FSC FINANCIAL SERVICES COUNCIL

Single Disciplinary Body for Financial Advisers – Exposure Draft Legislation - *Financial Services Royal Commission Recommendation 2.10*

FSC Submission

May 2021

FSC FINANCIAL SERVICES COUNCIL

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advice licensees and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Executive Summary

The FSC is submitting on Treasury's Exposure Draft **(ED)** legislation implementing Financial Service Royal Commission **(FSRC)** Recommendation 2.10 to establish a single disciplinary regime overseeing the financial advice profession.

The FSC seeks a robust, low-cost and sustainable regime of disciplinary oversight for financial advice that ensures trust and provides for continuous improvement in the profession. The requirements set out in the ED need to be better reconciled with the ultimate objective of creating a financial advice profession.

Affordable and Accessible advice: FSC Green Paper on financial advice[1] proposes for public discussion a disciplinary regime that clarifies the role of Licensees and Advisers in relation to the disciplinary regime to split between Treasury, and ASIC through the Financial Services and Credit Panel **(FSCP)** with the objective of reduce cost without undermining consumer protections or professional standards. It adds further proposals for consideration in tandem with the this submission that responds directly to the ED.

Improvements to the ED suggested in this submission include:

- Introducing a more defined pathway for triaging vexatious and more serious claims, underpinned by a significance test, to reduce cost and resource pressures on the FSCP while ensuring timely resolution of claims and enforcement against misconduct that builds trust.
- Better defining which persons are within scope of the Financial Services and Credit Panel **(FSCP)** disciplinary oversight with a singular and independent pathway for reviews and appeals and more clearly set out process and timeframes for triaging claims.
- Removal of the term tax (financial) adviser from the Tax Agent Services Act 2009
- Better reflection of relevant financial advice expertise to support a disciplinary process representative of the profession and obligations for the Australian Securities and Investments Commission **(ASIC)** and the FSCP to consult regularly with industry and take a holistic approach to compelling compliance
- A flexible arrangement for registering financial advisers and a common agreement' consulted on by ASIC clarifying this relationship should be reached with licensees.
- Legislation that is better aligned with the breach reporting requirements and the transfer of registrations from the Tax Practitioners Board **(TPB)**.

[1]Page 43, 'Renewing the Licensing and Registration of Professional Financial Advice'. *Affordable and Accessible: FSC Green Paper on financial advice*. Source: https://fsc.org.au/policy/advice/green-paper

3. FSC Recommendations

- The disciplinary regime have minimal cost impact to industry and its resourcing requirements should be specified.
- The governance, management and staff relating to the management of the FSCP reflect financial advice experience and qualifications.
- Following the establishment of the disciplinary regime, regular independent reviews of its operations should assess the level of financial advice expertise, experience and qualifications.
- ASIC and the FSCP should routinely consult to identify where industry and the regulator can work proactively to apply standards of conduct and professionalism most effectively.
- ASIC in conjunction with the FSCP should issue and maintain guidance in relation to the Code of Ethics to assist the profession to meet its obligations.
- Bulk registration of financial advisers by advice licensees should be permissible under the legislation.
- As the regime comes into force, ASIC should consult on a 'common agreement' around licensee and adviser responsibilities, and that of any other regulators.
- The ED should clarify the process licensees should follow in relation to consumers where a financial adviser's registration is suspended.
- The ED should align with incoming breach reporting requirements and relevant protocols issued by ASIC with regard to reference checking and information sharing. The legislation should make clear that all sanctions applied during the transition period will be effective.
- Licensees required to register a large number of advisers should have the flexibility of a single registration date for all financial advisers such licensees authorise.
- Separate pathways for processing vexatious and more serious claims should be clearly set out to ensure timely resolution of complaints and minimised pressure on the FSCP's resources to continually build trust in the profession.
- The legislation should include a significance test for serious breaches and this should be consulted on. This should be supported by clear regulatory guidance on the definition or threshold for serious incidents.
- The definition of which persons are subject to FSCP disciplinary action should be simplified and consulted and clarity with regard to the FSCP's oversight of financial advisers providing all forms of financial advice (eg personal advice, general advice).
- All matters regarding a financial adviser should be referred directly to the FSCP and the power to issue a banning order should rest with the FSCP.
- Timeframes should be specified for matters to be referred to and considered by the FSCP.
- There should be one simple process for appealing and/or reviewing the decisions of the FSCP in relation to a financial adviser and the responsibility of review and appeals of these decisions should rest with the Administrative Appeals Tribunal **(AAT)** as an independent reviewer.
- A fit and proper person as defined by the Tax Practitioners Board should be the same definition used by the Financial Services and Credit FSCP.

