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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Jane Hume,

Minister for Superannuation, Financial Services and the Digital Economy,

Minister for Women’s Economic Security)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory material

|  |  |
| --- | --- |
| Abbreviation | Definition |
| AAT | Administrative Appeals Tribunal |
| ASIC | Australian Securities and Investments Commission |
| ASIC Act | *Australian Securities and Investments Commission Act 2001* |
| Bill | *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021* |
| Corporations Act | *Corporations Act 2001* |
| CPD year | Continuing professional development year |
| FASEA | Financial Adviser Standards and Ethics Authority |
| Financial services licensee | Australian Financial Services licence-holder |
| Financial Services Royal Commission | Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry |
| Guide to Framing Commonwealth Offences | Attorney-General’s Department’s *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition |
| Old Tax Agent Services Act | Old *Tax Agent Services Act 2009* |
| Tax Practitioners Board Review | Independent Review of the Tax Practitioners Board |

General outline and financial impact

## A new disciplinary system for financial advisers

On 4 February 2019, the Government released its response to the Financial Services Royal Commission entitled *Restoring trust in Australia’s financial system*. The Government’s response committed to taking action on the recommendations of the Financial Services Royal Commission.

This Bill implements recommendation 2.10 of the Financial Services Royal Commission, which recommended the establishment of a single disciplinary body for financial advisers and the requirement that all financial advisers who provide personal financial advice to retail clients be registered.

On 27 November 2020, the Government released the Tax Practitioners Board Review Final Report and its response to it. The Government’s response supports 20 of the Review’s 28 recommendations in full, in part or in-principle.

This Bill implements recommendation 7.1 of the Tax Practitioners Board Review, which recommended that a new model be developed for regulating tax (financial) advisers in alignment with implementing recommendation 2.10 of the Financial Services Royal Commission Final Report.

The Bill also delivers the Government’s announcement on 9 December 2020 that it would wind-up FASEA and transfer its standard setting functions to the Minister responsible for the Corporations Act and to ASIC.

The Financial Services Royal Commission Final Report has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform. The Financial Services Royal Commission Final Report and the Regulation Impact Statement certification is available from the Department of Prime Minister and Cabinet website.[[1]](#footnote-2)

The Tax Practitioners Board Review Final Report has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform. The Tax Practitioners Board Review Final Report and Regulation Impact Statement certification is available from the Department of Prime Minister and Cabinet website.[[2]](#footnote-3)

Date of effect: The Bill commences on the day after Royal Assent. The new disciplinary and registration systems for financial advisers apply from 1 January 2022.

Proposal announced: The Government announced its response to the Financial Services Royal Commission on 4 February 2019.

The Government announced its response to the Tax Practitioners Board Review Final Report on 27 November 2020.

On 9 December 2020 the Government announced that, as part of implementing recommendation 2.10 of the Financial Services Royal Commission, it would expand the role of the Financial Services and Credit Panel within ASIC to take on the functions of the single disciplinary body and transfer the functions of FASEA to the Minister responsible for administering the Corporations Act and to ASIC.

Financial impact: Funding for this measure was provided to the Department of Treasury in the 2021-22 Budget. This included   
$2.5 million in 2021-22 to fund the ongoing operational costs of FASEA and its wind-up costs after its industry funding agreement ceases on   
30 June 2021.

Human rights implications: This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2.

Compliance cost impact: Low compliance cost.

1. A new disciplinary system for financial advisers

## Outline of chapter

* 1. The Bill implements the Government’s response to recommendation 2.10 of the Financial Services Royal Commission Final Report by:
* expanding the role of the Financial Services and Credit Panel within ASIC to operate as the single disciplinary body for financial advisers to ensure that less serious misconduct does not go unaddressed;
* creating new penalties and sanctions for financial advisers who have breached their obligations under the Corporations Act;
* introducing a new registration system for financial advisers to improve the accountability and transparency of the financial services sector; and
* transferring functions from FASEA to the Minister responsible for administering the Corporations Act and to ASIC to streamline the regulation of financial advisers.
  1. The Bill also implements the Government’s response to recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system under the Corporations Act for financial advisers who provide tax (financial) advice services and removing duplicate regulation.

## Context of amendments

***Financial Services Royal Commission***

* 1. The Financial Services Royal Commission 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.
  2. The Financial Services Royal Commission Final Report found that while sanctions are available to ASIC, the lack of less serious sanctions means that ASIC generally only focuses on the most serious incidents. While sanctions may also be imposed on financial advisers by a financial services licensee, these do not generally extend beyond the adviser’s employment with the specific licensee.
  3. Recommendation 2.10 of the Financial Services Royal Commission Final Report recommended the establishment of a single disciplinary body for financial advisers and that all financial advisers who provide personal financial advice to retail clients be registered.
  4. On 4 February 2019, the Government released its response to the Financial Services Royal Commission, which agreed to introduce a new single disciplinary system for financial advisers and committed to the professionalisation of the financial advice industry.
  5. On 9 December 2020, the Government announced that it would deliver recommendation 2.10 by expanding the Financial Services and Credit Panel’s functions to perform the role of the single disciplinary body for financial advisers by leveraging the panel’s existing expertise. The Government also announced that FASEA would be wound-up and its functions transferred to the Minister responsible for administering the Corporations Act and to ASIC.

***Tax Practitioners Board Review***

* 1. In 2019, the Government announced an independent review into the effectiveness of the Tax Practitioners Board and the   
     *Tax Agent Services Act 2009* to ensure that tax agent services are provided to the public in accordance with appropriate professional and ethical standards.
  2. On 27 November 2020, the Government released the Tax Practitioners Board Review Final Report and its response to it. The Government’s response supports 20 of the Review’s 28 recommendations in full, in part or in-principle. The Government’s response seeks to achieve two main objectives: increasing the independence of the Tax Practitioners Board and reducing red tape for the tax profession.
  3. Recommendation 7.1 of the Tax Practitioners Board Review recommended that, in alignment with implementing recommendation 2.10 of the Financial Services Royal Commission Final Report, a new model be developed for regulating tax (financial) advisers in consultation with ASIC, FASEA, the Tax Practitioners Board and Treasury. The Government agreed in-principle to implement recommendation 7.1 by reducing regulatory overlap and ensuring that the new disciplinary regime for financial advisers also applies to individual tax (financial) advisers.

## Summary of new law

***Single disciplinary body for financial advisers***

* 1. The Bill implements recommendation 2.10 of the Financial Services Royal Commission Final Report by establishing a single disciplinary body for relevant providers.
  2. A ‘relevant provider’ is defined as an individual who is authorised to provide personal advice to retail clients in relation to relevant financial products, as the holder of an Australian financial services licence or on behalf of the licensee. In this explanatory memorandum, the term ‘financial adviser’ is used instead of ‘relevant provider’.
  3. The Bill expands the role of the Financial Services and Credit Panel within ASIC to take on the functions of the single disciplinary body for financial advisers.
  4. In prescribed circumstances, ASIC must convene a Financial Services and Credit Panel.
  5. A Financial Services and Credit Panel must comprise a minimum of at least two industry participants, which ASIC must select from a list of eligible persons appointed by the Minister. The Chair of the panel will always be an ASIC staff member.
  6. The list of eligible persons appointed by the Minister could include representatives from the financial services industry, such as financial advisers and financial services licensees, as well as people with experience in other fields, such as law, economics, accounting and tax.
  7. Once convened, a Financial Services and Credit Panel may take administrative action against a financial adviser. The types of administrative actions that a panel can take against a financial adviser are warnings or reprimands, directions to undertake specified training, supervision, counselling or reporting, and orders suspending or cancelling an adviser’s registration. For certain types of breaches, a Financial Services and Credit Panel may give the adviser an infringement notice or recommend that ASIC apply to the court for a civil penalty.
  8. Except in cases where a warning or reprimand is to be given to a financial adviser, before a Financial Services and Credit Panel can issue an infringement notice or make an instrument taking other administrative action, the panel must give the financial adviser a notice with:
* details of the relevant circumstances;
* the proposed sanction; and
* the adviser’s right to request a hearing or make a submission to the panel.
  1. If ASIC reasonably believes that a person has contravened a restricted civil penalty provision or that a specified circumstance exists or has occurred and does not take alternate enforcement action or convene a Financial Services and Credit Panel, ASIC must give the financial adviser a written warning or reprimand.
  2. ASIC must include details of the sanction on the Register of Relevant Providers (Financial Advisers Register) if the sanction is of a kind prescribed by regulations.
  3. Where it is appropriate to do so, a Financial Services and Credit Panel can accept an enforceable undertaking from a financial adviser, as an alternative to administrative or civil sanctions.

***Registration of financial advisers***

* 1. The Bill introduces a two-stage registration process for financial advisers.
  2. Stage 1 registration commences after 1 January 2022 and involves a one-off registration process administered by ASIC using the existing Register of Relevant Providers (Financial Advisers Register). This stage requires financial services licensees to apply to ASIC to register their financial advisers.
  3. Stage 2 registration commences on a day set by proclamation (or if no such proclamation is made within the specified period, four years after the day this Act receives Royal Assent). The commencement of   
     Stage 2 registration coincides with the delivery of the new Australian Business Registry Service administered by the Australian Taxation Office. This stage requires eligible individuals to apply to the Registrar to register themselves and renew their registration annually.

***Wind up of FASEA and transfer of its standards functions to the Minister and ASIC***

* 1. On 1 January 2022, FASEA will be wound up and its functions transferred to the Minister responsible for administering the Corporations Act and to ASIC.
  2. The Minister will be responsible for making education and training standards for financial advisers, including approving principles for the financial adviser exam, and a Code of Ethics. The Minister will also be responsible for approving foreign qualifications.
  3. ASIC will be responsible for administering the financial adviser examination in accordance with the principles approved by the Minister.

***Regulation of tax (financial) advisers***

* 1. The Bill also implements recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system for tax (financial) advisers.
  2. The Minister may make additional education and training standards for the provision of tax (financial) advice services.
  3. From 1 January 2022, financial advisers who meet the additional education and training requirements to provide tax (financial) advice services may do so without being registered under the *Tax Agent Services Act 2009*.
  4. A person or entity who provides tax agent services or business activity statement services (BAS services) must continue to be a registered tax agent or registered business activity statement agent (BAS agent) under the *Tax Agent Services Act 2009*.

Comparison of key features of new law and current law

| New law | Current law |
| --- | --- |
| **Single disciplinary body for financial advisers** | |
| ASIC may be required to convene a Financial Services and Credit Panel if it reasonably believes that a financial adviser has breached their Corporations Act obligations.  Once convened, a panel can:   * give a warning or reprimand; * make an instrument taking other administrative action; or * in certain circumstances – issue an infringement notice or recommend that ASIC apply to the court for a civil penalty. | ASIC may make banning orders for serious breaches of the  Corporations Act. |
| **Registration of financial advisers** | |
| Stage 1 registration (commences no later than 1 January 2023) – financial services licensees are required to apply to ASIC to register their financial advisers.  Stage 2 registration (commences by proclamation) – financial advisers are required to apply to the Registrar to register themselves annually. | A financial services licensee is required to authorise a person to provide financial advice on their behalf. |
| **Wind up of FASEA and transfer of its standards functions to the Minister and ASIC** | |
| The Minister is responsible for performing all of the standards‑setting functions.  ASIC must administer an exam for financial advisers in accordance with the principles approved by the Minister. | The Minister may establish a standards body by legislative instrument.  The standards body is responsible for performing all of the standards‑setting functions, including determining who will administer the financial adviser exam. |
| **Regulation of tax (financial) advisers** | |
| To provide tax (financial) advice services, a person must either be a registered tax agent, or be a financial adviser who has met the additional education and training standard to provide tax (financial) advice services under the Corporations Act. | Financial advisers who provide tax (financial) advice services must:   * be registered as a tax (financial) adviser under the *Tax Agent Services Act 2009*, which includes meeting the *Tax Agent Services Act 2009* education and experience requirements; * comply with the Code of Professional Conduct under the *Tax Agent Services Act 2009*; * be authorised as a financial adviser under the Corporations Act, which includes meeting Corporations Act education and training standards; and * comply with the Code of Ethics under the Corporations Act. |

## Detailed explanation of new law

* 1. The Bill consists of four key elements, which have been grouped as follows:
* Part 1 - Single disciplinary body for financial advisers;
* Part 2 - Registration of financial advisers;
* Part 3 - Wind-up of FASEA and transfer of its standards functions to the Minister and ASIC; and
* Part 4 - Regulation of tax (financial) advisers.

### Part 1 - Single disciplinary body for financial advisers

#### What is the single disciplinary body?

* 1. The Bill implements recommendation 2.10 of the Financial Services Royal Commission Final Report, by expanding the role of the Financial Services and Credit Panel within ASIC to take on the functions of a single disciplinary body for financial advisers.
  2. The Financial Services and Credit Panel is a panel comprised of an ASIC staff member and industry participants. ***[Schedule 1, items 1, 12, 14 and 19, sections 5 and 139(1), (3) and (4) of the ASIC Act and sections 9 and 910A of the Corporations Act]***
  3. ASIC may convene a Financial Services and Credit Panel to take action against a financial adviser. In certain circumstances prescribed by regulations, ASIC must convene a panel to perform functions or exercise powers under the Corporations legislation to take action against financial advisers. Corporations legislation includes a panel’s functions and powers under the Corporations Act and the ASIC Act. ***[Schedule 1, item 12, sections 139(1) and (2) of the ASIC Act]***

#### Who can be a member of a Financial Services and Credit Panel?

* 1. Each Financial Services and Credit Panel must comprise of a Chair, who is a staff member of ASIC, and a minimum of at least two other members. There is no limit on the number of members that can be appointed to a particular panel. ***[Schedule 1, items 2, 3 and 12, sections 5 and 139 of the ASIC Act]***
  2. ASIC must appoint the Chair and the other members of a Financial Services and Credit Panel by written instrument. In the case of members other than the Chair, ASIC must draw from a list of eligible persons appointed by the Minister. ***[Schedule 1, item 12, section 140 of the   
     ASIC Act]***
  3. The Minister may appoint a person to the list of eligible persons by making a written determination. To be appointed to the list, the Minister must be satisfied that the person has experience or knowledge in at least one of the following fields:
* business;
* administration of companies;
* financial markets;
* financial products and financial services;
* law;
* economics;
* accounting;
* taxation; or
* credit activities and credit services.

