

Exposure Draft Legislation Q&A – New Disciplinary System for Financial Advisers¹

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¹ The information in this document is based on the exposure draft legislation.

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New disciplinary system for financial advisers

What will the disciplinary process for financial advisers look like?

Recommendation 2.10 of the Financial Services Royal Commission called for the Government to establish a single disciplinary body for financial advisers. Commissioner Hayne noted that the only power typically available to ASIC was ASIC's banning powers, which was not always appropriate for more minor breaches.

On 9 December 2020, the Treasurer and Minister for Superannuation, Financial Services and the Digital Economy announced that the Government would deliver on this recommendation by expanding the role of the Financial Services and Credit Panel (FSCP) within ASIC to be the 'single disciplinary body'. Currently, the FSCP assists ASIC on more bespoke banning matters.

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 an FSCP to consider the matter.

The FSCP will consist of at least two industry representatives and an ASIC staff member as chair. The FSCP will meet to consider the evidence compiled by ASIC and decide whether to impose an administrative sanction, an infringement notice, or both. The FSCP may also decide to take no action.

If the FSCP, having considered the matter, decides on a proposed sanction, the financial adviser will be issued with a notice setting out the proposed sanction and giving the adviser 28 days to make a submission to the FSCP or seek a hearing.

The FSCP cannot take action until the 28 days have lapsed. If during that time a submission has been made, the FSCP must consider the submission before taking action against an adviser. Similarly, if an adviser requests a hearing, the FSCP may not take action until after the hearing has been held.

If no submission has been made or hearing requested, the FSCP can take the proposed action as outlined in the notice. If a submission was made or hearing given, the FSCP can take the action as proposed, or take a different action, including deciding that a sanction is no longer appropriate.

There are avenues for an adviser to seek a review of an FSCP decision. For administrative sanctions, the adviser can ask the FSCP to vary or revoke the sanction, or the adviser can seek a review with the AAT. For infringement notices, the adviser can ask the FSCP to withdraw the notice or the adviser can refuse to pay the infringement notice and prepare to have the matter determined by a court.

When will the 'single disciplinary body' be established?

1 January 2022 (subject to the passage of legislation).

Who will be subject to the single disciplinary body?

The FSCP will consider conduct and breaches by financial planners or advisers including tax (financial) advisers who are authorised to provide personal advice to retail clients. A person who is giving general advice only will not be subject to the FSCP.

Stockbrokers, actuaries and insurers are all subject to disciplinary action by the FSCP if they are giving personal advice to retail clients.

An Australian financial services (AFS) licence holder will only be subject to the FSCP where it is also a relevant provider and the breach relates to that person's conduct as a financial planner or adviser. Otherwise, breaches by a licensee will continue to be dealt with by ASIC.

What kinds of breaches will the single disciplinary body consider?

Broadly, there are six circumstances that, when they arise, are matters that will be referred to the FSCP.

The first circumstance is where the adviser is in a position that compromises their ability to practice as a financial adviser. For example, they could be insolvent, under administration, convicted of fraud, have been an officer of two or more corporations that have been unable to pay their debts, or not be a fit and proper person.

The second circumstance is where the adviser might have contravened a financial services law, for instance by failing to fulfil annual consent requirements or accepting conflicted remuneration. They may have breached the education and training standards set by the Financial Adviser Standards and Ethics Authority (FASEA) or the Code of Ethics.

The third circumstance is where an adviser has been involved with someone else's breach of a financial service law. For example, through developing an environment or business model that led to a contravention occurring, even if the specific acts were performed by others.

The fourth circumstance is where an adviser provides advice while unregistered.

The fifth circumstance is where an adviser fails to follow a previous sanction applied by the FSCP.

Lastly, an adviser may have failed to respond to a determination made by the Australian Financial Complaints Authority (AFCA) – the threshold being that the adviser must have twice been linked to a failure or refusal to give effect to such a determination.

Will the single disciplinary body consider matters or conduct that occurred prior to 1 January 2022?

No, but if the breach continues on or after 1 January 2022 the FSCP can consider the matter to the extent it relates to the period on or after 1 January 2022.

What sanctions can the FSCP impose?

