



20 August 2021

Director  
Retirement, Advice and Investment Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [SDBConsultation@treasury.gov.au](mailto:SDBConsultation@treasury.gov.au)

Dear Sir/Madam,

**SMSF ASSOCIATION SUBMISSION – SINGLE DISCIPLINARY BODY: POLICY PAPER**

The SMSF Association welcomes the opportunity to provide this submission in response to the Government’s Policy Paper on the proposed framework for the drafting of the single disciplinary body Regulations.

We note that it is proposed ASIC will address issues where the adviser is to receive a written warning, rather than referring the matter to the Financial Services and Credit Panel (“FSCP”). The Association considers this appropriate as it ensures that the time and resources of the FSCP are appropriately applied.

A clear and appropriate framework is needed to ensure the efficacy of the FSCP. It must also provide a clear, and practical operational framework for ASIC.

The Regulations should allow for a single FSCP to be convened to address multiple matters of a similar nature. This will allow for a more efficient operation of the FSCP, considering both time and cost, as well as providing consistent outcomes.

More complex or serious matters may require the convening of separate panels due to the time required and nature of the matters.

The Regulations must provide clear authority to ASIC, allowing them to allocate more than one matter when convening a panel, as they deem appropriate.

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?

The proposed criteria set out in the Policy Paper, is reasonable and appropriate.



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.

At first instance, the linking to the ‘significance test’ in the breach reporting regime is considered appropriate. The connection with the breach reporting rules would be considered practical and provide clear alignment. It will lead to a single set of interpretive rules and essential harmonisation of these related measures. If addressed separately, there is a risk of divergence which would increase complexity, confusion and uncertainty.

However, for this to be achievable, there needs to be clearer definitions supported by a practical framework within the Regulations. Ultimately this would be further supported by practical regulator guidance including relevant examples. However, in order to do so, solid regulatory foundations are needed.

Currently the breach reporting regime and regulator guidance does not provide a sufficiently clear framework for the application of the ‘significance test’. This includes how to determine materiality or frequency when dealing with repeated breaches.

Without a clear framework, precise definitions and examples, the risk remains that the breach reporting will see small or minor events reported for fear of non-compliance by licensees. Whilst this is a concern with regards to the operation of the breach reporting regime, it also highlights the need for clarity so that ASIC has an appropriate mandate to ensure the efficient management of complaints or breaches reported and ultimately the operation of the FSCP.

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

The inclusion of clear and considered definitions along with a practical framework in the Regulations will be essential. This is needed to ensure consistency in both the interpretation and application of these terms by all users. Without a clear definition and framework, there is a risk that the application of these terms is distorted over time, resulting in very different outcomes.

There is a lack of clear definition in the breach reporting legislation and ASIC’s proposed regulatory guidance on how to determine materiality or frequency when dealing with repeated breaches.

Any definitions or framework provided must ensure that there is alignment with the breach reporting regime. Any enhancements to the Regulatory guidance on breach reporting would be welcomed.



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."

The inclusion of the above terms would help to build a foundation to build an appropriate framework.

Material loss or damage to clients must be clearly defined. How this test is to be applied under the breach reporting regime is unclear and lacks guidance.

How is materiality to be applied in the case involving an individual client? Would a loss be deemed to be material on consideration of:

1. An individual's total personal wealth?
2. Total of the individual's funds under management with an adviser?
3. The areas of advice addressed in the adviser – client relationship?
4. The quantum of loss and the value of that product or investment subject to a loss?

Examining each of the various options above, is the loss deemed material if on assessment, at least one of those metrics results in a materiality threshold being exceeded?

Similarly, benefits gained by a relevant provider need to be quantified so that immaterial or trivial matters are not captured. Further, the types of benefits that are of concern should be clearly set out. Without clear definition, the interpretation could be quite broad and as such its interpretation and application over time risks becoming inconsistent or distorted.

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?

It is difficult to answer this question without further context. Whether a matter would be considered a repeated breach, and referred to the FSCP, would very much depend upon the nature and seriousness of the matter at hand. A minor or trifling matter, that has been remedied and not caused consumer harm, although occurring several times in a year, could still be minor.

To refer a matter of this nature to the FSCP, merely due to its repeated nature, would in our view be outside the policy intent.

However, if the matter is of a more serious nature, the repetition is indicative of poor behaviour and of a kind that would result in poor consumer outcomes, this should result in the matter being referred to the FSCP.

Consideration of the broader setting, including the adviser's overall history should be considered.

Repetition may in some circumstance be an indication of poor practices that could lead to more serious breaches occurring in the future. It may therefore be reasonable that the matter is referred to



the FSCP. Early intervention through education or direction orders provides an opportunity to shape behaviours and uphold the standards expected.

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.

The fit and proper person test is clearly defined in section 921U. No further examples appear to be needed. However, the FSCP should have discretion and an ability to consider individual facts and circumstances.

As an example, events and circumstances could arise whereby a company becomes insolvent and has its license cancelled. If this is a result of a fraud perpetrated by one individual director, it may not be indicative on whether another director is considered a fit and proper person.

#### Sanctions to be listed on the Financial Advisers Register

Where the FSCP has determined a matter is to be recorded on the Register of Relevant Provider, the Regulations must set out a clear definition of what is to be included on the register.

As a minimum, the notice issued by the FSCP needs to state what sanction is to be recorded and the period of time the sanction is to appear on the Register. It would be unreasonable for all sanctions to remain on the register for unspecified periods.

Where a directions-based instrument is issued, and the requirements have been met to the satisfaction of the FSCP, application could be made to have the sanction removed.

Other matters should remain on the Register of Relevant Providers for a period determined by the FSCP based up on the gravity of the matter and nature of the sanction issued.

Written warnings should be separated out from other types of sanctions and the legislation needs to prescribe that it would not be reportable on the Register of Relevant Provider (Financial Advisers Register). Where a written warning is issued, it is expected that it would relate to a minor breach. If the matter is not considered serious enough to refer to the FSCP, the appearance of the warning on a public register in this circumstance would be considered excessive and harsh.



Should you have any questions about our submission, please do not hesitate to contact us. We thank you again for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Peter Burgess', written over a faint circular stamp or watermark.

Peter Burgess  
Deputy CEO/Director of Policy and Education  
SMSF Association

#### **ABOUT THE SMSF ASSOCIATION**

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than \$700 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.