***[Schedule 1, item 12, sections 141(1) and (2) of the ASIC Act]***

* 1. Given its expertise in tax-related matters, the Minister may consult with the Tax Practitioners Board (established by section 60-5 of the *Tax Agent Services Act 2009*) to identify eligible persons with relevant taxation expertise. ***[Schedule 1, items 4 and 12, sections 5 and 141(3) of the   
     ASIC Act]***
  2. A written determination made by the Minister appointing a person to the list of eligible persons is not a legislative instrument within the meaning of ‘legislative instrument’ in section 8(1) of the   
     *Legislation Act 2003*. Such an instrument is administrative (not legislative) in character as it does not determine or alter the law, but rather applies the law to individuals, who are eligible to be appointed as members of a Financial Services and Credit Panel. ***[Schedule 1, item 12, section 141(4) of the ASIC Act]***
  3. In developing the list of eligible persons, the Minister may take into account the need for adequate representation from a range of specialty fields. This is intended to ensure that potential members of a Financial Services and Credit Panel have a diverse range of relevant knowledge and experience required to make informed decisions on misconduct committed by financial advisers.
  4. The application of section 33 of the *Acts Interpretation Act 1901* means that the Minister’s power to appoint a person also includes the power to remove or suspend a person from the list of eligible persons. Once a person has been removed from the list of eligible persons, that person is no longer eligible to be appointed by ASIC to a panel.
  5. It is important that conflicts of interest of members of the Financial Services and Credit Panel are appropriately managed noting in particular that members who are industry participants will have a range of financial and other interests. All of the people appointed to the list of eligible persons have an ongoing obligation to disclose to ASIC any direct or indirect financial or other interests, such as personal or business relationships, that could conflict with the proper performance of their duties as members of a Financial Services and Credit Panel, if they were to be appointed. ***[Schedule 1, item 12, section 142 of the ASIC Act]***
  6. It is intended that ASIC would be able to use these disclosures when considering making appointments of members to any given Financial Services and Credit Panel.
  7. In deciding whether to appoint a person as a member of a Financial Services and Credit Panel, ASIC is expected to consider the relevance of a person’s knowledge and expertise to the disciplinary matter to be considered by the panel. For example, the need for taxation-specific knowledge and expertise would be taken into account in appointing members for a matter involving the provision of tax (financial) advice services.
  8. Once appointed as a member of a Financial Services and Credit Panel, the member must act in accordance with any terms and conditions set by ASIC. Failure to comply with these terms and conditions could result in the termination of the member’s appointment from the panel by ASIC. ***[Schedule 1, item 12, section 145 and 146 of the ASIC Act]***
  9. A member of a Financial Services and Credit Panel may also resign as a member of a panel by giving a written resignation to ASIC. ***[Schedule 1, item 12, section 144 of the ASIC Act]***
  10. A member who is terminated or resigns from a Financial Services and Credit Panel remains eligible to be appointed to a future panel, unless or until they are removed from the list of eligible persons.
  11. At any time, ASIC may appoint an additional member to the panel (for example, where specific expertise is required) or to replace a member (other than the Chair) who has been terminated or resigns, by appointing a new member from the list of eligible persons approved by the Minister. ***[Schedule 1, item 12, section 140 of the ASIC Act]***
  12. If the Chair of a Financial Services and Credit Panel resigns or is terminated from a panel, ASIC may replace them by appointing another ASIC staff member as Chair of the panel. This may be required in circumstances where the Chair notifies ASIC of an interest they have (financial or otherwise) that conflicts, or could conflict, with their duties for a matter being considered, or about to be considered, by the panel. ***[Schedule 1, item 12, sections 148(3) and (4) of the ASIC Act]***
  13. Members of a Financial Services and Credit Panel will be paid an allowance. The allowance amount is to be determined by the Remuneration Tribunal, or if there is no such determination, by the Minister. ***[Schedule 1, item 12, section 143 of the ASIC Act]***
  14. Members of a Financial Services and Credit Panel, other than the Chair, are not officials of ASIC for the purposes of the *Public Governance, Performance and Accountability Act 2013*. ***[Schedule 1, item 12, section 147 of the ASIC Act]***

#### Who is subject to disciplinary action by a Financial Services and Credit Panel?

* 1. A Financial Services and Credit Panel has the power to take action against individual financial advisers, who are also known as ‘financial planners’ or ‘relevant providers’.
  2. The Bill inserts a definition of ‘relevant provider’ in the   
     ASIC Act and gives it the same meaning as in Part 7.6 of the   
     Corporations Act. The Corporations Act defines a ‘relevant provider’ as an individual who is authorised to provide personal advice to retail clients in relation to relevant financial products, either as the holder of an Australian financial services licence, or on behalf of the licensee. A relevant provider can be:
* a financial services licensee;
* an authorised representative of a financial services licensee; or
* an employee or director of a financial services licensee, or a body corporate related to the financial services licensee.

***[Schedule 1, item 4, section 5(1) of the ASIC Act]***

* 1. A Financial Services and Credit Panel has the power to take action against financial advisers. This includes financial advisers who are also financial services licensees and authorised representatives.
  2. However, a Financial Services and Credit Panel does not have the power to take action against financial services licensees and authorised representatives that are not financial advisers. Disciplinary action against these entities will continue to be administered by ASIC, using ASIC’s existing powers under the ASIC Act and the Corporations Act, which includes the power to cancel or suspend a licence, or to commence criminal or civil proceedings.
  3. This outcome reflects the focus of recommendation 2.10 of the Financial Services Royal Commission Final Report on improving the accountability of financial advisers, rather than financial services licensees or authorised representatives.

#### What kinds of matters can be referred to a Financial Services and Credit Panel?

* 1. The Bill creates the power for a Financial Services and Credit Panel to take action against financial advisers who contravene restricted civil penalty provisions or in situations where a specified circumstance exists or has occurred.
  2. A failure to comply with any of the following requirements is a contravention of a restricted civil penalty provision, for which a Financial Services and Credit Panel may issue an infringement notice, take other administrative action or recommend to ASIC that it seek a civil penalty:
* education and training standards;
* additional education and training standard for the provision of tax (financial) advice services – if the person provides tax (financial) advice services;
* the Code of Ethics;
* the obligations of a provisional financial adviser, or the supervisor of a provisional financial adviser; and
* the requirement to be registered to provide financial advice.

[Schedule 1, items 4, 14, 23, 25, 43, 45, 47, 49 and 89, section 5 of the ASIC Act and sections 9, 910A, 921BA(5), 921BB(4), 921E, 921F(8), 921Q, 921Y and 1317E of the Corporations Act]

* 1. The ‘specified circumstances’ for which a Financial Services and Credit Panel may take administrative action are matters that constitute a contravention of a financial adviser’s obligations under the   
     Corporations Act or relate to the suitability of a person to provide personal financial advice. In cases where a ‘specified circumstance’ exists or has occurred, a Financial Services and Credit Panel may make an instrument taking administrative action against a financial adviser.
  2. A specified circumstance exists or has occurred if:
* the financial adviser becomes insolvent;
* the financial adviser is convicted of fraud;
* a Financial Services and Credit Panel reasonably believes that the financial adviser is not a fit and proper person to provide financial advice;
* a panel reasonably believes that the financial adviser has contravened a financial services law, or has been involved in another person’s contravention of a financial services law;
* the financial adviser has at least twice been linked to a failure or refusal to give effect to a determination made by the Australian Financial Complaints Authority; or
* the financial adviser has been an officer of two or more corporations that have been unable to pay their debts.

***[Schedule 1, item 49, section 921K(1) of the Corporations Act]***

* 1. These ‘specified circumstances’ are predominantly the same as the matters for which ASIC may make a banning order under   
     section 920A of the Corporations Act.
  2. The Bill codifies ASIC’s existing power to delegate its power to make a banning order under section 920A of the Corporations Act and section 80 of the *National Consumer Credit Protection Act 2009* to a Financial Services and Credit Panel. If ASIC delegates this power to a Financial Services and Credit Panel, the panel may make a banning order. ***[Schedule 1, items 7, 31 to 34 and 102, 103, 104 and 105, section 102 of the ASIC Act, section 920A of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]***
  3. As noted above, one of the matters for which a Financial Services and Credit Panel may take administrative action against a financial adviser is if the panel reasonably believes that an adviser is not a fit and proper person to provide financial advice. ***[Schedule 1, item 49, section 921K(1)(c) of the Corporations Act]***
  4. In determining whether a financial adviser is a fit and proper person, a Financial Services and Credit Panel must have regard to any matter the panel considers relevant, including (but not limited to) whether the financial adviser has ever been:
* banned or disqualified under the Corporations Act or the *National Consumer Credit Protection Act 2009*;
* linked to a refusal or failure to give effect to a determination made by the Australian Financial Complaints Authority;
* an insolvent under administration;
* the subject of information given to ASIC, or an authority of a State or Territory;
* convicted of an offence in the last ten years;
* the subject of disciplinary action by a Financial Services and Credit Panel in the last ten years; or
* other matters prescribed by regulations (if any).

***[Schedule 1, item 49, section 921U of the Corporations Act]***

* 1. The matters to which a Financial Services and Credit Panel must have regard are adapted from, but slightly different to, the fit and proper person test that ASIC must apply in determining whether to grant an Australian financial services licence or make a banning order. The differences in the two tests exist because the panel does not have the power to take action against financial services licensees, and unlike financial advisers, licensees can also be a body corporate and have a broader range of obligations under the Corporations Act.
  2. The inclusion of a fit and proper person test for financial advisers is considered appropriate as it ensures that financial advisers are trustworthy persons who demonstrate the required integrity necessary to strengthen confidence in Australia’s financial services sector.

#### How does a Financial Services and Credit Panel consider a matter?

* 1. The Chair of a Financial Services and Credit Panel must convene meetings, as required, to perform and exercise the panel’s functions and powers. ***[Schedule 1, item 12, section 148(1) of the ASIC Act]***
  2. Meetings of a Financial Services and Credit Panel do not need to be held in person. The Chair of a panel may decide to hold all or part of a meeting using any technology that allows members to participate in the meeting without physically being at the meeting. If the Chair decides to hold all or part of a meeting using technology, any or all of the members of the panel may use that technology to participate in the meeting. ***[Schedule 1, item 12, section 153 of the ASIC Act]***
  3. A meeting of a Financial Services and Credit Panel, unlike a hearing, is not conducted in the presence of the financial adviser or their representatives.
  4. The Chair of a Financial Services and Credit Panel must preside at all meetings of the panel. ***[Schedule 1, item 12, section 149 of the ASIC Act]***
  5. Meetings may be convened at any time but must not be convened if the Chair has a conflict of interest. If the Chair of a Financial Services and Credit Panel has, or acquires, an interest that conflicts or could conflict with a matter being considered, or about to be considered, by the panel, the Chair must give written notice of this interest to ASIC. If the Chair has a conflict of interest, ASIC may terminate the Chair’s appointment and appoint another ASIC staff member as Chair of the panel. ***[Schedule 1, item 12, sections 148(2, (3) and (4) of the ASIC Act]***
  6. If a member of a Financial Services and Credit Panel (other than the Chair) has or acquires an interest that conflicts or could conflict with a matter that is being considered, or is about to be considered by the panel, the member must disclose the nature of the interest to the Chair as soon as possible after becoming aware of the issue. If the disclosure is made at a meeting, it must be recorded in the minutes of that meeting, or otherwise at the next meeting after the disclosure is made to the Chair. After the disclosure, the member must not be present during any deliberations, or take part in any decisions, on the matter to which the conflict relates. ***[Schedule 1, item 12, sections 150 and 155 of the ASIC Act]***
  7. A quorum is made up of a majority of the members of a Financial Services and Credit Panel. If a member of the panel is not entitled to be present at a meeting due to the disclosure of a conflict, the remaining members of the panel at the meeting constitute a quorum. If one or more members of the panel are not able to participate in decision‑making on a matter, ASIC may appoint additional members to the panel. ***[Schedule 1, item 12, section 151 of the ASIC Act]***
  8. A decision of a Financial Services and Credit Panel is to be determined by a majority of the members that are present and voting. The Chair of the Financial Services and Credit Panel has a deliberative vote, and if the votes are equal, a casting vote, to resolve deadlocks. ***[Schedule 1, item 12, section 152 of the ASIC Act]***
  9. A Financial Services and Credit Panel is not required to hold a meeting to make decisions. If the panel has previously agreed to a process for making decisions without a meeting, the panel can make a decision if the Chair notifies members of the proposed decision, and the majority of members agree to the decision, in accordance with the process agreed by the panel. As per decisions made at meetings, if the votes are equal, the Chair of the panel has a casting vote. The panel must prepare and retain a record of panel decisions made without a meeting. ***[Schedule 1, item 12, section 156 of the ASIC Act]***
  10. In making disciplinary decisions, a Financial Services and Credit Panel must take into account any evidence or submission given to the panel at a hearing, any submission lodged with the panel before the day of a hearing, or any submission made in response to a proposed action notice. ***[Schedule 1, item 12, section 158 of the ASIC Act]***
  11. A Financial Services and Credit Panel may regulate the conduct of its meetings as it considers appropriate. ***[Schedule 1, item 12, section 154 of the ASIC Act]***

#### What actions can a Financial Services and Credit Panel take against a financial adviser?

* 1. A Financial Services and Credit Panel may take action against a financial adviser if a specified circumstance exists, or has occurred, or an adviser has contravened a restricted civil penalty provision.
  2. The action that a Financial Services and Credit Panel may take depends on the nature of the contravention.

***Administrative actions***

* 1. If a specified circumstance exists or has occurred (see *paragraph 1.61*), a Financial Services and Credit Panel may make an instrument taking administrative action against a financial adviser. ***[Schedule 1, item 49, section 921K of the Corporations Act]***
  2. The types of administrative actions that a Financial Services and Credit Panel may take against a financial adviser include directions to undertake specified training, counselling, supervision or reporting certain matters to ASIC, and orders suspending or prohibiting a financial adviser’s registration. ***[Schedule 1, item 49, section 921L(1) of the Corporations Act]***
  3. A direction or order given by a Financial Services and Credit Panel is not a legislative instrument within the meaning of a legislative instrument in section 8(1) of the *Legislation Act 2003*. These instruments are administrative in character as they do not determine or alter the law, but rather they apply the law to individual financial advisers. ***[Schedule 1, item 49, section 921K(5) of the Corporations Act]***
  4. A panel cannot make an instrument taking administrative action against a financial adviser unless the panel has given the financial adviser a written notice of the proposed sanction (a proposed action notice), which must include:
* details of the relevant circumstances and the proposed instrument;
* information about the financial adviser’s right to make a submission or request a hearing within the response period (28 days of the notice being given, or a longer period approved by the panel);
* a statement that if the financial adviser does not make a submission or a request within the response period, the panel may take the action stated in the notice; and
* whether details of the proposed instrument would be included on the Register of Relevant Providers (Financial Advisers Register).

***[Schedule 1, items 4, 12, 14, 23 and 49, sections 5 and 157(2) of the ASIC Act and sections 9, 910A, 921K(2) and 921P of the Corporations Act]***

* 1. Within the end of the response period for a proposed action notice, the financial adviser may:
* take no action – a financial adviser who receives a proposed action notice is not required to request a hearing or make a submission;
* make a written submission to the panel; or
* make a request in writing that the panel hold a hearing.
  1. If the financial adviser does not request a hearing or make a submission within the response period, the Financial Services and Credit Panel may make the instrument specified in the proposed action notice. ***[Schedule 1, item 49, section 921K of the Corporations Act]***
  2. If the financial adviser requests a hearing within the specified response period, the Financial Services and Credit Panel must hold a hearing. However, even if a hearing is requested, the financial adviser can decide not to appear at the hearing. Where a person requests a hearing but does not appear at the hearing, a hearing is still taken to have been held for the purposes of the panel’s decision-making processes. ***[Schedule 1, item 12, sections 157 and 162 of the ASIC Act]***
  3. If a hearing is requested, or a submission is made, within the specified response period, the panel’s decision must be informed by the evidence given at the hearing, or in the submission. ***[Schedule 1, item 12, section 158 of the ASIC Act]***
  4. If a proposed action notice is given and the financial adviser requests a hearing, or makes a submission within the response period, the Financial Services and Credit Panel must hold a hearing or consider the submission and may decide to:
* take no action against the financial adviser;
* make the instrument specified in the proposed action notice;
* make a different instrument to the instrument mentioned in the proposed action notice;
* give the financial adviser a written warning or reprimand;
  + A panel may not make an instrument and give the adviser a warning or reprimand for the same matter.
* if the specified circumstance for which an instrument was proposed to be made is also a contravention of a restricted civil penalty provision – issue an infringement notice; or
  + A panel may not make an instrument or give a warning or reprimand and issue an infringement notice for the same matter.
* if the specified circumstance for which an instrument was proposed to be made is also a contravention of a restricted civil penalty provision – make an instrument and/or recommend that ASIC seek a civil penalty.
  + A panel may not issue an infringement notice and recommend that ASIC seek a civil penalty for the same matter.