- Licensees should be afforded a defence of qualified privilege (similar to what is proposed for the *ASIC Reference Checking protocol*[2]) to ensure the licensee is protected if they legitimately believe that the person is not 'fit and proper'.
- Auditing should be conducted by the regulator or a duty imposed on the financial adviser to confirm and disclose such checks, on a regular basis for example every 12 months.
- The circumstances in which AFCA can refer complaints to ASIC and the FSCP should be set out.
- The distinction of tax (financial) adviser should be removed from the Tax Agent Services Act 2009.
- Clarity is needed on whether the 'sufficient number' model for registering licensees is permissible under the legislation.
- Tax (financial) advisers that meet the FASEA education requirements should be considered to have satisfied the TPB's education requirements.
- Defer the changes proposed by the TPB (March 2021) affecting tax (financial) advisers until the single disciplinary regime is established and has consulted with industry.

[2] Page 10, ASIC CP 333: Implementing the Royal Commission recommendations: Reference Checking and Information Sharing protocol. Source: https://asic.gov.au/media/5858201/cp333-published-19-november-2020.pdf

4. The Single Disciplinary Regime

4.1. Resourcing and cost

The resourcing requirements and costs of the regime are unclear.

The FSC understands the fees to fund the cost of the regime will be consulted on, although it is not clear how the new regime will be funded, or the cost-impact on industry that this will have that is inevitably worn by the consumer. There is also limited detail on what the costs should be and significant concerns have already been raised regarding the level of increase in costs year on year. Expanding the remit of ASIC, will likely to require additional resourcing.

The capacity of the FSCP to process a potentially high volume of matters and resolve these appropriately and equitably is not clear from the ED. A lack of a significance test and process for discerning between vexatious or more serious matters could see the processing of a significant number of largely administrative or minor claims relating to a financial advisers conduct. If ASIC has to convene the FSCP whenever it is believed special circumstances exist, and this includes where the FSCP reasonably believed a financial adviser has breached the law, the volumes will be large.

The impost that an increasing regulatory burden has on advice licensees inevitably burdens the consumer. The number of financial advisers exiting the industry will further impede the ability of consumers to access professional financial advice, as the number of those in need of advice increases.

Recommendation: The disciplinary regime should be designed to have minimal cost impact to industry and its resourcing requirements specified.

4.2. FSCP composition and expertise

The ED is unclear to whether the expertise on an FSCP in a given situation will be qualified to adjudicate on every matter. The FSCP might not always have the right level of advice experience, particularly if the member's experience is related to tax, or accounting, for example, rather than financial planning. An FSCP of 2-3 members might not sufficiently represent the right level of expertise to make the professional determinations on a financial advisers professionalism and competence.

Ensuring the disciplinary regime reflects sufficient financial advice expertise should be a priority for the Government. Possessing a clear understanding of the industry it is tasked with regulating, and providing discipline over, will be central to the disciplinary regime's overall effectiveness and authority. Many existing competency and professional issues relating to advice have been exacerbated by perceptions that regulators lack necessary expertise or understanding of industry issues. This works against the effectiveness of the regulator, in this case the disciplinary regime, at a time when it will be directly mandated to ensure greater professionalisation of financial advice.

To sanction a financial adviser in a manner that procedurally fair, and consistent, requires a regime with the requisite skill to be able to assess claims. The experience of industry with

bodies such as the Financial Adviser Standards and Ethics Authority **(FASEA)** has underlined this need. The leadership and staff should therefore reflect this experience and demonstrable competencies in these areas. The FSC supports the inclusion of consumer and academic voices in the disciplinary regime's operations however a greater focus on incorporating financial advice specialisation into the disciplinary regime's operations is needed than in the past.

