

15 October 2021

Email: SDBconsultation@treasury.gov.au

Anna Schneider Rumble
The Manager
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Anna

BETTER ADVICE BILL – EXPOSURE DRAFT REGULATIONS

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 exposure draft regulations and draft instrument supporting the *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021* (the Bill).

SAFAA attended a Treasury roundtable on 8 October 2021 at which we provided member feedback and had a further discussion with representatives from Treasury that day to clarify certain points around the transition provisions for tax (financial) advisers.

SAFAA also 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* on 14 May 2021, attended a Treasury roundtable with other industry associations on 28 April 2021, gave evidence to the Senate Economic Legislation Committee on the Bill in June 2021 and provided a submission on the policy paper on 20 August 2021. SAFAA's submissions are available on the advocacy page of our website [here](#).

Executive Summary

SAFAA supports the Bill and its supporting regulations and legislative instrument being passed as soon as possible in order to provide regulatory certainty for our members. Of particular importance to our members is the extension to the exam cut-off date to 30 September 2022 and the finalisation of the rules surrounding the Single Disciplinary Body. It is vital that the legislation be passed this year. We consider that our feedback on these issues which is included in this submission will improve the design and operation of the Single Disciplinary Body and the exam.

Including changes to the Tax (financial) adviser regime that incorporate the recommendations of the government's James Review to the Bill and regulations is proving to be challenging and problematic. Time is required to deal with the many issues that have arisen with the drafting of the Bill and the regulations in relation to this regime. Most important is the impact that these changes will have on our members who are currently tax

(financial) advisers or wish to apply to be tax (financial) advisers. The transitional provisions are complex and confusing. A communications strategy involving ASIC and the TPB will be required to ensure that tax (financial) advisers understand what they need to do and by when in order to provide tax (financial) services after the relevant cut-off dates. We have concerns that advisers may 'slip through the cracks' given complexity of the proposed changes. We are also running out of time to manage this transition – it is already 15 October.

We consider that the provisions implementing the Single Disciplinary Body and extending the cut-off time for the exam are too important to be held up while the government finalises the provisions concerning tax (financial) advisers. SAFAA recommends that the Bill and the regulations and legislative instrument be amended to excise those parts dealing with tax (financial) advisers and that stand-alone legislation that deals with the relevant James review recommendations be developed separately. This will allow the government to satisfy its obligations to implement the Hayne Royal Commission recommendation to establish a single disciplinary body, while giving itself the additional time required to legislate for the James Review recommendations.

We also recommend that the implementation date be delayed until 1 July 2022 in order to provide adequate time for industry to prepare for the Single Disciplinary Body, in light of the fact that the regulations and legislative instrument have not yet been finalised and the Bill is yet to pass. Starting the scheme on 1 January 2022 will pose challenges for financial advisers to be across the detail of the rules and processes of the Single Disciplinary Body.

Recommendations

SAFAA makes the following specific recommendations:

- The Panel should not consider any disciplinary action arising from a possible breach of Standards 3 or 6 of the 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.
- Directions sanctions should be treated in the same way as 'spent convictions' in the criminal code and automatically removed from the FAR after a period of five years (taking into account that this is a change to the primary legislation).
- The questions in the FASEA exam must be reviewed and overhauled in a timely manner by people who understand the financial advice industry in general and the stockbroking and investment advice profession in particular to ensure that financial advisers sit an exam that is 'fit for purpose' in 2022 and it contains tailored and bespoke scenarios appropriate for stockbrokers and investment advisers.
- 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.
- The provisions in the Bill and the regulations dealing with the James Review recommendations concerning tax (financial) advisers should be excised and dealt with in a separate bill at a later time in order to ensure a solution is reached that addresses the many issues raised by SAFAA and other professional associations whose members are impacted by these changes.

Our detailed feedback on the exposure draft regulations and legislative instrument is set out below.

Detailed comments

Criteria for when ASIC must refer matters to a Panel

In our previous submissions SAFAA raised concerns about whether the proposal paper had made it clear whether ASIC must convene a Panel in certain circumstances or retains the discretion to do so. We are pleased to see that the exposure draft regulations have clarified the circumstances in which ASIC must convene a Panel and where it has the discretion to do so.

We also welcome clarification that ASIC is not required to convene a panel for breach of the Code of Ethics. As we have argued before, the Panel should not consider any disciplinary action arising from a possible breach of Standards 3 or 6 of the 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.

We note that FASEA is currently undertaking a review of the wording of Standard 3 of the Code of Ethics. SAFAA has provided preliminary feedback to FASEA on this review and awaits the outcome.

Administrative sanctions that must be include on the FAR

SAFAA is pleased that warnings or reprimands issued by ASIC or a Panel under section 921S or 921T of the Corporations Act will never be included on the FAR. We are also pleased that as regards directions to undertake specified training, counselling or supervision or to report specified matters to ASIC, first-time offences will not be listed.