***[Schedule 1, items 49 and 84, sections 921K(2), 921T(1), 921Q(1) and (2) and 1317DAPA of the Corporations Act]***

* 1. If a Financial Services and Credit Panel makes an instrument taking administrative action against a financial adviser, the panel must give a copy of the instrument and a statement of reasons to the adviser, the financial services licensee (if the adviser is not also the licensee) and ASIC. The copy of the notice given to the financial adviser must also inform the adviser of their rights to apply to the AAT for a merits review of the panel’s decision or to apply to ASIC to request that the instrument be varied or revoked. However, a failure to give these notices does not affect the validity of the instrument. ***[Schedule 1, item 49, section 921M of the Corporations Act]***
  2. The requirement to give a copy of the instrument to the financial adviser along with a statement of reasons is consistent with the requirements in section 1317D of the Corporations Act for reviewable decisions. This requirement provides that, for reviewable decisions, the decision-maker (in this case, the Financial Services and Credit Panel) must take reasonable steps to give the affected person written notice of the decision and the person’s right to have that decision reviewed by the AAT.
  3. Regulations may prescribe the kinds of instruments, which if made against a financial adviser, must be included by ASIC on the Register of Relevant Providers (Financial Advisers Register). The kinds of instruments that may be prescribed in regulations include instruments made by a Financial Services and Credit Panel and warnings or reprimands given by a panel or by ASIC. ***[Schedule 1, items 49, 72 and 73, sections 921M, 922Q(2)(uc) and 922Q(3) of the Corporations Act]***
  4. This regulation-making power would allow certain classes of instruments made against financial advisers to be prescribed so that they must be listed on the Register of Relevant Provider (Financial Advisers Register). The regulations would be disallowable and therefore would be subject to appropriate parliamentary scrutiny.
  5. A financial adviser must comply with an instrument made by a Financial Services and Credit Panel taking administrative action against the adviser. A failure to comply with an instrument is a contravention of a civil penalty provision, for which ASIC may apply to the court for a civil penalty. ***[Schedule 1, item 49 section 921L(2) of the Corporations Act]***
  6. If a Financial Services and Credit Panel proposes to give a financial adviser a written warning or reprimand for a matter, the panel is not required to give the adviser a proposed action notice or the opportunity to request a hearing or make a submission. If the panel gives a financial adviser a written warning or reprimand, the panel must give the adviser, ASIC and the financial services licensee a copy of the warning or reprimand and a statement of reasons. ***[Schedule 1, item 49, sections 921T(2) and (3) of the Corporations Act]***
  7. A written warning or reprimand given by a Financial Services and Credit Panel to a financial adviser is not a legislative instrument within the meaning of ‘legislative instrument’ in section 8(1) of the *Legislation Act 2003*. Such an instrument is administrative (not legislative) in character as it does not determine or alter the law, but rather applies the law to individuals in circumstances where the panel reasonably believes that specified circumstance exists or has occurred. ***[Schedule 1,   
     item 49, section 921T(4) of the Corporations Act]***

***Infringement notices***

* 1. The Bill provides for a Financial Services and Credit Panel to give financial advisers infringement notices for an alleged contravention of a restricted civil penalty provision. These infringement notices are intended to be distinct from infringement notices issued by ASIC. ***[Schedule 1, items 85 and 86, Division 2 and 3 of Part 9.4AB of the Corporations Act]***
  2. If a Financial Services and Credit Panel reasonably believes that a financial adviser has contravened a restricted civil penalty provision, the panel may:
* make an instrument taking one or more administrative actions against the financial adviser for a contravention of a financial services law;
* give the financial adviser a written warning or reprimand;
* issue an infringement notice for an alleged contravention of a restricted civil penalty provision; or
* make a recommendation to ASIC that it apply to a court for a civil penalty for the alleged contravention of a restricted civil penalty provision.

***[Schedule 1, items 49, 77 and 84, sections 921K(1), 921T(1), 921Q(1) and 1317DAM(1A) of the Corporations Act]***

* 1. A Financial Services and Credit Panel cannot issue an infringement notice unless the panel gives the financial adviser a proposed action notice, which includes:
* details of the alleged contravention;
* the infringement notice amount;
* the adviser’s right to request a hearing or make a submission within the response period (28 days of the notice being given, or a longer period approved by the panel); and
* when the details of the infringement notice would be included on the Register of Relevant Providers (Financial Advisers Register).

***[Schedule 1, items 49 and 84, sections 921P and 1317DAPA of the Corporations Act]***

* 1. While a financial adviser is not required to request a hearing or make a submission, if the adviser requests a hearing, or makes a submission within the response period, the Financial Services and Credit Panel must hold a hearing or consider the submission. ***[Schedule 1, item 12, sections 157 and 158 of the ASIC Act]***
  2. Providing the financial adviser with the opportunity to request a hearing or make a submission before an infringement notice is issued, is intended to strike a balance between enhancing the Financial Services and Credit Panel’s capacity to deal with relatively minor contraventions and ensuring that there are adequate procedural safeguards for financial advisers.
  3. If the financial adviser does not request a hearing or make a submission within the specified response period, the Financial Services and Credit Panel may issue the infringement notice as specified in the proposed action notice. ***[Schedule 1, items 76, 77, 79 and 84, sections 1317DAM and 1317DAPA of the Corporations Act]***
  4. If the financial adviser requests a hearing or makes a submission within the response period, after the hearing is held or the submission is considered, the panel may decide to:
* take no action against the financial adviser;
* issue the infringement notice, as specified in the proposed action notice;
* make a recommendation to ASIC that it apply to the court for a civil penalty, even though this was not mentioned in the proposed action notice;
  + A panel may not issue an infringement notice and recommend that ASIC seek a civil penalty.
* make an instrument taking administrative action against the adviser for a contravention of a financial services law, even though this was not mentioned in the proposed action notice; or
  + A panel may not issue an infringement notice or give the adviser a warning or reprimand and make an instrument.
* give the financial adviser a written warning or reprimand, even though this was not mentioned in the proposed action notice.
  + A panel may not make an instrument or issue an infringement notice and give an adviser a warning or reprimand.

***[Schedule 1, items 49, 77 and 84, sections 921K, 921T(1), 921Q(1) and (2), 1317DAM(1A) and 1317DAPA of the Corporations Act]***

* 1. An infringement notice must be given within 12 months after the day on which the alleged contravention occurred. ***[Schedule 1, item 78, section 1317DAM of the Corporations Act]***
  2. The infringement notice amount for an alleged contravention of a restricted civil penalty provision is 12 penalty units for a single contravention. ***[Schedule 1, items 81, 82 and 83, section 1317DAP of the Corporations Act]***
  3. For multiple alleged contraventions of a restricted civil penalty provision, the infringement notice amount is 12 penalty units multiplied by the number of alleged contraventions. ***[Schedule 1, item 83,   
     section 1317DAP of the Corporations Act]***
  4. Two or more infringement notices can be given under the infringement notice regime. ***[Schedule 1, items 87 and 88, section 1317DAV of the Corporations Act]***
  5. If the Financial Services and Credit Panel gives a financial adviser an infringement notice and the adviser complies with the notice (i.e. that is, the adviser pays the full infringement notice amount within the payment period), ASIC must include all of the following on the Register of Relevant Providers (Financial Advisers Register):
* details of the infringement notice;
* a statement that the adviser has complied with the notice;
* a statement that compliance with the notice is not an admission of guilt or liability; and
* a statement that the financial adviser is not regarded as having contravened the provision specified in the notice.

***[Schedule 1, item 72, section 922Q(2)(ud) of the Corporations Act]***

* 1. ASIC must not include details of an infringement notice given to a financial adviser in the following circumstances:
* before the end of the payment period for the infringement notice;
* if the infringement notice is withdrawn by a Financial Services and Credit Panel; or
* if the financial adviser refuses to pay the infringement notice within the payment period.
  1. If a financial adviser refuses to pay the infringement notice within the payment period, ASIC may apply to the court for a civil penalty. ***[Schedule 1, item 90, section 1317J of the Corporations Act]***
  2. The issuing of an infringement notice represents a Financial Services and Credit Panel’s opinion about an alleged contravention of a restricted civil penalty provision. It does not represent a finding that the financial adviser has contravened a restricted civil penalty provision. Such a finding can only be made by the court.
  3. A financial adviser’s compliance with an infringement notice is not taken as an admission of a contravention of the law for any other purpose. However, compliance with the infringement notice would prevent ASIC from applying to the court for a civil penalty for the alleged contravention. If the infringement notice is not complied with, ASIC may pursue civil penalties to have the matter resolved.
  4. The infringement notice scheme is not intended to amount to the imposition of a financial penalty by a Financial Services and Credit Panel, but instead to provide a mechanism by which an individual can ensure that ASIC is not able to apply to the courts for the imposition of a financial penalty in relation to the contravention.
  5. Infringement notices are intended to be used for less serious contraventions by a financial adviser, supplement existing criminal and civil procedures, and remedy the gap in the current enforcement framework by facilitating the imposition of a relatively small financial penalty for relatively minor contraventions of the Corporations Act that would be resource intensive to otherwise be pursued through the courts.
  6. The infringement notice amount for a single contravention of an alleged contravention of a restricted civil penalty provision is set at 12 penalty units. This penalty amount is within the recommended limits specified in the Guide to Framing Commonwealth Offences, which states that the amount payable under an infringement notice scheme should generally not exceed 12 penalty units for a natural person. Furthermore, an infringement notice amount of 12 penalty units is consistent with the existing infringement notice amount for a single contravention of a prescribed civil penalty provision under the Corporations Act.
  7. The infringement notice amount for an alleged contravention of a restricted civil penalty provision is substantially lower than the maximum financial penalty that could be sought through court proceedings for a civil penalty. The maximum pecuniary penalty a court may order for the contravention of a restricted civil penalty provision is the greater of 5,000 penalty units or three times the benefit derived, and detriment avoided because of the contravention. The maximum penalty amount for a contravention of a restricted civil penalty provision in this Bill is the same as the maximum penalty for a contravention of existing civil penalty provisions in the Corporations Act.
  8. The limitation on the size of the financial penalty in the infringement notice and the restrictions preventing ASIC from seeking a civil penalty without a recommendation from a Financial Services and Credit Panel are intended to ensure that infringement notices are not used for more serious contraventions as an alternative to existing court processes.

***Civil penalties***

* 1. The Bill creates a number of new restricted civil penalty provisions, which apply to financial advisers (see *paragraph 1.59*).
  2. These provisions have been introduced into the civil penalty regime to strengthen the disciplinary system for financial advisers, which was a key focus of recommendation 2.10 of the Financial Services Royal Commission Final Report. These are provisions which, if contravened, are serious enough to warrant financial penalties as a sanction but are not characterised as a criminal offence.
  3. If a Financial Services and Credit Panel reasonably believes that a financial adviser has contravened a restricted civil penalty provision, and for which a panel has not issued an infringement notice (or has issued such a notice but it has been withdrawn), the panel may make a recommendation that ASIC apply to the court for a civil penalty.   
     ***[Schedule 1, items 49 and 88, sections 921Q and 1317DAV of the Corporations Act]***
  4. A Financial Services and Credit Panel may make such a recommendation whether or not the panel also makes an instrument taking administrative action against the financial adviser for the same matter. ***[Schedule 1, item 49, section 921Q(2) of the Corporations Act]***
  5. For a restricted civil penalty provision, unlike for other civil penalty provisions in the Corporations Act, ASIC must not apply to the court for a civil penalty unless a Financial Services and Credit Panel has recommended that ASIC do so. This ensures that the panel has a central role in decision-making concerning the appropriate sanction for these contraventions. ***[Schedule 1, items 49 and 90, sections 921Q and 1317J of the Corporations Act]***
  6. The exception to this is where a Financial Services and Credit Panel issues an infringement notice (which is not withdrawn), and the financial adviser does not pay the infringement notice within the payment period. In this situation, ASIC may apply to the court for a civil penalty without the need for a recommendation from a panel. ***[Schedule 1, item 90, section 1317J of the Corporations Act]***
  7. If ASIC decides not to follow a recommendation made by a Financial Services and Credit Panel to apply for a civil penalty, ASIC must include de‑identified information on the recommendation and the reasons why ASIC decided not to follow the recommendation in ASIC’s annual report. This ensures that there is appropriate scrutiny of regulator actions not to proceed with recommendations that have been made. ***[Schedule 1, item 11, section 136 of the ASIC Act]***
  8. If ASIC makes an application to the court, and the court is satisfied that the financial adviser has contravened a restricted civil penalty provision, the court must make a declaration of contravention and may order the person to pay a financial sanction, known as a pecuniary penalty order. The maximum financial sanction that the court may order is the greater of 5,000 penalty units and three times the benefit derived, and detriment avoided because of the contravention, if this can be determined by the court. This is consistent with the requirements for existing civil penalty provisions under the Corporations Act.
  9. If the court makes a declaration that the financial adviser has contravened a restricted civil penalty provision, ASIC must include this information on the Register of Relevant Providers (Financial Advisers Register). ***[Schedule 1, item 72, section 922Q(2)(ue) of the Corporations Act]***
  10. The civil penalty provisions in this Bill are considered necessary and proportionate to promote compliance with, and strengthen the integrity of, the new disciplinary and registration requirements for financial advisers.

#### What actions can ASIC take action against a financial adviser?

* 1. If all of the following circumstances apply, ASIC must give a financial adviser a written warning or reprimand:
* ASIC forms a reasonable belief that a financial adviser is not a fit and proper person to provide financial advice to retail clients or has contravened a ‘restricted civil penalty provision’ or a ‘specified circumstance’ exists or has occurred;
* ASIC does not convene a Financial Services and Credit Panel; and
* ASIC has not exercised any of its powers under the Corporations legislation (other than under this provision) against the financial adviser for the matter.
  + This includes ASIC’s powers to make banning orders, commence civil or criminal proceedings under the Corporations Act or the ASIC Act and accept enforceable undertakings under the   
    ASIC Act.

***[Schedule 1, item 49, section 921S(1) of the Corporations Act]***

* 1. ASIC’s power to give financial advisers a warning or reprimand applies to conduct that occurs on or after 1 January 2022. ***[Schedule 1, item 98, section 1686HA of the Corporations Act]***
  2. If ASIC gives a financial adviser a written warning or reprimand, ASIC must give a copy of the warning or reprimand and a statement of reasons to the financial adviser and the financial services licensee. ***[Schedule 1, item 49, sections 921S(2) and (3) of the Corporations Act]***
  3. A warning or reprimand given by ASIC to a financial adviser is not a legislative instrument within the meaning of ‘legislative instrument’ in section 8(1) of the *Legislation Act 2003*. Such an instrument is administrative (not legislative) in character as it does not determine or alter the law, but rather applies the law to individuals where ASIC reasonably believes that one or more specified circumstance exists or has occurred. ***[Schedule 1, item 49, section 921S(4) of the Corporations Act]***
  4. The requirement for ASIC to ‘reasonably believe’ that a financial adviser has contravened a restricted civil penalty provision or that a specified circumstance exists or has occurred requires the existence of facts sufficient to create such a belief in a reasonable person, which requires more than just mere suspicion. ASIC may develop a reasonable belief as a result of an investigation following a complaint or reported breach. Generally, a complaint or notification of a breach alone, without an investigation, would not be sufficient to constitute a ‘reasonable belief’.
  5. The power for ASIC to give financial advisers warnings or reprimands ensures that all contraventions, including less serious matters, are able to be addressed in some way, and enables the enforcement action to be efficient and proportionate to the nature and extent of the misconduct or other breach.

#### Financial Services and Credit Panel hearings

* 1. A Financial Services and Credit Panel may be required to hold a hearing where:
* ASIC delegates its power to make a banning order under section 920A(1) of the Corporations Act or section 80(1) of the *National Consumer Credit Protection Act 2009* to the panel, and the panel proposes to make a banning order against the financial adviser; or
* the panel proposes to issue an infringement notice or make an instrument taking administrative action against the financial adviser and the adviser requests a hearing in response to a proposed action notice.

***[Schedule 1, item 12, sections 157(1) and (2) of the ASIC Act]***

* 1. A Financial Services and Credit Panel may also hold a hearing, at the panel’s discretion, to decide whether to:
* consent to vary or withdraw an enforceable undertaking accepted by a Financial Services and Credit Panel; or
* vary or revoke an instrument taking administrative action against a financial adviser.

***[Schedule 1, item 12, section 157(3) of the ASIC Act]***

* 1. If a hearing is to be held, the Chair of the panel must give the financial adviser written notice of the details of the hearing, including the hearing time and place. ***[Schedule 1, item 12, section 160 of the ASIC Act]***
  2. Hearings are not required to be held in person. The Chair of a Financial Services and Credit Panel may decide to hold all or part of a hearing using any technology that allows an individual to participate in the hearing. If the Chair decides to use technology for all or part of a hearing, any or all of the participants in the hearing, including the panel members, may use the technology to participate in the hearing, rather than being required to appear in person. ***[Schedule 1, item 12, sections 159(3) and (4) of the ASIC Act]***
  3. The financial adviser who is the subject of the disciplinary action is not required to appear at a hearing of a Financial Services and Credit Panel. If the person chooses not to appear at a hearing, the person may, before the day of the hearing, make any written submissions to the panel that the person wishes the panel to consider in making the proposed decision. ***[Schedule 1, item 12, section 162 of the ASIC Act]***
  4. The purpose of a hearing is to provide a financial adviser with an opportunity to provide information or an explanation of events, which may assist the panel to make its decision. If a financial adviser declines to appear at a hearing, or make a submission, the Financial Services and Credit Panel will make a decision based on any information and documents before it. A hearing is intended to serve as an inquiry to determine the facts and to assist the panel make an informed decision.
  5. A financial adviser may request that all or part of a hearing be held in public. In deciding whether to grant this request, the panel must have regard to any relevant matters, including whether a matter that may arise during the hearing is confidential or relates to the commission of an offence, may cause unfair prejudice to a person’s reputation and whether it is in the public interest for the hearing to be conducted in public.   
     ***[Schedule 1, item 12, section 163 of the ASIC Act]***
  6. A hearing must be conducted with as little formality and technicality, and with as much expedition as can be achieved while still allowing for proper consideration of the matter. So far as it is practical, the requirements for decision-making at meetings also apply to hearings of a Financial Services and Credit Panel. While the rules of natural justice must be observed, the concepts of ‘burden of proof’ and rules of evidence are not applicable. ***[Schedule 1, item 12, sections 159(1), (2) and (5) of the ASIC Act]***
  7. Evidence may be taken under oath or affirmation. The oath or affirmation given must be appropriate to the culture and religion of the person giving evidence and is intended to signify that the evidence the person gives is true. ***[Schedule 1, item 12, sections 165(2) and (3) of the ASIC Act]***
  8. A financial adviser or witness may be represented at a hearing by a lawyer or a person approved by the Financial Services and Credit Panel (such as an employee of an individual or an officer, member or employee of a body corporate or unincorporated association). A key consideration in the panel’s decision to approve other persons to attend a hearing is fairness to the affected person and whether the requested person’s presence will assist in the conduct of the hearing. Except where the panel decides to hold all or part of a hearing in public, a person must not be present at a hearing, or part of a hearing, unless the person is:
* given a summons to appear at the hearing (or is a representative of a person given a summons);
* named in a direction made by the Chair of the panel permitting appearance at a hearing;
* a staff member of ASIC who has not been directed to leave all or part of the hearing; or
* the subject of the hearing (or their representative).