To achieve the complete professionalisation of financial advice as the FSRC and the Government intend, the disciplinary regime should reflect the right set of expertise across different areas of financial advice (e.g. retirement planning, investments).

An example of this might be Remuneration. Assessing remuneration requires sufficient skill and expertise and drives behaviours. An intimate understanding of this should be reflected in the skillset of officials tasked with making the Regime's determinations. Expertise is an issue across the board for regulators to greater or lesser extent. Accountabilities will need to be put in place to ensure this is maintained.

Regular assessment of the regime's ability to reflect and represent the industry it represents should be formalised into regular reviews of its operations.

Recommendation: The governance, management and staff relating to the FSCP reflect financial advice experience and qualifications.

4.3. Role of industry bodies and reporting obligations

Further clarity on the remit of the disciplinary regime versus existing industry bodies in general and in relation to a Licensee's reporting obligations should be clarified. For example, the FSC's Members have a duty to report breaches of FSC Standards to the FSC. The ED as worded suggests such breaches would require additional reporting to ASIC.

Recommendation: Following the establishment of the disciplinary regime, regular independent reviews of its operations should assess the level of financial advice expertise, experience and qualifications.

4.4. Encouraging continuous improvement across the profession

As industry shifts to ongoing fee arrangements and adopts stronger breach reporting obligations, professional standards and education requirements, the FSC seeks a disciplinary framework for financial advice that is fair, agile and that works openly with industry to enhance consumer protections and outcomes. The regime should be equipped to identify misconduct, and respond proportionally, in a timely manner. This in the interests of consumers and industry.

Weaknesses of the existing regulatory landscape for financial advice have often been due to limited communication and engagement from regulators. Where regulators have demonstrated a conscientious approach to responding to cases of wrongdoing, misconduct and poor practice they have been comparatively limited in proactive approaches to prevent

it, or at least could be more consistent. Many of their processes for managing this are slow, the FSRC referred to the 'time-consuming' nature of the existing disciplinary framework where banning orders are made, in its final report.[3]

The FSC questions the extent to which the ED as proposed provides a sufficient 'feedback loop' for continuous improvement beyond the issuing of banning orders. Until now the industry has relied on banning orders by which to do this.

The regime's design should bring about more professional conduct arising from the disciplinary process supported through the dissemination of resources and training provided to financial advisers to support compliance by professionals throughout the advice sector that is consistent.

ASIC under the ED is tasked with enforcing what are now much higher standards of professionalism and conduct on industry. A holistic approach to implementing these new standards is needed to ensure the transition of financial advice to a profession.

Recommendation: ASIC and the FSCP routinely consult to identify where industry and the regulator can work proactively to apply standards of conduct and professionalism most effectively.

4.5. Adjudicating on the Code of Ethics

The Code of Ethics is principles based. There is concern that FSCP decisions will be subjective in nature when applying the Code's standards in its determinations. There should be an obligation issue and maintain guidance in relation to the Standards, to assist advisers to meet their obligations. This guidance should consist of a clear and concise interpretation of each of the 12 FASEA standards within the Code including practical examples under each Standard.

Recommendation: ASIC in conjunction with the FSCP should issue and maintain guidance in relation to the Code of Ethics to assist the profession to meet its obligations.

[3] Page 216, Final Report. Volume 1. Royal Commission into the Misconduct in the Banking, Superannuation and Financial Services Industry. Source: https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf

5. A clear registration process

5.1. Registration of financial advisers

The registration process needs to be simple and straight forward given licensees will need to manage many adviser registrations. This process should carry a neutral cost impact as financial advisers change their registration from the TPB to ASIC. The change in registration requirements identified in the ED should not result in any increase in the cost of registration.

Requests to de-register a financial adviser should be dependent on there being no current investigations, and no reason to believe there should be an investigation, to ensure the FSCP's ability to sanction a financial adviser is not diminished. The FSC requests clarity on what the process should be if an advisers registration falls due while they are under investigation.