The FSCP can impose a range of administrative sanctions, an infringement notice or recommend that ASIC commence court proceedings seeking a civil penalty.

The administrative sanctions that the FSCP can apply are a warning or reprimand, directions to the adviser to undertake additional training or supervision, or suspending or cancelling the adviser's registration for a specified period.

The FSCP is able to impose an administrative sanction on any breach that is brought before it. This includes when an adviser is no longer a fit and proper person, has become insolvent, has twice been linked to a failure or refusal to act following a determination made by AFCA, or has fallen foul of the financial services law.

The FSCP has the additional option of imposing an infringement notice in response to specific breach types which are carved out as Restricted Civil Penalty Provisions (RCPPs). These breach types include not complying with the Code of Ethics or the education and training standards (including the requirements that apply to provisional financial advisers), providing personal advice to a retail client while unregistered, or breaching an existing order made by the FSCP. The availability of infringement notices does not preclude the FSCP from alternatively or additionally imposing an administrative sanction on the same breaches.

What is Restricted Civil Penalty Provision?

A restricted civil penalty provision refers to those provisions in the Bill which place obligations on a financial adviser to:

- meet the Education and training standards;
- comply with the Code of the Ethics;
- meet the requirements for supervising a provisional relevant providers;
- follow a direction or order given by the Financial Services and Credit Panel; and
- not give financial advice while unregistered.

If a financial adviser breaches one of these provisions, the FSCP may issue an infringement notice or recommend to ASIC that ASIC apply to a court for a civil penalty.

When can the FSCP issue an infringement notice?

The FSCP may impose an infringement notice in response to a breach of a Restricted Civil Penalty Provision.

How much are the fines that the FSCP can issue via infringement notice?

The infringement notice amount for an alleged contravention of a restricted civil penalty provision is 12 penalty units for a single contravention. This is currently \$2,664.

How can an adviser provide 'evidence' to the single disciplinary body?

Before the FSCP can take action against an adviser, the FSCP must give the adviser a notice explaining the proposed sanction and giving the adviser the opportunity to either have a hearing with the FSCP or make a submission. The adviser has 28 days to request a hearing or make a submission.

How will an adviser find out about a sanction?

The adviser will know about the proposed sanction and breach when the FSCP issues a notice setting out the proposed sanction. The notice also gives the adviser an opportunity to request a hearing with the FSCP or make a submission.

Can the single disciplinary body enter into an enforceable undertaking as a way of resolving a breach?

The FSCP will be able to accept enforceable undertakings as an alternative to other sanctions or a civil penalty.

Further details on enforceable undertakings will be available through regulatory guidance prepared for the FSCP.

What is the appeal process for an FSCP decision?

In the first instance, an adviser will always be offered the opportunity to contest a proposed sanction before the FSCP. However, once the proposed sanction is decided and imposed, there are a number of appeal routes depending on the type of sanction.

Administrative sanctions, once imposed, are reviewable via two mechanisms.

Firstly, the FSCP may consider revoking or varying a sanction. This review will either take place where an adviser has made an application to ASIC or ASIC becomes aware of a change in the circumstances that formed the basis of the original FSCP decision. ASIC can convene an FSCP to consider the matter. An adviser can apply to the Administrative Appeals Tribunal (AAT) for a review of the FSCP's decision to not vary or revoke its original decision.

Secondly, an adviser can apply to the AAT for a review of the FSCP's original decision. After conducting a hearing, the AAT can decide to affirm the FSCP's original decision, vary its decision, set aside the decision and replace it with a new decision, or set aside the original decision and send the matter back to the FSCP for a new decision.

The AAT's decision will usually be made public. A copy of the AAT's decision and the reasons for it will also be provided to the FSCP and the adviser.

The adviser can appeal the AAT's decision by lodging an appeal with the Federal Court within 28 days after receiving the AAT's decision. The appeal must relate to a question of law.

Where the sanction is an infringement notice or civil penalty the review process is different.

Where the FSCP issues an infringement notice, the person may make an application to ASIC to have the notice withdrawn within 28 days. ASIC can then convene an FSCP to decide whether to withdraw the infringement notice.