***[Schedule 1, item 12, sections 161 and 164 of the ASIC Act]***

* 1. If it is considered necessary, the Chair of the panel may, by written summons, require a person (other than the subject of the disciplinary proceedings) to appear before the panel to give evidence or produce specified documents and take an oath or make an affirmation. These persons may also be required to answer a question put to them at a hearing, or produce a document specified in the summons. This ensures that the panel is able to obtain access to all of the information it needs to make its decision, without displacing the privilege against self‑incrimination. ***[Schedule 1, item 12, sections 165(1), (4) and (5) of the ASIC Act]***
  2. A person who receives a summons to appear at a hearing is entitled to be paid the prescribed allowances and expenses (if any):
* if the summons was issued at the financial adviser’s request—by the financial adviser; or
* otherwise—by ASIC.

***[Schedule 1, item 12, section 166 of the ASIC Act]***

* 1. A Financial Services and Credit Panel can protect any confidential or commercially sensitive information that is provided to it in the course of disciplinary proceedings. A panel may make a direction restricting the publication of evidence or matters contained in documents lodged with the panel, if the panel is satisfied that the material is confidential or relates to the commission of an offence, could result in unfair prejudice to a person’s reputation, or that it is in the public interest to do so. ***[Schedule 1, item 12, section 167 of the ASIC Act]***
  2. ASIC, at the request of the Chair of a Financial Services and Credit Panel, may refer a question of law arising at a hearing to the court. Where a question of law is referred to the court, the panel must not make a decision to which the question is relevant, while the reference is pending, or make a decision that is inconsistent with the court’s opinion on the question. ***[Schedule 1, item 12, section 171B of the ASIC Act]***
  3. Members of a Financial Services and Credit Panel, barristers or solicitors, other persons representing a person at a hearing, and persons appearing at a hearing will have the same protection as they would have in a proceeding in the High Court. ***[Schedule 1, item 12, section 171C of the   
     ASIC Act]***
  4. The Bill creates a range of new offence provisions to protect the integrity of Financial Services and Credit Panel hearings, which are consistent with the existing offence provisions that apply to ASIC hearings.
  5. A person commits an offence if they do, or omit to do, an act that obstructs or hinders a panel in the performance of its functions or exercise of its powers, or that results in the disruption of a Financial Services and Credit Panel hearing. The penalty for these offences is   
     two years imprisonment, which is necessary to protect the integrity of the Financial Services and Credit Panel’s decision-making process, while also ensuring consistency across the legislation by being the same as the equivalent penalties for ASIC hearings. ***[Schedule 1, item 12, section 168 of the ASIC Act]***
  6. It is an offence to give evidence at a hearing that is false or misleading that is material to the matter being considered, unless at the time the person gave the evidence, they reasonably believed that the evidence was true and not misleading. The penalty for this offence is also two years imprisonment, which is necessary for protecting the integrity of the Financial Services and Credit Panel’s hearings process, while also ensuring consistency across the legislation by being the same as the existing penalty for giving false or misleading evidence at an ASIC hearing. ***[Schedule 1, item 12, section 169 of the ASIC Act]***
  7. The evidential burden for demonstrating that a person ‘reasonably believed’ that the evidence they gave was true and not misleading falls on the person giving the evidence. In other words, the person must point to the relevant evidence that suggests a reasonable possibility that the person believed, at the time the evidence was given, the evidence was true and not misleading. Once the defendant discharges this evidential burden, the onus is on the prosecution to disprove the matters beyond reasonable doubt.
  8. The reversal of the evidential burden of proof is considered appropriate in this situation as the person giving the evidence is best placed to raise evidence as to why they believed the evidence they gave was true, given it could at least in part involve some inquiry as to the person’s state of mind and knowledge. This approach is also consistent with the principle in the Guide to Framing Commonwealth Offences.
  9. In the following circumstances, a person commits an offence of strict liability:
* failing to comply with a requirement in accordance with a summons – the penalty is 50 penalty units;
* failing to take an oath or make an affirmation – the penalty is 50 penalty units;
* failing to answer a question or produce a document – the penalty is 50 penalty units;
* a person is present at a Financial Services and Credit Panel hearing, or part of a hearing, that is private, but is not permitted to attend – the penalty is 30 penalty units; and
* a person publishes evidence given before, or matters contained in documents lodged with, a Financial Services and Credit Panel and a direction restricting the publication of that evidence or those matters is in force – the penalty is 120 penalty units.

***[Schedule 1, item 12, sections 170, 171 and 171A of the ASIC Act]***

* 1. Strict liability offences are considered appropriate in all of these circumstances to:
* strongly deter misconduct that can have serious detriment for a person against whom a proposed action or order is to be made or whose reputation or business may be unfairly harmed by the publication of evidence or certain matters;
* ensure consistency with the existing penalties for non‑compliance with the same requirements for hearings conducted by ASIC, under Division 6 of Part 3 of the ASIC Act; and
* reduce non‑compliance in order to bolster the integrity of the disciplinary scheme.
  1. In all but one of these cases (the penalty for publication of restricted materials), the penalty for these strict liability offences is below the maximum penalty amount for strict liability offences specified in the Guide to Framing Commonwealth Offences, which provides that strict liability offences may be punishable by a fine of up to 60 penalty units for an individual.
  2. The exception is the penalty for publication of evidence or matters contained in documents restricted by a Financial Services and Credit Panel, which imposes a penalty higher than is recommended for strict liability offences in the Guide to Framing Commonwealth Offences. This exception is considered necessary and proportionate to ensure the protection of confidential information given for the purposes of the panel’s examination of a particular issue. Furthermore, in deciding whether to make a direction restricting publication of evidence or particular matters, the panel must take into account considerations such as public interest and privacy concerns, including protection of the reputation of persons appearing before the panel. This is also justified on the basis that it imposes the same penalty as the existing penalty for publishing restricted evidence or material restricted by ASIC, which ensures consistency across the legislation.

#### Is there an alternative to an administrative or civil sanction?

* 1. As an alternative to an administrative or civil sanction, a Financial Services and Credit Panel may accept an enforceable undertaking from a financial adviser, if the panel considers this an appropriate mechanism to address the actions of the adviser. ***[Schedule 1, items 6 and 12, sections 93AA and 171E(1) of the ASIC Act]***
  2. If an enforceable undertaking given by a financial adviser is accepted by a Financial Services and Credit Panel, ASIC is required to include information about that undertaking on the Register of Relevant Providers (Financial Advisers Register). ***[Schedule 1, item 70, section 922Q(2)(q) of the Corporations Act]***
  3. Enforceable undertakings, once accepted by a Financial Services and Credit Panel, may be withdrawn or varied, subject to the consent of a panel. A financial adviser may apply to ASIC to withdraw or vary an enforceable undertaking. If an application is made, ASIC must decide whether or not to make a request to a Financial Services and Credit Panel to decide whether to consent to the variation or withdrawal of the undertaking. In deciding whether or not to consent to withdraw or vary an undertaking, a panel may hold a hearing if the panel determines that this would be necessary to inform their decision-making process. ***[Schedule 1, item 12, sections 171E(2), (3) and (4) of the ASIC Act]***
  4. A decision by ASIC not to make a request to a panel is a reviewable decision for the purposes of Part 9.4A of the Corporations Act, which means that the applicant may apply to the AAT for a merits review of ASIC’s decision. ***[Schedule 1, item 13, section 244 of the ASIC Act]***
  5. Once an undertaking has been accepted, if ASIC considers that a person has breached any of the terms of the undertaking, ASIC may apply to the court for an order. If the court is satisfied that the person has breached a term of the undertaking, the court may make any order that it thinks appropriate, including directing the person to:
* comply with the terms of the undertaking;
* pay the Commonwealth an amount up to the amount of any financial benefit that the person directly or indirectly obtained, and which can be reasonably attributed to the breach; or
* compensate any other person who has suffered loss or damage as a result of the breach.

***[Schedule 1, item 12, sections 171E(5) and (6) of the ASIC Act]***

#### Can a financial adviser appeal or review the decision of a Financial Services and Credit Panel to take administrative action?

* 1. A decision by a Financial Services and Credit Panel to give a financial adviser a written warning or reprimand or to make an instrument taking other administrative action against the adviser is a reviewable decision. This means that the financial adviser may apply to the AAT for a merits review of the panel’s decision. ***[Schedule 1, item 49, section 921V of the Corporations Act]***
  2. If a Financial Services and Credit Panel has made an instrument taking administrative action against a financial adviser (other than a written warning or reprimand), the adviser can also make an application to ASIC for a Financial Services and Credit Panel to vary or revoke the direction or order. If the adviser makes an application to vary or revoke an instrument, ASIC must decide whether or not to make a request to a Financial Services and Credit Panel for a decision. A decision by ASIC not to make such a request to a panel is a reviewable decision (i.e. subject to merits review by the AAT). ***Schedule 1, item 49, sections 921N(1), (3) and (4) of the Corporations Act]***
  3. ASIC may also initiate a request to a Financial Services and Credit Panel to make a decision to vary or revoke an instrument, if ASIC is satisfied that there has been a change in a circumstance which formed the basis of the original decision. ***[Schedule 1, item 49, section 921N(2) of the Corporations Act]***
  4. In response to a request, a Financial Services and Credit Panel must decide to do one of the following:
* revoke the instrument;
* if an application was made by the financial adviser – either vary the instrument as requested in the application or in a different way; or
* refuse to vary or revoke the instrument.

***[Schedule 1, item 49, section 921N(5) of the Corporations Act]***

* 1. The Financial Services and Credit Panel must give the financial adviser written notice of the panel’s decision and a statement of reasons. If the panel decides to vary or revoke the instrument, the Chair of the panel must also give written notice of the panel’s decision to the financial services licensee and ASIC. ***[Schedule 1, item 49, sections 921N(6) and (7) of the Corporations Act]***
  2. A decision by a Financial Services and Credit Panel to vary the instrument other than as specified in the application, or to refuse to vary or revoke the instrument, is a reviewable decision and is subject to merits review by the AAT. ***[Schedule 1, item 49, section 921V of the Corporations Act]***
  3. If the original instrument made by a Financial Services and Credit Panel was included on the Register of Relevant Providers (Financial Advisers Register) and the panel decides to vary or revoke the instrument, ASIC is required to update the details of the instrument on the Register. ***[Schedule 1, item 72, section 922Q of the Corporations Act]***
  4. A financial adviser may also apply for merits review of a decision by ASIC to give a warning or reprimand. ***[Schedule 1, item 49, section 921S of the Corporations Act]***

#### Can a financial adviser appeal or review the decision of a Financial Services and Credit Panel to issue an infringement notice?

* 1. A decision by a Financial Services and Credit Panel to issue an infringement notice for an alleged contravention of a restricted civil penalty provision is not a reviewable decision. This is consistent with the exclusion in section 1317C(gf)(i) of the Corporations Act, which applies to all infringement notices issued under section 1317DAM of the Corporations Act.
  2. Merits review of the decision to issue or withdraw an infringement notice is considered inappropriate because there is no obligation on the financial adviser to comply with the notice and   
     non-compliance with the notice leaves ASIC with the decision whether or not to initiate court proceedings to enforce the restricted civil penalty provision.
  3. Within 28 days of being given an infringement notice by a Financial Services and Credit Panel, the financial adviser can make a request, via ASIC, for a panel to withdraw the infringement notice. ASIC may also initiate a request to a panel to withdraw an infringement notice if ASIC is satisfied that there has been a change in a circumstance which formed the basis of the original decision to issue the infringement notice. ***[Schedule 1, item 86, sections 1317DATC(1) and (2) of the Corporations Act]***
  4. The panel must decide whether to withdraw the infringement notice and give the financial adviser notice of the panel’s decision within 14 days after receiving a request. Otherwise, the panel is taken to have refused the request to withdraw the infringement notice and the refusal is taken to have occurred on the last day of the 14-day period. ***[Schedule 1,   
     item 86, sections 1317DATC(3) and (5) of the Corporations Act]***
  5. When deciding whether or not to withdraw the infringement notice, a Financial Services and Credit Panel:
* must take into account any written representations given by the person to ASIC (if any); and
* may take into account any other matter that the panel considers relevant including:
  + whether a court has previously imposed a penalty on the person for a contravention of a provision of the Corporations Act;
  + other circumstances of the alleged contravention of the restricted civil penalty provision to which the infringement notice relates; and
  + whether the person has paid an amount, stated in an earlier infringement notice, for an alleged contravention of the Corporations Act.

***[Schedule 1, item 86, section 1317DATC(4) of the Corporations Act]***

* 1. If, at the time a Financial Services and Credit Panel withdraws the infringement notice, the person has paid all or part of the amount stated in the infringement notice, ASIC must refund the amount already paid. ***[Schedule 1, item 86, section 1317DATC(6) of the Corporations Act]***
  2. If a Financial Services and Credit Panel refuses to withdraw an infringement notice, the payment period ends on the later of:
* the last day of the original payment period;
* seven days after adviser is given notice of the decision not to withdraw the infringement notice; and
* seven days after the day the panel is taken to have refused the application.

***[Schedule 1, item 86, section 1317DATB(4) of the Corporations Act]***

* 1. If the Financial Services and Credit Panel refuses to withdraw the infringement notice, the financial adviser can either:
* pay the infringement notice amount and avoid possible civil proceedings for the alleged contravention of a restricted civil penalty provision; or
* refuse to pay and ASIC may decide to apply to the court for a civil penalty for the alleged contravention of a restricted civil penalty provision.
  1. As for other infringement notices issued by ASIC under the Corporations Act, the decision of a Financial Services and Credit Panel not to withdraw an infringement notice is not reviewable.
  2. If a Financial Services and Credit Panel does withdraw the infringement notice, the panel may decide to:
* make a recommendation to ASIC that it commence civil proceedings for an alleged contravention of a restricted civil penalty provision; or
* take no further action against the financial adviser.

***[Schedule 1, items 49 and 88, sections 921Q and 1317DAV of the Corporations Act]***

* 1. ASIC can make an application to the court for an alleged contravention of a restricted civil penalty provision in the following circumstances – if a Financial Services and Credit Panel:
* does not issue an infringement notice and instead makes a recommendation to ASIC;
* issues and withdraws an infringement notice and makes a recommendation to ASIC; or
* issues, but does not withdraw, an infringement notice, and the financial adviser refuses to pay the infringement notice within the payment period.

***[Schedule 1, items 49, 88 and 90, sections 921Q, 1317DAV and 1317J of the Corporations Act]***

* 1. If ASIC makes an application to the court, and the court is satisfied that the financial adviser has contravened a restricted civil penalty provision, the court must make a declaration of a contravention and may also order the payment of a financial penalty.
  2. The issue of an infringement notice does not limit a court’s discretion to determine the amount of a penalty (up to the maximum pecuniary penalty amount) to be imposed on a person who is found to have contravened a restricted civil penalty provision. ***[Schedule 1, item 88, section 1317DAV of the Corporations Act]***

#### How does a financial adviser pay an infringement notice?

* 1. An infringement notice given to a financial adviser must specify the details of the alleged contravention, the amount payable, how to pay the infringement notice, how to make a request for the notice to be withdrawn, the implications of paying (or not paying) the infringement notice and how to apply for an extension of the payment period or to pay in instalments. ***[Schedule 1, item 80, section 1317DAP of the Corporations Act]***
  2. A financial adviser has 28 days after the day on which the infringement notice is given to pay the infringement notice unless this payment period is extended by the Chair of the Financial Services and Credit Panel. ***[Schedule 1, item 86, section 1317DATB(1) of the Corporations Act]***
  3. The Chair of the Financial Services and Credit Panel that issued the infringement notice may, in writing, extend the payment period for an infringement notice if, during the 28-day payment period, the financial adviser or ASIC makes a request for an extension. Similarly, the financial adviser or ASIC can also make a request during the payment period for the Chair to arrange for the financial adviser to pay the infringement notice in instalments. ***[Schedule 1, item 86, sections 1317DATB(2), (3), (5) and (6) of the Corporations Act]***
  4. The Chair of the Financial Services and Credit Panel has 14 days after a request for an extension or to pay in instalments is made, to decide whether to grant the application. If the Chair does not make a decision and notify the adviser of the decision within 14 days, the Chair is taken to have refused the request, and this decision is taken to have been made on the last day of the 14-day period. ***[Schedule 1, item 86, section 1317DATB(2) of the Corporations Act]***
  5. If the Chair refuses the request for an extension or for the infringement notice to be paid in instalments, the financial adviser is required to pay the infringement notice by the later of:
* the last day of the original payment period;
* seven days after the adviser is given notice of the decision; and
* seven days after the day the request is taken to be refused.