5.2. Role of the licensee

The FSC is concerned licensees in practice be responsible only for providing declarations in relation to its advisers on the on the Financial Advisers Register (FAR) or 'Register of Relevant Providers'. The process for registering advisers is resource intensive and costly. Functionality is needed within the ED to allow registration and attestations on an exception's basis or in bulk.

A clear process should apply for licensees to follow that specifies when and at what point they must they pass information to the FSCP. Guidance from the FSCP should be holistic in licensees on how they should best meet what are substantially heightened obligations. Much of the existing guidance issued by regulators to date has been open-ended and this has been constructively intended. An unintended consequence has been confusion.

The FSC seeks an approach from regulators which is clear and explicit and easy to administer in the interests of advice businesses that sees resources focused on directly upholding the best interests of consumers, not simply meeting compliance costs.

Recommendation: Bulk registration of financial advisers by advice licensees should be permissible under the legislation.

Recommendation: As the regime comes into force, ASIC should consult on a 'common agreement' around licensee and adviser responsibilities, and that of any other regulators.

There is a broader question about being responsible for registering ARs. This should be the practitioners responsibility as it is with other professions. For example, a licensee pays an ARs registration at the beginning of the year, the AR then changes licensees in April of the same year. The new licensee would then need to pay a pro-rated registration fee and the previous licensee is out of pocket. The AR paying and registering directly would be agonistic of licensee or subsequent change in licensee.

5.3. Disruption to consumers arising from a suspension

Consideration of the cost and resource requirements regarding the suspension of the registration of authorised representatives (**ARs**) and the consequent disruption this has for consumers.

For example, this could include considering the impact on consumers being serviced by a financial adviser who has been suspended for a minimum of three months; what obligations there are on the licensee to communicate this to the consumer; and the impact on the consumer who would in under this scenario be left orphaned. A licensee would need to communicate this to a consumer which would likely trigger contractual considerations with regards to the agreement between the financial adviser and the consumer.

Recommendation: The legislation should clarify the process licensees should follow in relation to consumers where a financial adviser's registration is suspended.

5.4. Interaction with the incoming breach reporting framework

The current breach reporting timeframe is 30 days for breaches. It is unclear how the requirements in the ED interact with the incoming breach reporting framework, for example, how a licensee must act when a there is a determination of the FSCP against adviser and a consequent banning order is issued.

Recommendation: The legislation should align with incoming breach reporting requirements and relevant protocols issued by ASIC with regard to reference checking and information sharing.

5.5. Alignment of registration and sanctions

The ED states the new registration system for financial advisers commences from 1 January 2022. However, it will not become an offence to provide financial advice while unregistered until 1 January 2023.

Recommendation: The legislation should make clear that all sanctions applied during the transition period will be effective.

5.6. Registration Date

Under the ED, ASIC may, by legislative instrument, determine the 'registration year' of a financial services licensee (or a class of licensees), which is to be a 12-month period beginning on a specified day and each subsequent 12-month period.

Recommendation: Licensees required to register a large number of advisers should have the flexibility of a single registration date for all financial advisers such licensees authorise.

Currently individual financial advisers are responsible for their own registration with the TPB and will have different registration dates. Guidance is needed on how the licensee should manage this as a situation where the licensee needs to register each adviser on the date their current TBP registration expires would be administratively unworkable.

The FSC would welcome the opportunity to register financial advisers on an exceptions basis rather than each adviser individually. Not allowing flexibility would require licensees accessing the FAR given expiry dates will transfer from the TPB. This should be as administratively simple and efficient as possible. Licensees need to be able to manage process without incurring further unnecessary costs.

6. Streamlinging disciplinary oversight and enforcement

The process outlined in the flow chart[4] should allow for a pathway to triage vexatious and more serious matters relating to conduct and professionalism. Not including such a pathway will exacerbate pressure on ASIC's resources and lead to confusion.

Recommendation: Separate pathways for processing vexatious and more serious claims should be clearly set out to ensure timely resolution of complaints and minimised pressure on the FSCP's resources to continually build trust in the profession.