We note that while we advocated for the directions sanctions to be treated in the same way as 'spent convictions' in the criminal code and automatically removed from the FAR after a period of five years, changes would need to be made to the Bill, not the supporting regulations, to effect this change. While we acknowledge this technicality, we urge the government to make this small change to the primary legislation on the grounds of fairness and commonsense.

We were pleased to receive confirmation at the Treasury roundtable on 8 October 2021 that there is no intention to remove the professional membership field from the FAR (although we query why the Bill repeals the definition of 'professional association' from section 910A of the Corporations Act). As we have long argued, details of a financial adviser's professional association membership is essential information to be provided at registration and is an important signal to consumers.

Extending the deadline to complete the financial adviser exam to 30 September 2022

SAFAA welcomes the extension of the deadline to complete the financial adviser exam to 30 September 2022.

We note that the Bill clarifies that the Minister's power is intended to be used to approve the principles underpinning the exam, rather than approve each exam and all of the exam questions, and that it not the government's policy intent to change the knowledge which the exam tests.

SAFAA does not have an issue with the matters which the exam must cover — regulatory and legal obligations, ethical and professional reasoning and communication and financial advice construction. We have however been arguing for some time that the questions in the exam are not 'fit for purpose' for stockbrokers and investment advisers or reflect what they do in real life.

The results of the July FASEA exam are proving what we have been saying for some time – the FASEA exam is not fit for purpose. FASEA's lack of understanding about how stockbroking and investment advice differs from

financial planning has led to its 'one-size-fits-all' approach to financial advice that is reflected in the exam questions.

The following data that FASEA provided regarding the results of the July exam sitting is of particular interest:

- Only 60% of candidates sitting the July exam passed.
- Of the candidates sitting the July exam, 30% of them were resitting.
- While the average pass rate of those sitting the exam for the first time was 81% across all exams, the pass rate for those sitting the July exam for the first time was only 69%.

The pass rates for the exam have been steadily declining.

This is not an academic exercise – SAFAA's members will lose their livelihood if they don't pass the exam. Feedback from our members is that the questions in the exam are on matters on which they do not provide advice, such as insurance, estate planning and centrelink benefits and are more suitable for financial planners. SAFAA has received specific feedback that in relation to the July exam, only one scenario related to stockbroking. That member stated *"It was a financial planning exam."*

In addition our members have told us that the exam feedback is unhelpful and generic and the structure of the questions is flawed.

With the deadline for the wind-up of FASEA and the transfer of the administration of the exam looming, it is vital that the government 'hit the ground running' in overhauling FASEA's failed policies concerning the exam. It is important that 1 January 2022 does not represent a continuation of the mess created by FASEA, but is genuinely a fresh start. The exam questions must be reviewed and overhauled in a timely manner by people who understand the financial advice industry in general and the stockbroking and investment advice profession in particular to ensure that financial advisers sit an exam that is 'fit for purpose' in 2022.

The new fees for the financial adviser exam

The proposed exam fee of \$948 per sitting is a significant increase from the existing fee of \$540. While we note the reasoning behind the fee increase is to take account of the reduced numbers that will be sitting the exam, it does not take into account that, to be eligible to sit the exam, an adviser will have already paid two lots of exam fees totalling \$1080. This results in a total outlay of \$2028 for an adviser to sit an exam in 2022 after having sat and failed an exam twice before that was not 'fit for purpose'. We consider that the only way the government can justify charging this significantly increased amount is by taking action to ensure that someone with experience in retail stockbroking and investment advice reviews the exams to be undertaken in 2022 to ensure they are 'fit for purpose' and contain tailored and bespoke scenarios appropriate for stockbrokers and investment advisers. It is important that ASIC does not roll out the same FASEA financial planning exams previously offered in 2021.

Extending the implementation date of the Single disciplinary Body to 1 July 2022

We note that the intended implementation date for the single disciplinary body is 1 January 2022.

As Treasury is well aware, six reforms arising out of the recommendations from the Royal Commission and other inquiries commenced 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 emerging from renewed lockdowns. SAFAA welcomed ASIC's recent announcement that it 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.

These regulations and legislative instrument are not yet finalised and the bill is yet to pass. 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.

Tax (financial) advisers

SAFAA welcomes the provisions that grandfather existing tax (financial) advisers from the additional education and training requirements and exempts existing advisers from the additional education requirements until 1 January 2026. Existing tax (financial) advisers already provide incidental tax advice in accordance with TPB registration and should not be required to undertake additional education. Existing advisers are subject to the education requirements under the Corporations Act.

As we have previously stated, including the recommendations of the James Review regarding tax (financial) advisers with the Bill has created complexity and confusion. The transitional provisions are complicated and difficult to understand.

We recommend provisions in the Bill and the regulations dealing with tax (financial) advisers should be excised and dealt with in a separate bill at a later time in order to ensure that a solution is reached that addresses the many issues raised by SAFAA and other professional associations whose members are impacted by these changes. The amendments to the Bill would be straightforward, with the bulk of them contained in the sections relating to registration and the creation of Qualified Tax Relevant Providers. Amending the regulations is equally straightforward as the amendments concerning tax (financial) advisers are in the one schedule.