***[Schedule 1, item 86, section 1317DATB(2) of the Corporations Act]***

* 1. If the Chair grants the financial adviser’s request for an extension, the payment period is extended in accordance with the notice given by the Chair. ***[Schedule 1, item 86, section 1317DATB(2) of the   
     Corporations Act]***
  2. If the Chair grants the financial adviser’s application to pay in instalments, the payment period ends on the earlier of:
* the last day on which an instalment is to be paid under the arrangement; and
* if the person fails to pay an instalment in accordance with the arrangement – the last day on which the missed instalment was to be paid.

***[Schedule 1, item 86, section 1317DATB(2) of the Corporations Act]***

#### What role does ASIC play in Financial Services and Credit Panel processes?

* 1. In addition to being required to convene a Financial Services and Credit Panel in certain circumstances prescribed by the regulations, ASIC must convene a Financial Services and Credit Panel if it delegates the power to make a banning order under section 920A of the Corporations Act or section 80 of the *National Consumer Credit Protection Act 2009* to a panel. ***[Schedule 1, items 7, 31 to 34, 102 to 105, section 102 of the ASIC Act, section 920A of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]***
  2. The delegation of ASIC’s power to make a banning order to a Financial Services and Credit Panel codifies existing delegation arrangements and supports the efficient performance and exercise of ASIC and the panel’s disciplinary functions and powers, and ensures that the delegation is only exercised by persons who are appropriately trained and qualified.
  3. Even if ASIC delegates its power to make a banning order to a Financial Services and Credit Panel, ASIC may continue to make a banning order without the need for a hearing where it involves the suspension or cancellation of a financial services or credit licence or the person has been convicted of serious fraud. ***[Schedule 1, items 34 and 105, section 920A of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]***
  4. ASIC must provide staff and support facilities to the Financial Services and Credit Panel as required for the effective performance and exercise of the panel’s functions and powers. ***[Schedule 1, item 5, section 11 of the ASIC Act]***
  5. ASIC’s annual report, which is required to be prepared by the ASIC Chair and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013*, must include information about:
* the activities undertaken by each Financial Services and Credit Panel;
* the financial adviser exams (if any) administered by ASIC;
* written reprimands and warnings (if any) given by ASIC to financial advisers; and
* if during the period, ASIC decided not to follow a recommendation by the Financial Services and Credit Panel to apply to the court for a civil penalty – the recommendation and the reasons why ASIC decided not to follow it.

***[Schedule 1, item 11, section 136 of the ASIC Act]***

* 1. In order to enable the effective performance and exercise of ASIC and the Financial Services and Credit Panel’s functions and powers, the Bill authorises the disclosure of information by ASIC to a Financial Services and Credit Panel, to ensure that each panel has access to the information necessary for the performance and exercise of the panel’s functions and powers. ***[Schedule 1, item 8, section 127 of the ASIC Act]***
  2. Similarly, the disclosure of information by a person who is, or was, a member of a Financial Services and Credit Panel is authorised if the disclosure is:
* required by Commonwealth, State or Territory law;
* made to ASIC for the purposes of the performance or exercise of ASIC’s functions and powers under the corporations legislation or the *National Consumer Credit Protection Act 2009*; or
* made in the course of the panel performing its functions or exercising its powers; or
* made to another Financial Services and Credit Panel for the purposes of the performance or exercise of that other panel’s functions and powers.

***[Schedule 1, item 12, section 171D of the ASIC Act]***

* 1. Given the potentially sensitive nature of information that may be presented to a Financial Services and Credit Panel, the unauthorised use or disclosure of information obtained in connection with the performance or exercise of the panel’s functions or powers, by a person who is or was a member of a Financial Services and Credit Panel is an offence. The penalty for this offence is two years imprisonment. ***[Schedule 1, item 12, section 171D of the ASIC Act]***
  2. This offence provision is considered necessary and appropriate to strongly deter misconduct by persons in a position to cause serious detriment to a person’s reputation and business, and ensure consistency with the penalties for unauthorised use or disclosure of information by a person who is, or was, a member of the Tax Practitioners Board under section 70-35 of the *Tax Agent Services Act 2009*.
  3. To enable efficient and effective communication between advisers and ASIC and the Financial Services and Credit Panel, the Bill provides that:
* in relation to documents that are required or permitted to be given to any person by a panel, chair of the panel or ASIC– these documents may be given by means of electronic communication or by providing the person with sufficient information to access the document electronically if, at the time, it is reasonable to believe that the document would be readily accessible and there is a nominated electronic address to which the document or information may be sent; and
  + This applies to documents given by a panel or the Chair of a panel under Part 9 of the ASIC Act or the Corporations Act.
  + This applies to documents given by ASIC under Part 9 of the ASIC Act (Financial Services and Credit Panels), Division 8A (Professional Standards for relevant providers), Division 8B (Action against relevant providers) or Division 8C (Registration of relevant providers) of Part 7.6 of the Corporations Act or Part 9.4AB of the Corporations Act (infringement notices given by Financial Services and Credit Panels).
* in relation to documents that are required or permitted to be given by any person to a panel, the Chair of a panel or to ASIC– these documents may be given by means of electronic communication if, at the time, it is reasonable to believe that the document would be readily accessible and there is a nominated electronic address to which the document or information may be sent.
  + This applies to documents given to a panel, or the Chair of a panel under Part 9 of the ASIC Act or the Corporations Act, or to ASIC under Part 9 of the ASIC Act, Divisions 8A, 8B or 8C of Part 7.6 of the Corporations Act or Part 9.4AB of the Corporations Act.
  + In the case of a person giving information to a panel, the Chair of a panel or ASIC, the person is not permitted to give a document by providing sufficient information to allow the recipient to access the document electronically (for example, a link to a website). This is to ensure that the information given to the Regulator (the panel, Chair of a panel or ASIC) does not change over time.

***[Schedule 1, items 12 and 49, section 171F of the ASIC Act and sections 921W and 921X of the Corporations Act]***

### Part 2 - Registration of financial advisers

* 1. Recommendation 2.10 of the Financial Services Royal Commission Final Report recommended that all financial advisers who provide personal financial advice to retail clients be registered. The Bill implements this recommendation in a transitioned way in parallel with the development of supporting IT infrastructure.
  2. The first stage (Stage 1 registration) involves a one-off obligation for financial services licensees to apply to ASIC to register their financial advisers by providing additional information on their authorised advisers. ASIC is required to use this information to update the Register of Relevant Providers (Financial Advisers Register). ***[Schedule 1, item 49, Division 8C of Part 7.6 of the Corporations Act]***
  3. The second stage (Stage 2 registration), which commences by proclamation, will be administered by the Australian Taxation Office using the new Australian Business Registry System and involve individual financial advisers applying to register themselves. ***[Schedule 2, Division 8C of Part 7.6 of the Corporations Act]***

#### Stage 1 registration

* 1. Under Stage 1 registration, the obligation to register a financial adviser sits with the financial services licensee, on whose behalf the adviser is authorised to provide personal advice to retail clients in relation to relevant financial products. ***[Schedule 1, item 49, sections 921ZA(1) and 921ZB(1) of the Corporations Act]***
  2. From 1 January 2023, it will be an offence to provide personal financial advice while unregistered. This means that all financial advisers are required to be registered by 1 January 2023 to avoid contravening a restricted civil penalty provision. ***[Schedule 1, items 49 and 98, sections 921Y and 1684L of the Corporations Act]***
  3. ASIC will provide further guidance on when and how applications for registration are able to be lodged to ensure that all financial advisers are able to be registered before penalties apply.
  4. Financial services licensees are required to apply to ASIC to register their financial advisers. If the financial adviser is also the financial services licensee, the licensee is required to submit an application to register themselves as a financial adviser. ***[Schedule 1, item 49, sections 921ZA(1) and 921ZB(1) of the Corporations Act]***
  5. Registration is not open to provisional financial advisers (i.e. a financial adviser who is undertaking work and training in accordance with the requirement in section 921B(4) of the Corporations Act).
  6. To be valid, an application for registration must be submitted to ASIC in the approved form and include:
* a written declaration:
  + from the financial adviser that they are a fit and proper person – if the financial adviser is also the financial services licensee; or
  + from the financial services licensee that they have received a declaration from the financial adviser (for whom the application is being made) that the adviser is a fit and proper person – if the financial adviser is not the financial services licensee.
* a written declaration by the financial services licensee on whether the licensee is aware of any reason why the financial adviser might not be a fit and proper person to provide financial advice (this is not required if the adviser is also the financial services licensee);
* a written declaration by the financial services licensee that the financial adviser has met all applicable education and training standards prescribed in the Corporations Act; and
* if the financial adviser provides tax (financial) advice services – a written declaration by the financial services licensee that the adviser has met the additional education and training standard for the provision of tax (financial) advice services.

***[Schedule 1, item 49, sections 921ZA(2) and 921ZB(2) of the Corporations Act]***

* 1. An application for registration is not valid and is taken not to have been lodged if the financial adviser has not met all of the applicable education and training standards.
  2. Declarations by the financial adviser and financial services licensee (if the licensee is not also the financial adviser) about the adviser’s fitness and propriety to provide personal financial advice are required to be made with reference to the matters specified in the fit and proper person test. ***[Schedule 1, item 49, sections 921ZA(3) and 921ZB(3) of the Corporations Act]***
  3. The requirement that the financial services licensee make a declaration about whether they are aware of any reason why the financial adviser might not be a fit and proper person is not intended to require the licensee to undertake additional investigation but is intended to be based on information already available to the licensee. For example, this assessment would take into account whether the adviser has had an instrument made against them by the Financial Services and Credit Panel, notification of which is required to be provided to the financial services licensee. Also, while a licensee is not required to undertake a criminal history check for the purpose of making this declaration, if a check was undertaken by the licensee, any information resulting from the check would need to be taken into account as part of the licensee’s declaration. The licensee is not required to include reasons for their declaration as part of the application for registration.
  4. A declaration by a financial services licensee that they are aware of any reason why the financial adviser might not be a fit and proper person is not, by itself, grounds for ASIC to refuse to register the adviser. However, if upon investigation, ASIC reasonably believes that the adviser is not a fit and proper person to provide personal financial advice, disciplinary action may be taken against the financial adviser.
  5. If a person provides false or misleading information in the application for registration, they commit an offence and contravene a civil penalty provision under sections 1308(1) and 1308(4) of the   
     Corporations Act. ***[Schedule 1, item 49, sections 921ZA and 921ZB of the Corporations Act]***
  6. A fee is payable upon lodgement of an application for registration. The fee amount is to be prescribed in the *Corporations (Fees) Regulations 2001*. This fee is intended to recover the costs of registering financial advisers.
  7. ASIC must register a financial adviser by recording that the adviser is registered on the Register of Relevant Providers (Financial Advisers Register). As soon as practicable after registering a financial adviser, ASIC must give written notice of the registration to the financial adviser and financial services licensee (one notification is sufficient if the adviser is also the financial services licensee). A failure by ASIC to provide a notice of registration does not affect the validity of the registration. ***[Schedule 1, item 49, sections 921ZC(1), (4) and (5) of the Corporations Act]***
  8. If a financial adviser is authorised by more than one financial services licensee, only one of the adviser’s licensees is required to submit an application for registration; however, a notice of registration is required to be provided to each of the adviser’s licensees.
  9. Registration is taken to come into force when ASIC records that the financial adviser is registered on the Register of Relevant Providers (Financial Advisers Register) and remains in force until the earliest of:
* the cancellation time specified in a registration prohibition order in force against a financial adviser;
* the time when a banning order against a financial adviser takes effect; and
* if the financial adviser is not also the financial services licensee – the day the financial services licensee ceases to authorise the adviser to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products; and
* if the financial adviser is also the financial services licensee – the day the licensee’s Australian financial services licence is cancelled in accordance with Subdivision C, Division 4 of Part 7.6 of the Corporations Act.

***[Schedule 1, items 16 and 49, sections 910A, 921ZD and 921ZE of the Corporations Act]***

* 1. If a financial adviser’s registration ceases to be in force for one of these reasons, the adviser is not permitted to provide financial advice until they are registered again.
  2. Stage 1 registration introduces a one-off obligation to be registered, and unless the person’s registration ceases for one of these reasons, the person is not required to be registered again for the duration of Stage 1. This process seeks to achieve a balance between the need for accountability of financial advisers and the need to minimise regulatory burden for the financial services licensees and their advisers.
  3. As per the existing obligation, if a financial services licensee ceases to authorise a financial adviser, the licensee must lodge a notice notifying ASIC within 30 business days of the change.
  4. Upon receiving a valid application for registration, ASIC must register a financial adviser, unless one or more grounds for refusal apply. ASIC must refuse to register a financial adviser if the adviser is banned, disqualified or, if a person is subject to a registration prohibition order, until after the end of the prohibition end day specified in the order. ***[Schedule 1, item 49, sections 921ZC(1), (2) and (3) of the Corporations Act]***
  5. If ASIC refuses to register a financial adviser, ASIC must give written notice of the refusal to the adviser and the financial services licensee within five business days after making the decision and specify the grounds for the refusal. ***[Schedule 1, item 49, sections 921ZC(6) and (7) of the Corporations Act]***
  6. The Register of Relevant Providers (Financial Advisers Register) already includes any information ASIC thinks is relevant, including the financial adviser’s name and the name of their authorising financial services licensee, recent advising history, educational qualifications, whether they have been banned or disqualified and the type of advice they are authorised to provide. If ASIC registers a financial adviser, ASIC must also include on the Register whether:
* the financial adviser’s registration is in force; and
* the financial adviser provides, or is to provide, tax (financial) advice services.

***[Schedule 1, item 72, sections 922Q(2)(ua) and (ub) of the Corporations Act]***

* 1. From 1 January 2023, it is a contravention of a restricted civil penalty provision to provide personal advice to retail clients in relation to relevant financial products while unregistered. ***[Schedule 1, items 49 and 98, sections 921Y and 1684L of the Corporations Act]***
  2. Also from 1 January 2023, if a financial adviser provides personal financial advice while unregistered, the financial services licensee commits an offence or contravenes a civil penalty provision if, at the time the advice is provided, the licensee has not revoked or ceased the financial adviser’s authorisation to provide financial advice on the licensee’s behalf. ***[Schedule 1, items 49 and 98, sections 921Z and 1684L of the Corporations Act]***
  3. A financial services licensee that contravenes this requirement commits an offence of strict liability (the penalty is 20 penalty units) and contravenes a civil penalty provision. This is not a restricted civil penalty provision, and the responsibility for enforcing this offence provision by issuing an infringement notice, or commencing criminal or civil proceedings, rests exclusively with ASIC. ***[Schedule 1, items 49, 89 and 99, sections 921Z and 1317E and Schedule 3 of the Corporations Act]***
  4. The use of a strict liability offence in this circumstance is considered appropriate, as it is necessary to strongly deter misconduct that can have serious detriment for consumers of financial services. Strict liability offences are also used to reduce non-compliance and bolster the integrity of the registration regime administered by ASIC. The penalty amount for this offence is below the maximum penalty amount specified in the Guide to Framing Commonwealth Offences, which provides that the penalty for strict liability offences should not exceed 60 penalty units for individuals or 300 penalty units for a body corporate.
  5. In accordance with section 1317DAN(a) of the Corporations Act, ASIC may issue an infringement notice for the alleged contravention of a strict liability offence. In accordance with   
     section 1317DAP(2)(a) of the Corporations Act, the infringement notice amount for a single contravention of a strict liability offence is half the maximum penalty that a court could impose on the person for the contravention. Accordingly, the infringement notice amount for this strict liability offence is 10 penalty units, which is below the maximum amount for an infringement notice, of 12 penalty units, recommended in the Guide to Framing Commonwealth Offences.
  6. If a Financial Services and Credit Panel makes an instrument imposing a registration suspension order against a financial adviser, the adviser’s registration is taken not to be in force during the suspension period. A registration suspension order begins at, or after (but not before) the time a copy of the order is given to the financial adviser. At the end of the suspension period, the adviser’s registration is re-instated. ***[Schedule 1, items 23, 25 and 49, sections 910A and 921L(1), (3) and (4) of the Corporations Act]***

**Example 1.1 – Registration suspension order**

A Financial Services and Credit Panel makes a registration suspension order against Lyn, a financial adviser, and gives a copy of the order to Lyn, her financial services licensee and to ASIC. The registration suspension order is in force from 10 March 2023 to 9 May 2023.