Civil penalties are imposed by a court. If a court imposes a civil penalty the person may appeal the decision through the court process.

What disciplinary proceedings against advisers will be put on the Financial Advisers Register and be visible to the public?

In addition to the existing requirement that ASIC include details of a banning order made against an adviser on the Financial Advisers Register, ASIC will also be required to include the following details, which will be visible to the public, on the register:

- where requested by an FSCP, details of any disciplinary action against the adviser by the FSCP - this includes warnings, reprimands, directions to undertake specified training, counselling or supervision, orders suspending or prohibiting registration, and infringement notices;
- details of any declarations made by the Court that the relevant provider has contravened a restricted civil penalty provision; and
- details of any undertakings given by the relevant provider to an FSCP.

When will matters be referred to the single disciplinary body?

ASIC will become aware of a potential breach either through a complaint, breach report or through its own monitoring work. 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. If ASIC reasonably believes that a breach has occurred, ASIC must convene an FSCP. ASIC is not required to convene an FSCP if it is instead seeking a banning order.

Who can submit a complaint or breach to be considered by the FSCP?

Anyone will be able to submit a complaint to ASIC. This includes but is not limited to industry associations, AFS licensees, consumers, AFCA and the Tax Practitioners Board (TPB).

Whether or not these complaints are then considered by the FSCP will be determined by ASIC's investigation and subsequent decision as to whether ASIC reasonably believes a breach has occurred.

Who sits on the single disciplinary body and how are they appointed?

The Minister determines the people who are eligible to be appointed to an FSCP. To be appointed by the Minister, 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.

When ASIC convenes an FSCP, ASIC must appoint at least two members from this pool. An ASIC officer will be the chair of each FSCP.

Can an adviser be represented by a lawyer at a hearing? Will the single disciplinary body pay legal costs if the adviser is not found to have committed a breach?

Yes, a financial adviser can be represented at a hearing by a lawyer. The financial adviser can also be represented by a person other than a lawyer at a hearing, as long as the person has been approved by the FSCP. The representative could include an employee of the adviser or another member of an association of which the adviser is a member. The FSCP will not pay legal costs for the adviser in any circumstances.

How long will the process take from report of a breach to ASIC, to a decision by the single disciplinary body?

This will depend on the complexity of the matter, the approach taken by the adviser, and ultimately the sanction that is being sought. It could be as little a couple of months to a number of years if the adviser chooses to exercise their review rights.

How will I be able to find out about the cases that the FSCP hears and the outcome?

ASIC will need to report on the work the FSCP does in ASIC's annual report. The evidence considered as part of a specific matter will not be publicly available. However, when imposing a sanction, the FSCP can decide to also instruct ASIC to list the sanction on the Financial Advisers Register. This means that when a person looks on the Financial Advisers Register to find a financial adviser, any sanctions imposed on an adviser would also appear on the register against the adviser's name.

How does the single disciplinary body differ from AFCA?

AFCA is an independent external dispute resolution scheme that resolves complaints that consumers and small businesses have with their financial firms. It can award compensation for losses suffered because of a financial firm's error or inappropriate conduct. It does not impose fines or administrative, civil or criminal penalties on a financial firm or individual advisers.

What decisions or sanctions can ASIC make or impose on advisers without the single disciplinary body?

Banning orders.

Will there be changes to the way that banning matters are dealt with?

There are no changes to ASIC's existing power to make banning orders. ASIC will still be able to ban financial advisers or delegate its banning powers to the FSCP.

What is the disciplinary process for licensees? What if I am both a licensee and an adviser?

The disciplinary process for licensees is mostly unchanged, except for new obligations and penalties around registration. The single disciplinary body does not apply to licensees in their capacity as licensees.

The new registration system requires licensees to submit a registration form for each of the advisers they have authorised to provide financial advice on their behalf. In doing this the licensee must make declarations about whether the adviser is a fit and proper person and has met the education and training standards. Sanctions may be imposed on the licensee if they have provided false or misleading information in the registration form or declarations. A licensee also faces a sanction if they continue to authorise an unregistered adviser to provide advice on their behalf. ASIC is responsible for administering the disciplinary system for licensees.

