

By Email: SDBconsultation@treasury.gov.au

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FINSIA SUBMISSION: SINGLE DISCIPLINARY BODY RESPONSE

Introduction

FINSIA (the Financial Services Institute of Australasia), welcomes the opportunity to make a submission in response to the Single Disciplinary Body: Policy Paper and the proposals to implement regulations under the Financial Sector Reform (Hayne Royal Commission Response- Better Advice) Bill 2021 (the Bill).

FINSIA's purpose is to deepen trust in financial services by raising standards of professionalism. It is a not-for-profit professional membership body for individuals working across the full spectrum of financial services industry in Australia. As a connector between finance professionals and industry, FINSIA is keen to support the financial services industry's commitment to earn back trust and create an enduring customer focussed culture.

Overview of response

FINSIA supports a practical and appropriate balance in the matters which should be referred to the FSCP to allow the FSCP's decisions, as intended by the Royal Commission, to demonstrate what conduct is or is not unacceptable. This includes the better defining of notions of "serious" and "repeated" and not confusing processes and outcomes by including suitability of persons to provide financial advice. FINSIA also suggests some sanctions listed on the Financial Advisers Register (FAR) should be removable over time.

Questions for stakeholder response

1. Should the criteria include other specified breaches of the law such as other restricted civil penalty provisions or circumstances prescribed in section 921K of the Bill?

FINSIA acknowledges that FSCP will perform an important function in highlighting unacceptable conduct in a broad range of cases, which might not otherwise be subject to disciplinary action because a banning order is a serious sanction which may not always be appropriate. It agrees that there is a balance between lowering the number of matters that require the FSCP to be convened (thereby reducing cost and time pressures on ASIC and the FSCP) while ensuring the FSCP considers a broader range of matters to demonstrate that particular conduct is unacceptable, and the questions for stakeholder largely revolve around where that balance is reached.

However FINSIA considers there will be a very broad range of circumstances which are considered as a result of the draft criteria and the inclusion of other specified breaches of the law would risk excessive cost of regulation for no appropriate return.

finsia.com

Level 4
16 Spring Street
Sydney NSW 2000
Australia

T 61 2 9275 7900
T 1300 346 742
F 61 2 9275 7999
membership@finsia.com

PO Box H99
Australia Square
NSW 1215
Australia

ABN 96 066 027 389

2. *Should the proposed criteria be linked to the 'significance test' in the breach reporting regime?*

- *The effect of this would be that every breach reported by a licensee to ASIC would then be required to be referred to the FSCP, if ASIC does not take other action (such as banning).*
- *Complaints received by the public would also be subject to the 'significance test' in the breach reporting regime.*

FINSIA considers that linking the proposed criteria to the “significance test” in the breach reporting regime is likely to place an overload on ASIC and FSCP where more nuanced criteria would avoid the overload while producing a broad range of matters demonstrating unacceptable conduct.

3. *Should the terms 'serious' and 'repeated breach' be defined in Regulations? if so, how should they be defined?*

FINSIA considers it would be helpful to provide a guiding definition, otherwise the judgement will be a purely subjective one.

4. *Should the proposed criteria in (a) and (b) above be included as part of the definition of 'serious'? For example, "the contravention is a serious breach taking into account:*

- *the material loss or damage to clients;*
- *the benefit gained by the relevant provider; and*
- *repeated breaches of a similar nature."*

5. *Should a repeated breach be interpreted as similar breaches that have occurred on two or more occasions and in a specific timeframe, such as in a 12-month period?*

FINSIA considers there is merit in the approach set out in paragraphs 4 and 5 taken together, however FINSIA would add that the apparent intent should also be taken into account. Given the same consequence a deliberate action with mild consequences might rightly be considered serious, whereas an inadvertent breach or misjudgement might not be. Naturally fraud or dishonesty must be referred.

It is also suggested that there should be some mechanism for related potential breaches be referred to the same FSCP to ensure the process is efficient, whatever the outcome, and avoid unnecessary costs, stress and delay all involved.

FINSIA also suggests that the importance of personal proactive responsibility should not be inadvertently quashed by the system.

6. *Should the proposed criteria in c) specify breaches that may affect the suitability of a person to provide financial product advice? For example, the person is not a fit and proper person taking into account the fit and proper criteria in the Bill, or the person has been involved in conduct that is dishonest or fraudulent.*

FINSIA suggests that specifying breaches that may affect the suitability of a person to provide financial advice is most unlikely to provide the clear broad guidance on unacceptable conduct found

by the Royal Commission to be in need. It is more likely to create a set of processes and outcomes which are confusing to those in the industry and the community.

Publication of sanctions

FINSIA considers that it would be fair and practical to provide some mechanism for removal of a sanction on the FAR after a period of time. It would seem grossly unfair, and out of keeping with societal notions of “spent” punishments, that for example mandated specified training of a 25-year-old should remain in place 30 years later. The lack of an ability to remove a sanction will likely result in increased applications to FSCP to revoke sanctions, a process probably costing a great deal more. FINSIA agrees that it would not be appropriate for written warnings and reprimands issued by ASIC and FSCP to be included on the FAR.

FINSIA considers there would be significant benefit in publicising the short facts of referrals to FSCPs and the outcome in anonymous form as a powerful educational tool for industry. The practical application in each case can be valuable to all in the industry.

Conclusion

In FINSIA’s view appropriately defining the criteria for reference to FSCPs will be an important pre-requisite to successful operation of the Bill.

FINSIA’s Council, leadership team and members are eager to engage with the Retirement, Advice and Investment Division of the Treasury to deliver the best community outcomes.

In addition to this submission, we would like to propose a meeting with the Division and FINSIA leadership to discuss the important issues raised in further detail as needed.



John Corcoran
Chair, Financial Advice and Services Industry Council



Chris Whitehead
CEO & Managing Director