An additional measure to mitigate this issue would be the introduction of a significance test for serious breaches. Not introducing such a test could constrain the focus and resources of the FSCP, as it convenes, away from making determinations about more serious matters. For example, under the existing breach reporting regime failure to provide a Financial Services Guide **(FSG)** is exempt but not exempt under this regime.

Paragraph 1.4[5] of the Draft Explanatory Memorandum **(EM)** asserts ASIC will solely focus on more serious incidents however what such incidents this will cover is not clear. Clarity on this point will have a positive impact on determining the appropriate resourcing requirements of the FSCP for which there is limited information on its current structure, membership and remit by which to judge this as the ED is finalised.

Recommendation: The legislation should include a significance test for serious breaches and this should be consulted on. This should be supported by clear regulatory guidance on the definition or threshold for serious incidents.

The timeframes and specific obligations for managing complaints and thresholds for serious breaches and misconduct are not clear. This makes ascertaining the resourcing needs of the regime and financing of its functions difficult and further consultation will likely be needed.

A significance test relating to client detriment rather than minor breaches of the Corporations Act. As an example if an adviser due to an administrative or technology related issue sends 10 FDS's one day outside of the prescribed 30 days, under the current wording of the ED this matter would need to be referred to ASIC. This would be a huge impost on time and cost for ARs, Licensees, ASIC and the FSCP and would result potentially thousands of breaches being reported.

6.1. Persons subject to disciplinary action and the definition of relevant provider

The proposed wording of exactly who falls within the scope of FSCP disciplinary action is convoluted. Financial advisers are subject to determinations of the FSCP but it appears ARs are not subject to the FSCP if the conduct occurred in the course of performing their duties as a financial adviser.

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[4] 'Draft Legislation: Disciplinary Process – ASIC and the FSCP'. Australian Government The Treasury. Source: https://treasury.gov.au/sites/default/files/2021-04/c2021-155598_flowchartofdisciplinaryprocess2.pdf

[5] Paragraph 1.4, Page 7. Draft Explanatory Memorandum. Source: https://treasury.gov.au/sites/default/files/2021-04/c2021-155598_explanatorymaterial.pdf

The ED defines a 'relevant provider'[6] however it would seem the authorisation of a financial adviser sits behind these requirements. The ED Q&A notes[7]:

> *"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."*

The FSC seeks clarity as to why the FSCP does not cover financial advisers who provide financial advice. In clarifying the application of the FSCP's oversight, consideration should also be given to the legal implications of the High Court's General Advice decision.[8] For example, if a financial adviser is registered on the FAR but that authorisation is limited, it is not clear how this definition would apply.

Recommendation: The definition of which persons are subject to FSCP disciplinary action should be simplified and consulted and clarity with regard to the FSCP's oversight of financial advisers providing all forms of financial advice (eg personal advice, general advice).

6.2. Matters referred to the Financial Services and Credit FSCP (FSCP)

The process outlined in the ED and supporting materials indicates ASIC will review matters reported to it and consider if it will make a banning order. If ASIC does not make, or propose to make, a banning order then the matter may be referred to the FSCP. The FSC suggest a more efficient approach is that all matters regarding a financial adviser be referred directly to the FSCP to consider.

Recommendation: All matters regarding a financial adviser should be referred directly to the FSCP and the power to issue a banning order should rest with the FSCP.

The FSCP should be equipped to make an appropriate decision and the FSCP can look across all sanctions to determine the appropriate response. This could include the FSCP determining whether a banning order should be made. This approach removes complexity and will ensure matters are dealt with in a timely and efficient manner.

6.3. Timeframe for issuing a banning order

It can take time for ASIC to determine if it will make a banning order, before the matter would be referred to the FSCP. This may involve additional resourcing requirements for the FSCP and it is suggested a pool of representatives may be considered.