Lyn must not provide personal advice to retail clients in relation to relevant financial products while the suspension order is in force. On 10 May 2023, Lyn’s registration is automatically reinstated, and she can resume providing financial advice (subject to her still being authorised).

* 1. If a Financial Services and Credit Panel makes an instrument imposing a registration prohibition order against a financial adviser, the panel must give a copy of the order to the adviser, the financial services licensee and ASIC. The financial adviser’s registration is cancelled at the time specified in the order, and the adviser is not to be registered again until the prohibition end day specified in the order. A registration prohibition order begins at, or after (but not before) the time a copy of the order is given to the financial adviser. If a financial services licensee applies to re-register the financial adviser, the adviser’s registration commences when ASIC records that the adviser is registered on the Register of Relevant Providers (Financial Advisers Register), which must not be before the prohibition end day specified in the order. ***[Schedule 1, items 16, 23 and 49, sections 910A, 921L(1) and (5), 921ZC(3), 921ZD and 921ZE of the Corporations Act]***

**Example 1.2: Registration prohibition order**

A Financial Services and Credit Panel makes a registration prohibition order against James, a financial adviser, and gives a copy of the order to James, his financial services licensee and ASIC. The registration prohibition order specifies that James’s registration is cancelled from the start of 1 July 2023 and prohibits James from being registered again until 1 March 2024.

James must not provide financial advice between 1 July 2023 and the date he is registered again, which cannot be before 1 March 2024.

James’ financial services licensee must cease to authorise James to provide personal advice to retail clients in relation to relevant financial products on the licensee’s behalf immediately after receiving notice of the registration prohibition order.

In late February 2024, James’ licensee authorises James and makes an application to ASIC to re‑register James. After 1 March 2024, ASIC must register James (unless there is a grounds for refusal) by recording that James is registered on the Financial Advisers Register and, as soon as reasonably practicable after this give James and his licensee a written notice of registration. James may begin providing financial advice again as soon as he has been registered.

***What are the registration requirements for tax (financial) advisers?***

* 1. A financial services licensee must specify in the application for registration if the financial adviser provides, or is to provide, tax (financial) advice services. If so, the adviser must have met the additional education and training standard (if any) for the provision of tax (financial) advice services and the licensee must make a declaration to this effect. ***[Schedule 1, items 43 and 49, sections 921BB, 921ZA and 921ZB of the Corporations Act]***
  2. If ASIC registers the financial adviser, ASIC is required to record on the Register of Relevant Providers (Financial Advisers Register) that the financial adviser provides, or is to provide, tax (financial) advice services and include details of the adviser’s educational qualifications and/or any courses completed by the adviser. ***[Schedule 1, items 49 and 72, sections 921ZC and 922Q of the Corporations Act]***
  3. A person contravenes a civil penalty provision under the   
     *Tax Agent Services Act 2009* if they provide tax (financial) advice services without either being a qualified tax relevant provider or a registered tax agent under the *Tax Agent Services Act 2009*. The penalty for this offence is 250 penalty units for an individual and 1,250 penalty units for a body corporate. ***[Schedule 1, item 118, section 50-17 of the Tax Agent Services Act 2009]***
  4. A qualified tax relevant provider is a financial adviser who has met the additional education and training requirements (if any) for the provision of tax (financial) advice services. ***[Schedule 1, items 23 and 133, section 910A of the Corporations Act and section 90-1 of the Tax Agent Services Act 2009]***
  5. If, at the time a financial adviser is to be registered the adviser does not satisfy the requirements to provide tax (financial) advice services, the adviser may subsequently provide tax (financial) advice services if:
* the adviser later meets the additional education and training standard (if any) for the provision of tax (financial) advice services; and
* the adviser’s financial services licensee authorises the adviser to provide tax (financial) advice services on the licensee’s behalf.
  1. In this situation, the financial adviser’s financial services licensee must lodge a notice (under section 922H of the Corporations Act) within 30 business days of the change to the adviser’s authorisation notifying ASIC that the financial adviser provides or is to provide tax (financial) advice services and the details of the education and training that the adviser has completed. Upon receiving the notice, ASIC must update the Register of Relevant Providers (Financial Advisers Register) to record that the financial adviser provides tax (financial) advice services and include information about the education qualifications and/or any relevant courses that the financial adviser has completed. ***[Schedule 1, item 72, section 922Q of the Corporations Act]***
  2. To avoid duplication of requirements, transitional provisions in the Bill provide that a person registered as a tax (financial) adviser under the *Tax Agent Services Act 2009* immediately before 1 January 2022 is taken to be registered as a financial adviser under Stage 1 registration, unless the person’s registration as a tax (financial) adviser is suspended for that period. ***[Schedule 1, item 98, section 1684U of the Corporations Act and Schedule 1, items 139 and 140 of the Tax Agent Services Act 2009]***

#### Stage 2 registration

* 1. Schedule 2 of the Bill provides for Stage 2 registration, which commences on a date to be fixed by proclamation but no later than four years after the day this Act receives the Royal Assent. The commencement of Stage 2 registration is intended to coincide with the roll out of the new Australian Business Registry System administered by the Australian Taxation Office, which will replace the existing Register of Relevant Providers (Financial Advisers Register) administered by ASIC.
  2. Under Stage 2 registration, a financial adviser must submit an application to register themselves to the Regulator (in this case, the Registrar). The application must include:
* a declaration by the adviser that they are a fit and proper person to provide personal advice to retail clients in relation to relevant financial products – in making this declaration, the adviser must have regard to the matters in the fit and proper person test;
* declarations by the adviser that they have complied with all applicable education and training standards;
* if the adviser provides, or is to provide tax (financial) advice services – a declaration that they have complied with the additional education and training standard (if any) for the provision of tax (financial) advice services; and
* any other requirements specified in the data standards.

***[Schedule 2, item 1, section 921ZA of the Corporations Act]***

* 1. As for Stage 1 registration, registration is not open to provisional financial advisers, who are undertaking work and training in accordance with section 921B(4) of the Corporations Act. ***[Schedule 2, item 1, section 921ZA(2)((b)(iv) of the Corporations Act]***
  2. If a person submits a valid application and the Registrar is satisfied that the person’s identity has been established, the Registrar must register the person by recording that the person is registered in the records maintained by the Registrar under section 922A of the Corporations Act unless one or more grounds for refusal apply. If the Registrar registers the person, the Registrar must as soon as practicable after this give the person a notice of registration. A failure by the Registrar to give a person notice of registration does not affect the validity of the person’s registration. ***[Schedule 2, items 1, 6, 7 and 8, sections 921ZC(1) and (4), 922Q and Subdivision C of Division 9 of Part 7.6 of the Corporations Act]***
  3. The Registrar must refuse to register a person who is banned or disqualified, or, if the person is subject to a registration prohibition order, until after the prohibition end day specified in the order. If a person’s registration is refused, the Registrar must give the person a notice of refusal within five business days after the refusal along with the reason(s) for the refusal. ***[Schedule 2, item 1, sections 921ZC(2), (3), (5) and (6) of the Corporations Act]***
  4. A person’s registration comes into force when the Registrar records that the person is registered in the records maintained by the Registrar, and that registration remains in force until the earliest of:
* the cancellation time specified in a registration prohibition order in force against the person;
* the time when a banning order takes effect; and
* the end of the financial year in which the person was registered.

***[Schedule 2, item 1, section 921ZE(1) of the Corporations Act]***

* 1. For example, if a person is registered for the first time on 20 August 2026, the person’s registration would remain in force until 30 June 2027 (unless their registration is cancelled earlier due to a banning order or a registration prohibition order).
  2. Unlike Stage 1 registration, a financial adviser must renew their registration annually.
  3. An application to renew a person’s registration must be made while a person’s registration is in force. The requirements for the application for renewal are the same as the requirements for the application for registration. However, unlike for registration, the Registrar is not required to give the adviser a notice of registration renewal of registration. Registration renewal comes into force immediately after the end of the financial year in which the application is made and remains in force until the earliest of:
* the cancellation time specified in a registration prohibition order in force against a financial adviser;
* the time when a banning order against a financial adviser takes effect; and
* the end of the next financial year.

***[Schedule 2, item 1, sections 921ZD and 921ZE(2) of the Corporations Act]***

* 1. For example, if a person is registered until 30 June 2027, the person may make an application to renew their registration any time while their registration is in force. Once renewed, the person will be registered for the period from 1 July 2027 to 30 June 2028 (unless their registration is cancelled earlier due to a banning order or registration prohibition order).
  2. A financial adviser contravenes a restricted civil penalty provision if they provide personal financial advice while unregistered. ***[Schedule 2, item 1, section 921Y of the Corporations Act]***
  3. Unlike for Stage 1 registration, a person’s authorisation as a financial adviser is not directly linked to their registration. Consequently, a financial services licensee does not commit an offence if a financial adviser provides financial advice while unregistered and the licensee has not revoked or ceased the financial adviser’s authorisation to provide financial advice on the licensee’s behalf. ***[Schedule 2, items 9 and 11, section 1317E of the Corporations Act]***
  4. Notwithstanding this, authorisation by a financial services licensee (or being granted a financial services licence by ASIC) remains a mandatory requirement for the provision of personal advice to retail clients in relation to relevant financial products.
  5. Under Stage 2 registration, responsibility for ensuring the accuracy of the information in the records maintained by the Registrar is split between the financial services licensee and the registered financial adviser. These new arrangements require:
* a person whose registration is in force must notify the Registrar of a matter that is included in the records maintained by the Registrar (unless that change is required as a consequence of an act by ASIC) – matters of the kind specified in the data standards; and
* the financial services licensee must notify the Registrar of changes to particulars in the records maintained by the Registrar (unless the financial adviser is required to notify the Registrar of that change).

***[Schedule 2, items 4 and 5, sections 922H and 922PA of the Corporations Act]***

* 1. In accordance with existing requirements under the Corporations Act, a licensee commits an offence (50 penalty units) and contravenes a civil penalty provision for failing to comply with their obligation to notify the Registrar of a change in a matter within   
     30 business days following the change. ***[Schedule 2, items 3 and 4, section 922H of the Corporations Act]***
  2. The Bill provides that a financial adviser also commits an offence (20 penalty units) for failing to comply with their obligation to notify the Registrar of a change within 30 business days after the change, if the matter is of a kind specified in the data standards. ***[Schedule 2, items 5 and 12, section 922PA and Schedule 3 of the Corporations Act]***
  3. Section 1270G of the Corporations Act provides that the Registrar may, by legislative instrument, make data standards on matters about the performance of the Registrar’s functions and the exercise of the Registrar’s powers. Data standards will be subject to appropriate Parliamentary scrutiny as they may be disallowed by Parliament.
  4. The Bill provides transitional arrangements for persons who are registered as financial advisers immediately before the commencement of Stage 2 registration (see *paragraphs 1.347 to 1.354).*

### Part 3 - Wind-up of FASEA and transfer of standards functions to the Minister and ASIC

* 1. On 9 December 2020, the Government announced that, as part of establishing a single disciplinary body, the functions currently performed by FASEA would be transferred to the Minister responsible for administering the Corporations Act and to ASIC.
  2. The repeal of Division 8C of Part 7.6 of the Corporations Act, which takes effect on 1 January 2022 has the effect of winding up FASEA by repealing the Minister’s power to declare a body corporate to be the standards body. ***[Schedule 1, item 49, Division 8C of the Corporations Act]***
  3. The transition and application provisions in the Bill preserve the legislative instruments made by FASEA, by providing that these instruments will continue in force as if they were instruments made by the Minister. This means that financial advisers will need to continue to meet the education and training standards and the Code of Ethics made by FASEA, until such time as the Minister amends these standards or makes new standards. ***[Schedule 1, item 98, sections 1684M, 1684N and 1684P of the Corporations Act]***

#### What standards function will the Minister perform?

* 1. The Bill removes the power for the Minister to appoint a standard setting body, and instead provides that, from 1 January 2022, the Minister may, by legislative instrument, do the following:
* approve bachelor or higher degrees or equivalent qualifications, required for a person to be a financial adviser;
* approve principles for an exam to be administered by ASIC;
* set requirements for work and training;
* set continuing professional development requirements to be completed in a financial services licensee’s CPD year (or other period determined by the Minister); and
* make a Code of Ethics.

***[Schedule 1, items 42 and 45, sections 921B(6) and 921E(1) of the Corporations Act]***

* 1. Before making these legislative instruments, the Minister must be satisfied that doing so is necessary or desirable to ensure that financial advisers are adequately trained and competent to provide personal financial advice to retail clients. ***[Schedule 1, item 42, section 921B(7) of the Corporations Act]***
  2. This power to determine the education and training standards via legislative instruments is intended to protect consumers and the integrity of the financial services sector, by ensuring that, where applicable, all financial advisers have met minimum education and training standards as a pre‑condition for the provision of personal advice to retail clients in relation to relevant financial products. The legislative instruments supplement the provisions in the Bill by dealing with the procedural issues, administrative matters and other matters that may need to be prescribed from time to time to deal with new requirements and particular circumstances, as they arise. It is appropriate to use delegated legislation to prescribe education and training standards to ensure that the standards can be updated regularly, as required to keep up with the needs of consumers and the industry.
  3. The legislative instruments that may be made by the Minister are subject to disallowance by Parliament and sunsetting after ten years and will therefore be subject to parliamentary scrutiny and periodic review.
  4. The education and training standards do not apply if the financial adviser only provides personal advice to retail clients about a time-sharing scheme. ***[Schedule 1, item 43, section 921BC of the Corporations Act]***
  5. To meet these education and training standards, a financial adviser (unless otherwise exempt from meeting some or all of these requirements) must:
* complete a bachelor or higher degree or equivalent qualification approved by the Minister;
  + ‘Existing providers’ are required to comply with this obligation by 1 January 2026.
  + Since 1 January 2019, financial advisers other than ‘existing providers’ have been required to complete an approved degree or equivalent qualification before they can provide financial advice.
* pass the financial adviser’s examination;
  + ‘Existing providers’ are required to pass the exam by 1 January 2022, or by the date specified in the regulations.
  + Since 1 January 2019, financial advisers other than ‘existing providers’ have been required to pass the exam before they can provide financial advice.
* complete, or be undertaking, at least one year of work and training that meets the requirements set by the Minister; and
  + A person who is undertaking work and training is a provisional financial adviser.
  + ‘Existing providers’ are not required to comply with the work and training requirement unless they fail to comply with the requirement to complete an approved degree or pass the financial adviser exam by the specified timeframes.
  + Since 1 January 2019, financial advisers other than ‘existing providers’ have been required to complete the work and training and requirement before they can be a “full” financial adviser (not a provisional financial adviser).
* comply with continuing professional development requirements during the licensee’s CPD year (or other period determined by the Minister).
  + Provisional financial advisers are not required to comply with the continuing professional development requirement.
  + The requirement to comply with continuing professional development requirements prescribed by the Minister commences for the financial services licensee’s CPD year that begins on, or after, 1 January 2022. These continuing professional development requirements in the Bill do not have retrospective effect.