Leaving the disciplinary system for licensees mostly unchanged was a deliberate policy design. A licensee already has a number of obligations around the oversight and supervision of the advisers that they authorise to operate under their licence, as well as specific conditions and requirements that apply as the holder of a licence. For example, licensees are already under an obligation to ensure that their advisers are adequately trained and competent to provide financial advice.

The establishment of the single disciplinary body was intended to target individual advisers and establish a range of sanctions – from low level sanctions to high level sanctions that could be applied directly on the adviser.

Licensees can also be financial advisers. If a person is a licensee and a financial adviser, they will be subject to disciplinary systems administered by both ASIC and the FSCP depending on the context of the breach.

The licensee can have its licence varied, suspended or cancelled by ASIC. ASIC can take these actions without holding a hearing in certain circumstances or following a hearing in other circumstances.

Registration

What are the requirements for an adviser to be registered?

As well as recommending the Government establish a single disciplinary body for financial advisers, Commissioner Hayne recommended that all financial advisers be registered.

The Bill requires an adviser to be registered in order to provide personal financial advice and for this registration to be renewed annually.

Who will be responsible for an adviser registration?

The obligation for an adviser to be registered sits with the licensee. If the adviser is also the licence holder, the adviser will be registering him or herself.

What is the proposed registration process for an existing adviser?

Under the Bill, a licensee can begin registering their existing financial advisers from 1 January 2022 and has until 1 January 2023 to register their financial advisers for their advisers to be able to continue to provide advice.

What is the proposed registration process for a new adviser?

From 1 January 2021, new advisers cannot begin to provide financial advice until ASIC has confirmed that the adviser has been registered.

How often does the registration need to be updated?

Registration needs to be renewed annually. However, provided that the registration renewal form has been submitted by the due date, a financial adviser can continue to provide advice without needing to wait for ASIC to confirm that the adviser's registration has been renewed.

What will be included in the registration form?

Registration requires the licensee to submit a registration form to ASIC. The registration form will need to include:

- a declaration from the adviser that they are a fit and proper person;
- a declaration from the licensee that the person has met the education and training standards; and
- a declaration from the licensee that they are not aware of any reason why the adviser is not a fit and proper person. This is required to be based on information already

available to the licensee and will not require the licensee to undertake additional investigation.

ASIC registers a financial adviser by recording that the adviser is registered on the existing Financial Advisers Register.

What will happen if my licensee fails to, or refuses to, register me?

An adviser must be registered in order to provide financial advice.

If an adviser provides advice while unregistered, and their licensee has not revoked their authorisation, then the licensee is subject to penalties. This places the onus on the licensee to register the adviser, or revoke their authorisation.

If an adviser gives advice and the 'adviser' is not authorised by a licensee (or their authorisation has ceased) – then it is the adviser who is in breach.

Will the general public be able to access the register? Where from?

Yes – From the MoneySmart website.

Will there be a fee to register?

Yes, it is proposed that a fee will be payable. This will be set in the *Corporations (Fees) Regulations 2001*. The Government will consult on these regulations at a later date.

Changes for tax (financial) advisers

What are the changes for tax (financial) advisers?

A person who provides tax (financial) advice services will no longer need to register with the Tax Practitioners' Board (TPB). The adviser will only need to be registered with ASIC. The adviser's licensee will be responsible for the registration.

To provide tax (financial) advice, an adviser also must meet the additional education and training standards set by the Minister which will be specific to advisers wanting to provide tax (financial) services. An adviser can also provide tax (financial) advice if they are a registered tax agent.

What happens to a tax (financial) adviser's registration with the TPB?

If a tax (financial) adviser's registration with the TPB continues beyond 1 January 2022, that tax (financial) adviser will be deemed to be registered with ASIC until their registration with the TPB expires. Once the tax (financial) adviser's registration expires with the TPB, the licensee of the tax (financial) adviser will need to renew their registration with ASIC.

Will there be a 'gap' in the regulation of tax (financial) advisers?

No. Currently, tax (financial) advisers are required to comply with the requirements under the *Corporations Act 2001* to be a financial adviser as well as the requirements set for tax (financial) advisers in the *Tax Agent Services Act 2009*.