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[6] Page 3, ED. Uses 'relevant provider' as defined in Part 7.6 of the Corporations Act: https://treasury.gov.au/sites/default/files/2021-04/c2021-155598_exposuredraftlegislation.pdf

[7] Page 4, ED Q+A. Source: https://treasury.gov.au/sites/default/files/2021-04/c2021-155598_questions_and_answers190421.pdf

[8] Westpac Securities Administration Ltd & Anor v ASIC [2021] HCA 3

The ED does not specify timeframes for the FSCP to consider matters referred to it. The FSC appreciates each case will differ and its is possible the intent of the ED is to afford some systemic flexibility by way of timeframes for processing. However, to ensure trust and integrity in the processes by which disciplinary action is dispensed, timeframes for receipt, processing and resolution should be clearer.

Recommendation: Timeframes should be specified for matters to be referred to and considered by the FSCP.

6.4. Circumstances in which financial services law is breached

There are a number of specified circumstances proposed[9] in which matters of misconduct will be referred to the FSCP. The proposed second circumstance where a financial adviser might be found to have contravened financial services law will likely require an overhaul of many Australian Financial Services License **(AFSL)** Supervision & Monitoring **(SaM)** question sets. This could have the unintended consequences of:

- The advice process becoming further compliance-focussed and costly with hundreds of questions for auditors to run through rather than the continuation of risk focussed question sets which have evolved in the industry over time;
- Increases in the time taken to review files;
- Additional time taken to report matters to the FSCP.

This will be an ambitious task to ensure is fully and consistently compliant across industry by 1 January 2022. A potential scenario arising from the proposed requirements could be considerable and costly levels of breach reporting and investigations, but disproportionate levels of consumer detriment being found.

6.5. Reviews and appeals

The proposed approach to appeal or review is convoluted. For example, a financial adviser may in some instances apply to the AAT for a review, or may apply to ASIC to vary or revoke a direction or order made against the financial adviser or ASIC may also request the FSCP to make a decision to vary or revoke an instrument.

The financial adviser should have available to them a simple mechanism by which they can appeal or request a review of an FSCP's decision. Financial advisers are, as a result of recent and incoming reforms, subject to substantially higher duties and obligations. Equally high levels of scrutiny of the regime's determinations conform to the principles of due process and the need to enforce consistency across the profession. This will maintain the integrity of the profession and the confidence of Australian consumers.

If the FSCP made the determination, it may be more appropriate that the FSCP has the right of final determination and not for ASIC to overrule the FSCP, rather than the financial

[9] Page 4, Q+A, Exposure Draft Legislation Q&A – New Disciplinary System for Financial Advisers. Source: https://treasury.gov.au/sites/default/files/2021-04/c2021-155598_questions_and_answers190421.pdf

adviser appealing to ASIC to vary or revoke the direct or order made. If new facts emerge then the matter should be referred to the FSCP for further determination.

Recommendation: There should be one simple process for appealing and/or reviewing the decisions of the FSCP in relation to a financial adviser and the responsibility of review and appeals of these decisions should rest with the Administrative Appeals Tribunal (AAT) as an independent reviewer.

6.6. Declaration of 'fit and proper'

The ED is unclear as to how licensees will determine and declare whether an AR is fit and proper and the costs and ongoing monitoring requirements this will attract.

Consideration should only be given to only requiring this declaration when the financial adviser is initially registered with ASIC. This is because once the adviser is registered, if the licensee subsequently formed a view that the financial adviser was not fit and proper the reporting obligations would apply (ie the licensee would terminate the financial adviser's authorisation as an AR and report the individual to ASIC).

Guidance on matters which go to an assessment of 'fit and proper' will be required to assist the decision-making and oversight of licensees. Alignment of the definitions of a fit and proper person test as used by the TPB would have minimal disruption for industry.

Recommendation: A fit and proper person as defined by the Tax Practitioners Board[10] should be the same definition used by the Financial Services and Credit FSCP**.**

Recommendation: Licensees should be afforded a defence of qualified privilege (similar to what is proposed for the *ASIC Reference Checking protocol*[11]) to ensure the licensee is protected if they legitimately believe that the person is not 'fit and proper'.

Registration relies on the licensee to self-report any issues or concerns. There is no auditing conducted by the regulator, this is not consistent with the process for other professions such as lawyers who may also be audited during their registration.