***[Schedule 1, items 27, 28, 29, 35, 36, 39, 40, 41, 42, 43 and 98, sections 913B, 916A, 916B, 921B, 921BA, 1684A, 1684B, 1684C, 1684E and 1684G of the Corporations Act]***

* 1. An ‘existing provider’ is defined in existing section 1546A of the Corporations Act as a person who is a financial adviser at any time between 1 January 2016 and 1 January 2019 unless they have been banned or disqualified, or otherwise prevented from providing personal advice to retail clients in relation to relevant financial products on 1 January 2019. The Bill maintains the existing application of the law and does not retrospectively alter the obligations of financial advisers to complete education and training standards prior to 1 January 2019. This ensures continuity and certainty of obligations for financial advisers. ***[Schedule 1, items 91 and 98, sections 1546A and 1684 of the Corporations Act]***
  2. A failure to comply with applicable education and training standards is a contravention of a restricted civil penalty provision. ***[Schedule 1, items 49 and 89, sections 921Q and 1317E of the Corporations Act]***
  3. The Bill provides for regulations to be made extending the deadline for existing providers to pass the financial adviser exam in certain prescribed circumstances. Existing providers who satisfy the conditions prescribed in the regulations are granted an extension for passing the financial adviser exam and can continue to be existing providers. This means that these persons continue to be exempt from the requirement to comply with the obligation to complete at least one year of work and training in accordance with the requirements prescribed by the Minister and are not required to complete an approved degree or equivalent qualification until 1 January 2026. ***[Schedule 1, item 98, section 1684B of the Corporations Act]***
  4. This regulation-making power to extend the deadline for passing the financial adviser exam in specified circumstances provides the Government with the necessary flexibility to support financial advisers to comply with their obligations and ensure that consumers will still be able to readily access financial advice. The regulations would be subject to disallowance and therefore will be subject to appropriate parliamentary scrutiny.
  5. Compliance with the education and training standards is also a requirement for the granting of an Australian financial services licence, and for an individual to be authorised to provide financial advice on behalf of a financial services licensee.
  6. For a person applying for an Australian financial services licence, ASIC must not grant a licence that covers the provision of financial advice to an individual if the applicant has not:
* completed an approved degree or equivalent qualification;
* passed the financial adviser exam;
* undertaken at least one year of work and training in accordance with the requirements prescribed by the Minister; and
* completed the additional education and training standards (if any) for the provision of tax (financial) advice services – if the licence is intended to cover the provision of tax (financial) advice services.

***[Schedule 1, item 44, section 921C(1) of the Corporations Act]***

* 1. For a financial adviser who is an authorised representative of the licensee; an employee or director of a financial services licensee or a related body corporate of the licensee; or is an individual authorised by an authorised representative – a financial services licensee (or authorised representative) must not authorise the person to provide financial advice on behalf of the licensee if the person has not:
* completed an approved degree or equivalent qualification and passed the financial adviser exam;
* undertaken, or be undertaking at least one of year work and training (professional year); and
* completed any additional education and training standards for the provision of tax (financial) advice services – if the person is to provide tax (financial) advice services.

***[Schedule 1, item 44, sections 921C(2), (3) and (4) of the Corporations Act]***

* 1. ASIC may make a banning order against a person if ASIC has reason to believe that the person was authorised to provide personal financial advice, without having complied with all of the applicable education and training standards.
  2. As per existing requirements, these education and training standards do not apply to a financial adviser if the financial adviser only provides personal advice to retail clients about a time-sharing scheme. The exemption for time-share operators has been in place since the professional standards were first introduced. ***[Schedule 1, items 43 and 44,   
     sections 921BC and 921C(5) of the Corporations Act]***
  3. From 1 January 2022, the Minister may approve applications for foreign qualifications. ***[Schedule 1, items 37 and 48, sections 921B and 921G of the Corporations Act]***
  4. A person who wants to be a financial adviser in Australia and who has completed a foreign qualification may apply to the Minister responsible for administering the Corporations Act for approval of their foreign qualification. The Minister may approve an application if they are satisfied that the foreign qualification is equivalent to a domestic degree or equivalent qualification approved by the Minister and the person has completed any courses that the Minister requires the person to complete. This ensures that persons with foreign qualifications meet the same high standards for providing financial advice, which is important for maintaining confidence in, and the integrity of, our financial advice industry. ***[Schedule 1, item 48, section 921G of the Corporations Act]***
  5. In accordance with section 1345A of the Corporations Act, the Minister may, by signed instrument, delegate the power to approve foreign qualifications to an officer of the Department, if this is prescribed in the *Corporations Regulations 2001*.
  6. The transition and application provisions in the Bill provide that foreign qualification approvals granted by FASEA will continue in force after 1 January 2022 as if they were instruments made by the Minister. ***[Schedule 1, item 98, sections 1684R and 1684S of the Corporations Act]***
  7. To ensure a smooth transition process, the transitional provisions also ensure that an application for approval of a foreign qualification made to FASEA before 1 January 2022 and which has yet to be determined, is taken to be a valid application to the Minister under the new requirements. This means that persons who have already submitted an application for approval of their foreign qualification to FASEA before 1 January 2022 (but whose application has not yet been decided) do not need to submit another application to the Minister after 1 January 2022. ***[Schedule 1, item 98, section 1684Q of the Corporations Act]***
  8. The Bill provides that the Minister may make a Code of Ethics by legislative instrument. All financial advisers are required to comply with the Code of Ethics. The Code of Ethics may impose different obligations for different classes of financial advisers. For example, the Code of Ethics may contain specific requirements only applicable to financial advisers who provide tax (financial) advice services. A failure to comply with the Code of Ethics is a contravention of a restricted civil penalty provision. ***[Schedule 1, items 17, 30, 45, 49 and 89, sections 910A, 920A, 921E, 921Q and 1317E of the Corporations Act]***
  9. The Minister may prescribe continuing professional development requirements for all financial advisers and also for financial advisers who provide tax (financial) advice services. Financial advisers are required to comply with these requirements within a financial services licensee’s CPD year (or another period determined by the Minister). The continuing professional development requirements do not apply to provisional financial advisers. ***[Schedule 1, items 19. 26 42 and 43, sections 910A, 912A, 921B(6), 921BA(4), 921BB(3) and 921BC of the Corporations Act]***
  10. If a financial adviser (other than a provisional financial adviser or exempt financial adviser) does not comply with these requirements during the financial services licensee’s CPD year, the financial services licensee must lodge a notice of non-compliance with ASIC. In accordance with existing requirements, details of the adviser’s non-compliance will be included on the Register of Relevant Providers (Financial Advisers Register). ***[Schedule 1, items 57, 58, 59, 60, 61, 68 and, 69, section 922HB and 922Q of the Corporations Act]***
  11. A failure by a financial adviser to comply with the continuing professional development requirements is a contravention of a restricted civil penalty provision. ***[Schedule 1, items 43, 49 and 89, sections 921BA(5), 921BB(4), 921Q and 1317E of the Corporations Act]***
  12. The Bill gives the Minister the power to make a legislative instrument that specifies a different CPD year for the purposes of compliance with the continuing professional development requirements. The power is limited to prescribing the CPD year of a financial services licensee within which a financial adviser is required to have completed their continuing professional development. ***[Schedule 1, items 48, 94 and 95, sections 921H and 1546E of the Corporations Act]***
  13. The existing legislation gives this power to the standards body. Giving this power to the Minister is appropriate and necessary for determining the requirements for financial advisers whose CPD year changes and to modify the operation of the Corporations Act for these individuals. For example, this could require licensees to report non-compliance with continuing professional development requirements at a time other than at the end of their new CPD year. In this context, it is appropriate for the Minister to be able to modify the requirements as the issues to be addressed require flexibility to consider individual circumstances and cannot be reasonably addressed in the primary law. A legislative instrument made by the Minister is disallowable and subject to sunsetting and will therefore be subject to parliamentary scrutiny and periodic review. This modification power will also be subject to the usual safeguards, including administrative review by the AAT, judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.

#### What standards function will ASIC perform?

* 1. From 1 January 2022, ASIC must administer the financial adviser’s exam in accordance with the principles approved by the Minister. ***[Schedule 1, items 38 and 96, sections 921B and 1546Y of the Corporations Act]***

#### Transfer of functions and documents from FASEA

* 1. To enable the smooth transition of functions from FASEA to the Minister responsible for administering the Corporations Act and to ASIC, any document in the possession of a former director or employee of FASEA immediately before FASEA is wound up on 1 January 2022 are be transferred as follows:
* documents relating to FASEA’s functions as the standards body (other than the administration of the financial adviser exam) are required to be transferred to the Secretary of the Department of Treasury; and
* documents relating to FASEA’s function administering the financial adviser exam are required to be transferred to ASIC.

***[Schedule 1, item 98, section 1684V of the Corporations Act]***

* 1. The documents transferred from FASEA to the Secretary of the Department of Treasury and to ASIC will be exempt from release under the *Freedom of Information Act 1982*. In addition to this, documents held by ASIC concerning the administration of the financial adviser exam and documents held by the Secretary of the Department of Treasury concerning the approval of foreign qualifications will also be exempt from release in accordance with the *Freedom of Information Act 1982*.   
     ***[Schedule 1, items 100 and 101, Division 1 of Part II of Schedule 2 of the Freedom of Information Act 1982]***
  2. The exemption of ASIC documents concerning the administration of the financial adviser exam would include documents relating to the development of exam papers, past and future exam questions, exam analysis, detailed exam results, and complaints about the exam administration. This exemption is intended to allow ASIC to re-use exam questions across multiple exam sittings, uphold the integrity of the exam and reduce the potential misuse of information. However, to ensure that prospective financial advisers have access to necessary information on the examination process, ASIC will make available a range of supporting information, such as practice exams, information on how to request an exam re-mark, the release of examinee responses to questions (but not the questions themselves), high level guidance on areas where the examinee failed, media releases on overall results for each exam sitting, and guidance on the complaints handling process.
  3. The exemption of documents held by the Secretary of the Department of Treasury concerning foreign qualifications would include decision-making documents and deliberations on foreign qualification assessments, personal information such as certified transcripts, and outcomes of decisions relating to individuals. This exemption is intended to enable individuals to securely disclose personal and sensitive information in the course of applying to have their foreign qualification approved and ensure this information is not released without the individual’s consent.
  4. The exemption of documents transferred to the Secretary of the Department of Treasury from FASEA would include papers or minutes from FASEA Board and Board Committee meetings when deliberating and setting standards, confidential submissions as part of public consultations undertaken by FASEA, and other sensitive information developed and obtained through the performance of FASEA’s functions. The exemption of these documents is necessary to ensure the education and training standards set by FASEA are not undermined by information relating to deliberative processes being made public. The legislative instruments setting education, training and ethical standards that are already in place by FASEA will continue to remain in force and publicly accessible once the functions are transferred. Any changes to these standards, or the making of new standards will be subject to public consultation with stakeholders, and stakeholder submissions will be published (as appropriate).

### Part 4 - Tax (financial) advice services

* 1. The Bill implements recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system for financial advisers who provide tax (financial) advice services. These amendments permit financial advisers who meet the additional education and training standard for the provision of tax (financial) advice services in the Corporations Act, to provide tax (financial) advice services without needing to be registered under the *Tax Agent Services Act 2009*.
  2. Tax (financial) advice services are defined in section 90-15 of the *Tax Agent Services Act 2009* as a tax agent service (except where it involves representing an entity in their dealings with the Commissioner of Taxation) provided by a financial services licensee or a representative of a financial services licensee in the course of giving advice of a kind usually given by a financial services licensee or a representative of a financial services licensee. The Bill inserts a definition of ‘tax (financial) advice services’ in the Corporations Act and gives it the same meaning as it has in section 90-15 of the *Tax Agent Services Act 2009*. ***[Schedule 1, item 25, section 910A of the Corporations Act]***
  3. The provision of tax agent services and business activity statement services (BAS services) will continue to be regulated under the *Tax Agent Services Act 2009*. Accordingly, tax agent services may be provided by registered tax agents, and BAS services may be provided by registered tax agents or registered business activity statement agents (BAS agents). ***[Schedule 1, items 14 and 15, sections 9 and 766B of the Corporations Act]***

#### What are the requirements for providing tax (financial) advice services?

* 1. The Bill provides that in order to provide a tax (financial) advice service for a fee or reward, a person must be:
* a registered tax agent under the *Tax Agent Services Act 2009*; or
* a qualified tax relevant provider – a financial adviser who has met the additional education and training requirement as per the standard prescribed by the Minister (if any) for the provision of tax (financial) advice services under the Corporations Act.
  + In the case where tax (financial) advice services are provided on behalf of another person or entity (such as the licensee or an authorised representative of the licensee), the person providing the advice must either be a registered tax agent or a qualified tax relevant provider.

***[Schedule 1, items 23, 43, 118, 133, 135 and 137, sections 910A, 921BB(1) of the Corporations Act, item 137 of the Tax Agent Services Act 2009 and sections 50-17 and 90-1 of the Tax Agent Services Act 2009]***

* 1. The Bill inserts definitions of ‘qualified tax relevant provider’ in the Corporations Act and the *Tax Agent Services Act 2009*. A person is a qualified tax relevant provider if the person is a financial adviser and meets the additional education and training standard for the provision of tax (financial) advice services determined by the Minister (if any). ***[Schedule 1, items 23 and 133, section 910A of the Corporations Act and 90-1 of the Tax Agent Services Act 2009]***
  2. The Minister may, by legislative instrument, determine the requirements for the provision of tax (financial) advice services including the completion of one or more approved bachelor or higher degrees, qualifications or courses, the requirement that the person has undertaken specified work and training and requirements for continuing professional development. ***[Schedule 1, item 43, section 921BB(1) of the Corporations Act]***
  3. Before exercising the power to make these legislative instruments, the Minister must be satisfied that doing so is necessary or desirable to ensure that persons who provide tax (financial) advice services are adequately trained and competent. ***[Schedule 1, item 43, section 921BB(2) of the Corporations Act]***
  4. The power for the Minister to make legislative instruments determining the degrees, qualifications, courses, work and continuing professional development required to provide tax (financial) advice services is intended to protect consumers and the integrity of the financial services sector, by ensuring that persons who provide tax (financial) advice services have the appropriate knowledge, skills and experience to do so. It is appropriate to use delegated legislation to prescribe education and training standards to ensure that the standards can be updated regularly, as required to keep them up to date with the needs of consumers and the industry. The legislative instruments made by the Minister are subject to disallowance and sunsetting after ten years and will therefore be subject to parliamentary scrutiny and periodic review.
  5. The new requirements for the provision of tax (financial) advice services commence on 1 January 2022. ***[Schedule 1, item 98, section 1684U of the Corporations Act]***

#### What penalties apply to the provision of tax (financial) advice services?

* 1. A person or entity contravenes a civil penalty provision under the *Tax Agent Services Act 2009* if they knowingly provide a tax (financial) advice service that is not a business activity statement service (BAS service), for a fee or reward but did not comply with the requirements in paragraph1.295. The penalty for contravention of this civil penalty provision is 250 penalty units for an individual and 1,250 penalty units for a body corporate. ***[Schedule 1, item 118, section 50‑17 of the   
     Tax Agent Services Act 2009]***
  2. A person also contravenes a civil penalty provision under the *Tax Agent Services Act 2009* if they advertise that they will provide a tax (financial) advice service but are not either a registered tax agent or qualified tax relevant provider (or the person providing the advice on their behalf is not a registered tax agent or qualified tax relevant provider). The penalty for contravention of this civil penalty provision is 50 penalty units for an individual and 250 penalty units for a body corporate. ***[Schedule 1, item 118, section 50-18 of the Tax Agent Services Act 2009]***
  3. These penalties for the provision and advertisement of tax (financial) advice services are consistent with the penalties that apply to the advertisement or provision of tax agent services or business activity statement services (BAS services) under the *Tax Agent Services Act 2009*. These civil penalty provisions apply to conduct engaged in on, or after,   
     1 January 2022. ***[Schedule 1, items 137 and 138 of the Tax Agent Services Act 2009]***
  4. If a qualified tax relevant provider fails to comply with a requirement to undertake continuing professional development, the financial services licensee must lodge a notice notifying ASIC of the non‑compliance within 30 business days of the day following the last day of the licensee’s CPD year. A failure by the licensee to lodge a notice of non-compliance is an offence and a contravention of a civil penalty provision under the Corporations Act. ***[Schedule 1, items 43, 57, 58, 59, 60 and 61, sections 921BB and 922HB of the Corporations Act]***
  5. A failure by a qualified tax relevant provider to comply with the continuing professional development requirement for the provision of tax (financial) advice services is a contravention of a restricted civil penalty provision. ***[Schedule 1, items 43, 49 and 89, sections 921BB(4), 921Q and 1317E of the Corporations Act]***
  6. In order to enable the effective performance and exercise of the Tax Practitioners Board and the Financial Services and Credit Panel’s functions and powers, the Bill authorises the disclosure of information by a person who is or was a member of a Financial Services and Credit Panel if it is:
* required by Commonwealth, State or Territory law; or
* made to the Tax Practitioners Board for the performance or exercise of the Tax Practitioners Board’s functions and powers under the *Tax Agent Services Act 2009*; or
* made in the course of the panel performing its functions or exercising its powers.