In the meantime, we recommend that the status of tax (financial) advisers remains unchanged.

We set out some of the issues we have identified with the tax (financial) adviser provisions below.

Tax (financial) advisers who are not Financial Advisers

As we raised at the roundtable on 8 October, the issue of tax (financial) advisers who are not Financial Advisers as defined by the Corporations Act (as they only provide tax (financial) advice services to wholesale clients) is a complex one. The transitional provisions are incredibly complex and difficult to navigate and understand. We consider that many issues arise that will require further consideration and time is needed for this process to be undertaken.

As we pointed out in our submission dated 20 August 2021, SAFAA has identified about 1600 tax (financial) advisers thus far who would be affected by these provisions and we consider that the numbers are likely to be greater when you take into account the industry as a whole. We also have 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. Accordingly, we consider that over time more advisers who are not Financial Advisers as defined will provide incidental tax advice to wholesale clients and will be subject to these provisions. This is why it is important that time is taken to ensure the legislation is workable and easy for advisers to understand.

Registration as a tax agent

The proposed solution for tax (financial) advisers who provide tax (financial) advice services but are not Financial Advisers is for them to apply to the TPB to be registered tax agents. We consider that the term 'tax agent' has a different meaning to consumers than the term 'tax (financial) adviser' which may lead to confusion as to the services these advisers can provide. Consumers may believe that their tax (financial) adviser can provide them with tax advice that is not incidental if they are registered tax agents. For this reason we recommend that the term 'tax (financial) adviser' be retained for advisers registered by the TPB to provide incidental tax advice rather than the term 'tax agent'.

While we note that Treasury and the TPB have referred to the recommendations of the James Review as the rationale for not retaining regulation of tax (financial) advisers under the TPB, this argument does not stand scrutiny because:

- the James Review did not take into account the existence of tax (financial) advisers who provide advice to wholesale clients
- the overly complex and difficult-to-navigate regulations concerning the treatment of tax (financial) advisers has resulted in a cohort of tax (financial) advisers continuing to be regulated by the TPB and a change of name to tax agent does not obscure that reality.
- the ongoing regulation of a cohort of tax (financial) advisers by the TPB does not fulfil the stated objective of removing duplication of regulation.

Transitional arrangements

The transitional arrangements are causing confusion to our members, particularly the use of two different registration cut-off dates of 1 October 2022 and 1 January 2023.

The current proposal provides that a tax (financial) adviser who is not a Financial Adviser may continue providing tax (financial) advice services without being required to meet any additional requirements between 1 January 2022 and 30 September 2022 and that to continue providing tax (financial) advice services they must register as a tax agent under the *Tax Agents Services Act* before 1 October 2022. Under a different scenario, a person who is registered as a tax (financial) adviser immediately before 1 January 2022 is eligible to be registered as a tax agent as long as they make an application for registration before 1 January 2023.

Our members can't understand why there are two different dates. In fact, one of our members has assumed that tax (financial) advisers must submit their applications by 1 October 2022 to allow the TPB three months to process them by 1 January 2023. This is a good example of how having multiple cut-off dates is confusing.

SAFAA had a discussion on 8 October 2021 with Treasury representatives about the confusion created by these two dates. Our understanding is that the date of 1 January 2023 was chosen as a cut-off date as it allows tax (financial) advisers who have fallen off the FAR on 1 October 2022, due to a failure to sit and pass the FASEA exam by that date, an additional three months in which to apply to be registered as a tax agent by 1 January 2023. However, having two cut-off dates for slightly different scenarios is difficult for our members to understand and to administer. Complying with these transitional provisions will have important impacts on the livelihoods of individual advisers. This is why we consider the rules surrounding what tax (financial) advisers have to do and when in order to maintain their registration must be clear and easy to understand.

SAFAA recommends that in order to eliminate confusion and the risk that advisers 'slip through the cracks', the transition provisions be streamlined to have just one cut-off date, rather than two. Any cut-off date must allow plenty of time for advisers to transition.

Professional membership registration

SAFAA is an accredited tax (financial) adviser Association for the purposes of the *Tax Agents Services Act* and has individual practitioner members who are tax (financial) advisers. The Bill eliminates tax (financial) adviser Associations. Our members have raised their concerns with us about the removal of the professional membership registration option for tax (financial) advisers. They consider that a professional membership option should be available for practitioners required to register directly with the TPB due to the importance of them being represented by a professional body with the TPB. This is an issue that requires more discussion.

Conclusion

SAFAA is happy to engage with Treasury and provide whatever assistance is necessary to improve the operation of the Single Disciplinary Body. SAFAA is also happy to discuss in greater detail the issues surrounding the regulation of tax (financial) advisers.

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

A handwritten signature in black ink, appearing to be 'JF' with a large flourish and 'Gx' written below it.

Judith Fox
Chief Executive Officer