Recommendation: Auditing should be conducted by the regulator or a duty imposed on the financial adviser to confirm and disclose such checks, on a regular basis for example every 12 months.

Contraventions of the law are not limited to civil penalty provisions or offence provisions. At a minimum, the list of provisions excluded from automatic breach reporting under the incoming breach reporting requirements should be exempt from the definition of special circumstances, as relevant to financial advisers.

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[10] 'Fit and proper requirements for tax agents'. Tax Practitioners Board. Source: https://www.tpb.gov.au/fit-and-proper-requirements-tax-agents

[11] ASIC Consultation Paper 333.

Large volumes of complaints will create delay, increase costs and create uncertainty that diminishes trust and confidence. For example, in situations where there are multiple breaches of a differing nature. This could involve a scenario where the FSCP considers a potential breach of the Code of Ethics and versus another instrument.

It is unclear how the FSCP would consider all potential breaches in this instance. If there are multiple breaches of different types it is not clear whether there will be just one penalty imposed or how this will be recorded on the register.

6.7. Role of the Australian Financial Complaints Authority

Treasury's flow chart[12] indicates that the Australian Financial Complaints Authority **(AFCA)** can refer matters to ASIC for consideration. It is unclear on what basis AFCA will be able to do this. For example, will AFCA refer complaints to a FSCP before a hearing is held to be considered or will financial advisers be referred after AFCA finds in favour of a complainant.

Recommendation: The circumstances in which AFCA can refer complaints to ASIC and the FSCP should be set out.

The FSRC concluded that the financial advice industry lacked an effective system of professional discipline, as a result of there being too many different pathways for consumer complaints and ineffective sanctions to deal with misconduct appropriately. Given this, it is unclear whether under the ED consumers must be informed of the single disciplinary regime when they receive advice and is there any impact to the consumer on any decision or pending decision from other external bodies such as AFCA.

[12] 'Draft Legislation: Disciplinary Process – ASIC and the FSCP'. Australian Government The Treasury. Source: https://treasury.gov.au/sites/default/files/2021-04/c2021-155598_flowchartofdisciplinaryprocess2.pdf

7. A single regulatory regime for financial advice

7.1. Registration for tax (financial) advisers

Under the ED the requirement for financial advisers who provide tax (financial) advice services will come under the FSCP, and registration with the Tax Agent Services Act 2009 (TPB) will no longer be required (Recommendation 7.1 of the Independent Review of TSB). From 1 January 2022, Financial Advisers providing tax (financial) advice must be a registered tax agent or a Financial Adviser who meets the education and training standards under Corporations Act. This will provide relief to some Financial Advisers who are currently subject to duplicate regulation.

The distinction of separate registration and continuing professional development **(CPD)** requirements for tax (financial) advisers is unnecessary and all advisers provide tax (financial) advice. This is addressed through the FASEA education requirements and this additional requirement is unnecessary.

Recommendation: The distinction of tax (financial) adviser should be removed from the Tax Agent Services Act 2009.

The FSC's preference is the Tax (Financial) Adviser should be removed from the legislative regime for financial advice. In the event it is not there are a number issues that require resolution set out in Section 7 of this submission.

7.2. The 'sufficient number' model

Registering a Financial Adviser for the purposes of providing tax (financial) advice will now require the licensee to specify on the application form or renewal that the Financial Adviser provides, or is to provide, tax (financial) advice services, making a declaration the Financial Adviser has complied with the additional education and training standard for the provision of tax (financial) advice services.[13]

Currently, an AFSL can have a sufficient number of individuals registered with the TPB to oversee tax (financial) advice being provided by its representatives. It is not clear whether 'sufficient number' model for registering financial advisers is permitted under the ED.

Recommendation: Clarity is needed on whether the 'sufficient number' model for registering licensees is permissible under the legislation**.**

If the 'sufficient number' model is permissible it should also be clear whether a licensee must continue to register the staff comprising its 'sufficient number' once their registration expires after 1 Jan 2022 or only individual financial advisers.

[13] Items 34, 42 and 43, sections 921B(6), 921H, 921U, 921V, 921W and 921X of the Corporations Act.

