

Part 1: A New Disciplinary System for Financial Advisers

Posted by Cowell Clarke Financial Services Team 13 May 2021

The Government is consulting on its draft *Financial Sector Reform (Hayne Royal Commission Response—A New Disciplinary System for Financial Advisers) Bill 2021* ("**Bill**") which will expand the role of the Financial Services and Credit Panel ("**Panel**") to operate as the single disciplinary body for financial advisers. This alert covers the Bill expanding the power given to the Panel – part 2 contains further information about other measures in the Bill.

Consultation for the Bill will close on 14 May 2021.

If the legislation is passed, from 1 January 2022 ASIC will be required to convene a Panel if it reasonably believes that a person has contravened certain obligations under the Corporations Act and it has not made a banning order against the person.

What kind of matters can be referred to a Panel?

The Panel will be given the power to act against financial advisers who do not comply with their obligations under the *Corporations Act*, or in situations where a specified circumstance exists or has occurred. The Panel will also be delegated the power to make sanctions against a financial adviser. Once a Panel has decided on a sanction, the financial adviser will be issued with a notice setting out the proposed sanction. The adviser will be given 28 days before the sanction is applied to make a submission or seek a hearing.

A 'restricted civil penalty provision' is the failure to comply with any of the following:

- the education and training standards;
- the code of ethics;
- the obligation of a provisional financial adviser, or the supervision of a provisional financial adviser;
- an administrative sanction imposed by the Panel; and
- being registered as a financial adviser.

A 'specified circumstance' exists where:

- the financial adviser becomes insolvent or is convicted of fraud;
- the Panel reasonably believes that the adviser is not a fit and proper person to provide financial advice;
- the Panel reasonably believes that the adviser has contravened a financial services law or has been involved in another person's contravention of a financial services law;
- the adviser has at least twice been linked to a failure or refusal to give effect to a determination made by AFCA; or
- an adviser has been an officer of a corporation that has been unable to pay its debts.

The Panel will also have the power to act against a financial adviser for a breach of the Code of Ethics.

What actions can a Panel take?

Where an adviser contravenes a restricted civil penalty provision or where a specified circumstance exists, the Panel may act against the adviser. The action will depend on the nature of the contravention, but the Panel will be able to issue an infringement notice, impose an administrative sanction, or both. The Panel may also make recommendations to ASIC.

Civil Penalty Provision

The Panel may issue an infringement notice and/or an administrative sanction or make a recommendation to ASIC to pursue a restricted civil penalty. ASIC will not be able to apply to the Court for a civil penalty for a restricted civil penalty provision unless the Panel has recommended it do so (except in the case of an unpaid infringement notice).

Specified Circumstances

The Panel may impose administrative sanctions.

Administrative Sanctions

Administrative sanctions will include warnings or reprimands; specified training; supervision, counselling or reporting; and orders suspending or cancelling an adviser's registration.

Publication

The Panel can make a request to ASIC to include details of sanctions on the financial adviser register.

Who will make up the Panel?

The Panel will be comprised of a Chair, who is a staff member of ASIC, and at least two other members. Members must be appointed from a list of eligible persons approved by the Minister.

To be appointed to the list of eligible persons, the Minister must be satisfied that the person has experience or knowledge in at least one of the following; *business, administration of companies, financial markets, financial products and financial services, law, economics, accounting or taxation.*

Who is subject to disciplinary action by the Panel?

The Panel will have the power to take action against individual financial advisers, and against individuals where the relevant conduct occurs in the course of that person performing their duties as a financial adviser. Disciplinary actions involving financial services licensees and authorised representatives of financial services licensees (i.e. other than in the course of performing duties as a financial adviser) will continue to be administered by ASIC.

The Panel will be required to hold a hearing if:

- ASIC delegates its power to make a banning order to a Panel, and a Panel proposes to make a banning order against a financial adviser; or
- a financial adviser requests a hearing in response to a proposed action notice.

Appealing the decisions

Where a Panel imposes an administrative sanction, the adviser may apply to the Administrative Appeals Tribunal (“**AAT**”) for a merits review.

The adviser may also make an application to ASIC for the Panel to vary or remove the direction against the adviser. However, ASIC may decide not to make the request to the Panel for the decision. ASIC’s decision here is also subject to the AAT merits review.

A decision by a Panel to issue an infringement notice is not a reviewable decision as there is no obligation on the adviser to comply with this notice. However, non-compliance will leave ASIC with the ability to decide whether to initiate court proceedings to enforce the restricted penalty provision.

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