to be included on the FAR.

We also hope that as a result of the **proposed criteria** being applied to determine whether a Panel is to be convened, minor breaches will not be dealt with by a Panel or recorded on the FAR.

Subject to our other recommendations being adopted, we agree with the proposal that the following are to be included on the FAR, including first-time offences:

- A written direction by the Panel to undertake specified training.
- A written direction by the Panel to received specified counselling.
- A written direction by the Panel to received specified supervision.
- A written direction by the Panel to report specified matters to ASIC.
- A written registration suspension or prohibition order by the Panel.

SAFAA does not consider, however, that the written directions should remain on the FAR indefinitely. The current proposal is that they will only be removed if the sanction has been revoked by the Panel. We consider that sanctions that direct a financial adviser to undertake specific training, counselling or supervision, for example, become less relevant once that training, counselling and supervision has been undertaken and it would be unfair for those sanctions to appear on the FAR against the adviser's name forever. Additionally, we do not consider it would benefit consumers, who would form the view that the adviser had yet to undertake training, counselling or supervision.

We note that in respect of criminal records, if the court prescribes a community service; or rehabilitation check; or therapy; or fines; or any other penalties without recording a conviction, the individual must satisfy the condition. Once they meet the conditions, the court maintains its order of not recording a conviction. Furthermore, criminal records can be cleared under the Spent Conviction Scheme. Legislation exists in each State and Territory in Australia that outlaws the disclosure of some convictions once the 'waiting period' elapses. These offences are known as Spent Convictions, and no longer show up in the person's police check records. The period before an offence becomes spent may be known differently in the various States and Territories:

- Waiting period
- Crime-free period
- Rehabilitation period
- Qualification period
- Period of good behaviour

This removes discrimination against offenders who are convicted of minor offences which were commited some time ago. We see no rationale for including sanctions against financial advisers requiring training, counselling or supervision to remain on the record indefinitely, which would make this a harsher regime than that applying to criminal records.

SAFAA recommends that the written directions sanctions be automatically removed from the FAR after a period of five years.

Record of professional associations on the FAR

SAFAA has long argued that membership of a professional association should be mandatory in the financial services sector and we have urged the government to more fully consider the role of professional associations in regulating the sector. Currently, financial advisers are able to include details of their professional association membership in a field on the FAR. We consider that details of a financial adviser's professional association membership is essential information to be provided at registration. This is an important signal to consumers, who can assess if an adviser is a member of a professional association.

We consider that removing the field that shows membership of a professional association is a backward step, particularly as the FAR will shortly be migrating to the Modern Business Register which will have improved search and registration capability and flexibility. We also consider that it undermines the important work that professional associations are doing to maintain and improve professionalism in the sector.

SAFAA strongly recommends that Treasury retain the professional membership field on the FAR.

Timetable for implementation

We note that Treasury intends releasing exposure draft regulations later this year for public consultation in time for them to come into force on 1 January 2022. This is subject to the Bill passing the Senate.

As Treasury is well aware, six reforms arising out of the recommendations from the Royal Commission and other inquiries will commence in October 2021, requiring significant work and resources from our members and the broader financial services sector. These reforms are also taking place at the same time the industry is facing other challenges, including from COVID-19 and renewed lockdowns. SAFAA welcomed the announcement last week that ASIC would be taking a more facilitative approach to the new laws that take into account the context that firms are operating in, including the scale of the changes and the challenges arising from the current operating environment.

It appears to us that the regulations for the Bill will not be finalised until later on this year, and there are a number of issues such as the one we have raised concerning tax (financial) advisers that remain unresolved. We consider that in light of other other significant reforms currently taking place in the industry, the short time frame available from the time the regulations are finalised until the start of the scheme on 1 January 2022 will pose challenges for our member firms, in particular, in making their financial advisers aware of the detail of the rules and processes of the Single Disciplinary Body.

SAFAA recommends that the implementation date be delayed until 1 July 2022 in order to provide adequate time for industry to prepare for the scheme.

Conclusion

SAFAA is happy to engage with Treasury and provide whatever assistance is necessary to improve the operation of the Single Disciplinary Body.

If you require additional information or wish to discuss this submission in greater detail please do not hesitate to contact SAFAA's policy manager, Michelle Huckel, at michelle.huckel@stockbrokers.org.au.

Kind regards

Judith Fox
Chief Executive Officer