7.3. Interaction with existing and incoming TPB requirements

As the disciplinary regime takes effect there should be seamless interaction with existing and legacy FASEA and TPB requirements.

A number of options are available to financial advisers registering with the TPB. Item 304 provides that a financial adviser must[14]:

- be a voting member of a recognised tax (financial) adviser association or recognised tax agent association
- have the equivalent of six years of full-time, relevant experience in the preceding eight years.

While such individuals are unlikely to have met the education requirements prescribed by the TPB appropriate changes should be made meeting the FASEA educations requirements satisfies meeting the Education requirements of the TPB.

Recommendation: Tax (financial) advisers that meet the FASEA education requirements should be considered to have satisfied the TPB's education requirements.

Interaction with the TPB's proposed increase in continuing professional education **(CPE)** hours for tax (financial) advisers effective from 1 July 2021. Currently TFA CPE (60 hours over 3 years) overlaps to a significant extent with the FASEA 40 hour CPD per annum requirements.

Efforts should be undertaken as the disciplinary regime is assembled that to avoid result that an adviser must meet FASEA's current 40 hrs per annum requirement, plus (effectively) 20 hrs (or 40 hrs, as proposed by the TPB from 1 July 2021) of TFA CPD as a tax (financial) adviser = 60 (or 80 hrs CPD pa, potentially). Industry would welcome clarity from Treasury and ASIC as to how the disciplinary vody will enforce requirements relating to tax (financial) advice continuing professional development in the context of FASEA's requirements.

Recommendation: Defer the changes proposed by the TPB (March 2021) affecting tax (financial) advisers until the single disciplinary regime is established and has consulted with industry.

[14] Item 304 Qualifications and experience tax (financial) advisers. Source: https://www.tpb.gov.au/qualifications-and-experience-tax-financial-advisers

8. Fees and other matters

The ED proposes that an AFSL can commence registering Financial Advisers from 1 January 2022, with all Financial Advisers required to be registered by 1 January 2023. The fee is to be prescribed in the Corporations (Fees) Regulations 2001. However no guidance is provided to AFSLs as to what the fee will be.

The FSC notes Treasury's intention to consult and would ask that the following issues be considered as part of that consultation:

- Need for estimated annual fee for budget planning purposes;
- Clarity regarding the fees payable on the lodgement of registration relating to the management of rolling renewals and how this will be done in a cost-effective manner given many licensees bulk register financial advisers at times on a single day; and
- Timeframe and the payment of fees.

From 1 January 2022 an FSCP can be convened to take action against a Financial Adviser for an act and/or omission that occurs on or after 1 January 2022, regardless of registration status.[15]

The FSC seeks clarity on the following points:

- The process for notifying a financial adviser that an FSCP is to be convened;
- The fees if any, that apply to the Financial Adviser and/or AFSL when an FSCP is called[16]; and
- If fees do apply, who is responsible for costs where a case is dismissed.

Unlike ASIC's power to make a banning order, an FSCP may take action against a financial adviser for breach of the Code of Ethics and may not take action against the AFSL or an authorised representative of an AFSL. Decisions by the FSCP to impose an administrative sanction can be appealed or a review of decision requested.[17]

The FSC seeks clarity on the following points:

- Whether costs apply to the Financial Adviser or AFSL to request an appeal?
- Where a decision is made to vary or revoke the instrument, how long will it take for ASIC to update the register (1.144); and
- Whether the Financial Adviser able to provide financial advice services until the register is updated (subject to any other relevant matters).

A decision by the FSCP to issue an infringement notice for alleged contravention of a restricted civil penalty provision is not a reviewable decision, consistent with the Corporations Act. There are no obligations on a Financial Adviser to comply with the notice, with action against non-compliance a decision of ASIC, however a financial adviser does have the right to appeal a request by the FSCP to ASIC to include details of the infringement notice on the Register of Relevant Providers.

- Whether costs apply to the Financial Adviser or AFSL to request an appeal.

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[15] Item 84, sections 1684A and 1684B of the Corporations Act.
[16] It is assumed this will be covered by the annual registration fee.
[17] Item 43, section 921RA of the Corporations Act.