This means that a tax (financial) adviser is currently required to be listed on the Financial Advisers Register (as a result of being authorised by their licensee to provide financial advice) and registered with the TPB.

It also means that the adviser must meet the education and training standards, and the Code of Ethics set by FASEA as well as education and training standards for tax (financial) advisers in the *Tax Agent Services Act 2009*.

The changes will reduce duplicate regulation but do not create a gap in regulation. An adviser whose registration is current with the TPB on 1 January 2022 will automatically be registered with ASIC. The adviser will also need to continue to meet their obligations under the *Corporations Act 2001* as well as any additional education and training standards set by the Minister for tax (financial) advisers.

Any breaches by a tax (financial) adviser on or after 1 January 2022 will be referred to the FSCP. A sanction imposed against the tax (financial) adviser may be recorded on the Financial Advisers Register.

What happens to professional industry associations for tax (financial) advisers that are formally recognised under the *Tax Agent Services Act 2009 (TAS Act)*?

Professional industry associations for tax (financial) advisers will no longer be recognised under the TAS Act. They will also not be recognised under the *Corporations Act 2001*.

However, professional associations can continue to offer continuing professional development courses, set out their own Code for tax (financial) advisers (in line with the Code of Ethics) and discipline tax (financial) advisers.

Will tax (financial) advisers have new education and training requirements they must meet?

To provide tax (financial) advice, an adviser must meet the additional education and training standards set by the Minister.

Professional Standards and FASEA's functions

What are the proposed changes to how standards are set for financial advisers?

FASEA, which currently sets the education and training standards for financial advisers, is being wound-up. The standard setting function will be undertaken by the Minister responsible for the *Corporations Act 2001*.

Until new education and training standards are made or the existing standards are amended, the standards made by FASEA will remain operational – even once FASEA is wound-up.

What will happen to FASEA?

FASEA will be wound-up on 1 January 2022. Treasury and ASIC, who will be taking on FASEA's functions, are engaging with FASEA's existing staff to ensure a smooth transition.

Will the standards change as a result of this Bill?

The Bill does not change the standards but it does give the Minister the power to change the standards by legislative instrument.

The Bill ensures that even once FASEA is wound-up, the existing standards and the Code of Ethics remain in place unless they are amended or replaced by the Minister.

Will existing advisers still be able to sit the exam before 31 December 2021?

It is important that the transfer of the exam process is seamless. Existing providers want certainty that they are able to meet the exam requirements before the deadline of 1 January 2022.

FASEA will be supported by Government to enable it to continue to deliver the exam prior to 1 January 2022.

What does the bill mean when it says that ASIC will administer the exam? Will ASIC be able to decide the content and format of the exam?

The content and format of the exam are set by a standard – which will be made by the Minister. The existing standard does not include specific questions but it does set out:

- the knowledge and skills that must be tested by the exam;
- the number of exam questions, including the number of multiple choice questions and the number of short answer questions;
- the amount of time a person has to complete the exam, including reading time; and that the exam must be completed on a computer.

ASIC will be responsible for writing and approving exam questions; reviewing the exam before it is set; and marking the exam.

ASIC will be able to engage an external provider in the same way that FASEA has engaged the Australian Council for Educational Research (ACER) to provide services such as delivery of the exam.

Will there be a separate exam for stockbrokers and life insurance advisers?

The Bill does not provide for a separate exam for stockbrokers or life insurance advisers.

Who will approve higher education degrees?

The Minister will make the degree standards in the form of legislative instruments. Unless the Minister makes or amends the existing standards on degree requirements, the standards set by FASEA will continue to apply.

Will I still have to sit the exam and complete education requirements following the changes?

Yes, the Bill does not change the date by which existing advisers need to complete the exam. This will remain 1 January 2022.

Will the Minister change the Code of Ethics?

The Government is aware that the Code of Ethics is an area where the industry has previously raised concerns and has provided feedback through FASEA's consultation and review processes.

However, the Government has not made any decisions about when or if to change the Code of Ethics or other standards. The Government would not do this without further engaging with industry and understanding any concerns.

When will these changes take effect?

Primary law needs to pass Parliament before the changes can take effect. The proposed date for the changes to commence is 1 January 2022.