***[Schedule 1, items 4, 12, 25 and 131, sections 5 and 171D(2) of the ASIC Act, section 910A of the Corporations Act and section 90-1 of the Tax Agent Services Act 2009]***

* 1. Section 70-35 of the *Tax Agent Services Act 2009* provides that a person who is or was a member of the Tax Practitioners Board commits an offence if they record or disclose information that was acquired in the course of their duties under the *Tax Agent Services Act 2009*. The penalty for this offence is two years imprisonment. This offence does not apply to the disclosure of information to ASIC or a Financial Services and Credit Panel for the purpose of ASIC or the panel performing or exercising any of their respective functions or powers. ***[Schedule 1, item 129, section 70-40 of the Tax Agent Services Act 2009]***
  2. If the Tax Practitioners Board makes a finding about the conduct of a registered tax agent under the *Tax Agent Services Act 2009*, the Tax Practitioners Board must notify ASIC, within 30 days of making the decision or finding, if it concerns the provision of a tax (financial) advice service. ***[Schedule 1, items 123 and 125, section 60-125 of the Tax Agent Services Act 2009]***
  3. In order to enable the effective performance and exercise of ASIC and the Tax Practitioners Board’s functions and powers, the Bill authorises the disclosure of information by ASIC to the Tax Practitioners Board, to ensure that the Board has access to the information necessary for the performance and exercise of the Board’s functions and powers. ***[Schedule 1, item 8, section 127 of the ASIC Act]***
  4. Also, if one of the following actions is taken against a qualified tax relevant provider who is also a registered tax agent, ASIC must give written notice to the Tax Practitioners Board of the details of the action and the reasons for making the instrument:
* a Financial Services and Credit Panel makes an instrument taking administrative action against the qualified tax relevant provider;
* ASIC gives the qualified tax relevant provider a written warning or reprimand;
* a panel gives the qualified tax relevant provider a written warning or reprimand;
* a panel gives a qualified tax relevant provider an infringement notice for the alleged contravention of a restricted civil penalty provision;
* ASIC makes an application to the court seeking a civil penalty for the alleged contravention of a restricted civil penalty provision; or
* a panel accepts an undertaking given by a qualified tax relevant provider.

***[Schedule 1, item 49, section 921R(1) and (2) of the Corporations Act]***

* 1. A notice given to the Tax Practitioners Board must include the details of the notice, and the reasons for making the instrument (if applicable). ***[Schedule 1, item 49, section 921R(3) of the Corporations Act]***
  2. ASIC is also required to give the Tax Practitioners Board notice if the instrument mentioned in a notice previously given to the Board is varied, revoked or withdrawn. This notice must include details of the variation, revocation or withdrawal. These requirements ensure that the Tax Practitioners Board is kept informed of developments that may affect the registration of tax agents that are also qualified relevant providers. ***[Schedule 1, item 49, section 921R(4) of the Corporations Act]***

## Consequential amendments

* 1. The winding up of FASEA and the transition of standards functions from the standards body to the Minister and ASIC requires a number of consequential amendments to the Corporations Act, which include replacing all references to the ‘standards body’ with references to the Minister or ASIC, as appropriate. ***[Schedule 1, items 17, 24, 46, 56, 74, 75 and 92 to 97, sections 910A, 921B, 921F, 923C, 1546B, 1546C, 1546E, 1546Y and 1546ZB of the Corporations Act]***
  2. The amended requirements for the provision of tax (financial) advice services result in the need for a number of consequential amendments to the *Tax Agent Services Act 2009*, including by removing references to tax (financial) advisers and registered tax (financial) advisers. ***[Schedule 1, items 106 to 117, 119 to 122, 127, 134 and 136, sections 2-5, 20‑1, 20-5, 20-10, 20-20, 20‑25, 20-30, 20-40, 20-45, 30-1, 30-5, 30-10, 30-20, 30-25, 30‑35, 40-5, 40-10, 40-15, 40-20, 50-1, 50-5, 50‑10, 50-15, 50-25, 60-1, 60-15, 60-135, 60-140 and 90-1 of the Tax Agent Services Act 2009]***
  3. The Bill amends the ASIC Act, Corporations Act and *Tax Agent Services Act 2009* to remove references to monitoring bodies and compliance schemes. This includes repealing relevant provisions, definitions and references to compliance schemes and monitoring bodies, including repealing Division 8B of Part 7.6 of the Corporations Act.   
     ***[Schedule 1, items 9, 10, 18, 20, 21, 22, 49 to 56, 62 to 67, 71, 124, 126, 128, 129, 130 and 132, section 127 of the ASIC Act, sections 910A, 921E, 922E, 922F, 922H, 922HD, 922L, 922N, 922P and 922Q of the Corporations Act, Divisions 8B and 8C of Part 7.6 of the Corporations Act and sections 60-125, 70-34, 70-40 and 90-1 of the   
     Tax Agent Services Act 2009]***

## Application and transitional provisions

#### Commencement

* 1. Parts 1 and 2 in Schedule 1 to the Bill, which amend the Corporations Act, ASIC Act, *National Consumer Credit Protection Act 2009, Freedom of Information Act 1982* and the *Tax Agent Services Act 2009*, commence on 1 January 2022. ***[Table item 2 of Clause 2]***
  2. The amendments in Part 3 of Schedule 1 to the Bill, which amend the Corporations Act, commence at the same time as item 1150 of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* commences. ***[Table item 3 of Clause 2]***
  3. Schedule 2 to the Bill, which amends the Corporations Act, commences on a date to be fixed by proclamation, or if the provisions do not commence within the period of four years beginning on the day this Act receives Royal Assent, the provisions in Schedule 2 commence on the day after the end of this four-year period. ***[Table item 4 of Clause 2]***
  4. The commencement of Schedule 2 of the Bill is dependent on the register of financial advisers becoming operational on the new Australian Business Registry System. The delayed commencement of Schedule 2 of the Bill is essential to provide the flexibility required to take into account the broader scheduling considerations of the Modernising Business Registries project. This is a significant reform which will transfer 35 registers into the new Australian Business Registry System administered by the Australian Taxation Office.
  5. Alignment between the legislative changes and the IT infrastructure changes is required to ensure that the necessary systems and processes are in place in time for the delivery of a seamless transition for industry (financial services licensees and financial advisers) and the Regulator to the new registration system for financial advisers.
  6. The proclamation date for the commencement of Schedule 2 of the Bill will be set once the new IT infrastructure and relevant data standards required for the registration of financial advisers are operational.

#### Schedule 1 - Corporations Act

* 1. To manage the transition to the new disciplinary and registration systems for financial advisers, the Bill provides transitional rules setting out when and how the new systems and process will begin operating.
  2. The following terms are defined for the purposes of the transitional and application provisions:
* amending Act – means the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021*;
* exam cut-off date – applies to an existing provider and means the date by which the financial adviser exam must be passed – this day is 1 January 2022, or the day prescribed in regulations;
* existing provider – has the same meaning as given by section 1564A of the Corporations Act;
  + Existing provider is defined in existing section 1546A of the Corporations Act as a person who is a financial adviser at any time between 1 January 2016 and 1 January 2019 unless they have been banned or disqualified, or otherwise prevented from providing personal advice to retail clients in relation to relevant financial products on 1 January 2019.
* old Tax Agent Services Act – means the *Tax Agent Services Act 2009* as in force immediately before   
  1 January 2022;
* registered tax (financial) adviser – has the same meaning as under the old Tax Agent Services Act;
* relevant provider – has the same meaning as given by section 910A of the Corporations Act; and
* standards body - has the meaning given by   
  section 910A of the Corporations Act, as in force immediately before 1 January 2022.

***[Schedule 1, items 91 and 98, sections 1546A and 1684 of the Corporations Act]***

* 1. The application provisions for existing providers in the Bill replicate the existing requirements for existing providers in the Corporations Act. The Bill maintains the existing application of the law and does not retrospectively alter the obligations of financial advisers to complete education and training standards prior to 1 January 2019. This ensures continuity and certainty of obligations for financial advisers. ***[Schedule 1, item 98, sections 1684A, 1684B, 1684C, 1684D and 1684E of the Corporations Act]***
  2. A Financial Services or Credit Panel may make an instrument taking administrative action against a financial adviser or give an adviser a warning or reprimand for an act or omission by the adviser, or if a specified circumstance exists or has occurred, on or after 1 January 2022. ***[Schedule 1, item 98, sections 1684H and 1684K of the Corporations Act]***
  3. Action can also be taken against a financial adviser for the alleged contravention of a restricted civil penalty provision for an act, or omission to do an act, on or after 1 January 2022. ***[Schedule 1, item 98, section 1684J of the Corporations Act]***
  4. From 1 January 2023, a financial adviser contravenes a restricted penalty provision by providing financial advice while unregistered. The offence and civil penalty provisions that apply to financial services licensees, for failing to revoke or cease to authorise an unregistered financial adviser, also commence on 1 January 2023.   
     ***[Schedule 1, item 98, section 1684L of the Corporations Act]***
  5. Determinations made by FASEA prescribing education and training standards and the Code of Ethics, which are in force immediately before 1 January 2022, will continue in force and are to be dealt with on and after that day as if they had been made by the Minister. ***[Schedule 1,   
     item 98, sections 1684M, 1684N and 1684P of the Corporations Act]***
  6. If, immediately before 1 January 2022, a person has passed the financial adviser exam, that person is taken, from that time, to have satisfied this requirement under the amending Act. This means that once an adviser has passed the exam, they will not be required to re-sit the exam once the amending Act comes into force. ***[Schedule 1, item 98,   
     section 1684F of the Corporations Act]***
  7. An approval of a foreign qualification that was given by FASEA, which is in force immediately before 1 January 2022, will continue in force on and after that day as if it was approved by the Minister. This also applies in relation to pending foreign qualification approvals that would have been given when the person completed all of the specified courses. ***[Schedule 1, item 98, sections 1684R and 1684S of the Corporations Act]***
  8. If the Tax Practitioners Board makes, or has made, a disciplinary order against a person who is a registered tax (financial) adviser (while that person’s registration under the old Tax Agent Services Act continues) for conduct engaged in before 1 January 2022, the person is required to comply with that order. A failure to comply with the order could result in one of the following actions being taken against the financial adviser:
* a Financial Services and Credit Panel making an instrument taking administrative action against the adviser or giving the financial adviser a warning or reprimand;
* ASIC making an order against the adviser – an order made by ASIC is to be treated as if is a banning order made under section 920A of the Corporations Act; or
* if no other action is taken, or proposed to be taken, by a panel or ASIC - ASIC must give the adviser a warning or reprimand.

***[Schedule 1, item 98, sections 1684T(1), (2), (3), (4) and (7) of the Corporations Act]***

* 1. An action taken by a Financial Services and Credit Panel or ASIC for a failure to comply with an order made by the Tax Practitioners Board is subject to the same requirements as an action taken by a panel or ASIC for a specified circumstance. ***[Schedule 1, item 98, sections 1684T(5), (6) and (8) of the Corporations Act]***
  2. For example, a Financial Services and Credit Panel may not make an instrument taking administrative action against a financial adviser unless the panel has given the adviser a proposed action notice, which includes the right to request a hearing or make a submission. A failure by an adviser to comply with an instrument made by the panel may result in ASIC applying to the court for a civil penalty.
  3. A person registered as a tax (financial) adviser under the   
     *Tax Agent Services Act 2009* immediately before 1 January 2022 is taken to be registered as a financial adviser under the Corporations Act from   
     1 January 2022. The exception to this is where this person’s registration remains in force until the cancellation date in a registration prohibition order that is in force against them, the day a banning order takes effect, or they cease to be authorised to provide personal financial advice on behalf of a financial services licensee. ***[Schedule 1, item 98, sections 1684U of the Corporations Act]***

#### Schedule 1 - Tax Agent Services Act 2009

* 1. The civil penalty provisions that apply to the provision or advertisement of tax (financial) advice services apply to conduct engaged in, on or after, 1 January 2022. Conduct in this case could include an act or an omission to perform an act. ***[Schedule 1, items 137 and 138 of the   
     Tax Agent Services Act 2009]***
  2. In accordance with section 7 of the *Acts Interpretation Act 1901*, conduct engaged in before the commencement of this legislation on   
     1 January 2022, will remain subject to the civil penalty provisions in the old Tax Agent Services Act. ***[Schedule 1, item 137 of the Tax Agent Services Act 2009]***
  3. If a person’s registration as a tax (financial) adviser under the *Tax Agent Services Act 2009* continues beyond 1 January 2022, this registration will continue in force until the end of the period at which registration ends under that Act, unless it is terminated before the end of that period. ***[Schedule 1, item 139 of the Tax Agent Services Act 2009]***
  4. Notwithstanding that a person’s registration under the old   
     Tax Agent Services Act continues; the Tax Practitioners Board may not take disciplinary action against the tax (financial) adviser for conduct that occurs on or after 1 January 2022. Conduct that occurs on or after 1 January 2022 is subject to disciplinary action by a Financial Services and Credit Panel.
  5. However, as Stage 1 registration under the Corporations Act is a one-off obligation, the person’s registration under the Corporations Act may extend beyond the expiry of their registration as a tax (financial) adviser under the *Tax Agent Services Act 2009*. Once a person is taken to be registered under the Corporations Act, their registration continues in force until their registration is cancelled, the person is banned, or they cease to be authorised by their financial services licensee to provide financial advice.
  6. If a person’s registration as a tax (financial) adviser under the old Tax Agent Services Act continues in force beyond 1 January 2022 and the Tax Practitioners Board suspends that person’s registration as a result of conduct that occurs before 1 January 2022, that person is not a qualified tax relevant provider for the duration of their suspension period. This means that, unless the person is also a registered tax agent at the time, the provision of tax (financial) advice services during the suspension period contravenes a civil penalty provision under section 50-17 of the *Tax Agent Services Act 2009.* ***[Schedule 1, item 141 of the Tax Agent Services Act 2009]***
  7. If a financial adviser has, before 1 January 2022, submitted an application to register (or renew their registration) as a tax (financial) adviser under the old Tax Agent Services Act and the application has not been determined by the Tax Practitioners Board before 1 January 2022, the Tax Practitioners Board will still be required to make a decision on the application. If the application is granted by the Tax Practitioners Board, that person is taken to be registered as a financial adviser under the Corporations Act from the date their registration under the *Tax Agent Services Act 2009* commences and continues in force until the person’s registration is cancelled, the person is banned or they cease to be authorised as a financial adviser. ***[Schedule 1, item 140 of the Tax Agent Services Act 2009]***
  8. No new applications for registration as a tax (financial) adviser under the old Tax Agent Services Act may be submitted on or after 1 January 2022. Any new application to be registered as a tax (financial) adviser on or after 1 January 2022 will not be considered by the Tax Practitioners Board.

#### Schedule 1 - Contingent amendments

* 1. The amendments made in Part 3 of this Bill to the Corporations Act commence at the same time as Item 1150 of Schedule 1 to the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020*.
  2. These amendments commence at this time to take into account the amendments made to the Corporations Act by the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020*, which provides for registry functions under the Corporations Act to be transferred from ASIC to a Registrar appointed under the Corporations Act.
  3. On 4 April 2021, the Commissioner of Taxation was appointed the Registrar under section 1270 of the Corporations Act by the *Commonwealth Registers (Appointment of Registrars) Instrument 2021*.
  4. The Bill provides for the transfer of functions, powers and duties from ASIC to the Registrar by the following means:
* entering details of instruments made by a Financial Services and Credit Panel taking administrative action against a financial adviser in the records maintained by the Registrar – in this case a copy of the instrument will be provided to ASIC and the Registrar;
  + this information is provided to ASIC to ensure that ASIC has a comprehensive record of the adviser’s disciplinary history; and
  + this information is provided to the Registrar for inclusion of the details of the instrument (if the instrument is of a kind prescribed in the regulations) in the records maintained by the Registrar.
* amending or removing details of instruments made by a Financial Services and Credit Panel, if a panel makes a decision to vary or revoke an instrument - a copy of the instrument will be provided to ASIC and the Registrar;
  + this information is provided to ASIC to ensure that ASIC has an accurate record of the adviser’s disciplinary history; and
  + this information is provided to the Registrar for updating the details of the instrument (if the instrument is of a kind prescribed in the regulations) in the records maintained by the Registrar.
* registering financial advisers by recording that the adviser is registered in the records maintained by the Registrar and giving a notice of registration to the financial adviser and financial services licensee; and
* refusing to register a financial adviser and giving a notice of refusal (including the reasons for the refusal) to the financial adviser and licensee.

***[Schedule 1, items 142 to 161, sections 921L, 921M, 921N, 921P, 921ZA, 921ZB, 921ZC, 921ZD and 921ZE of the Corporations Act]***

#### Schedule 2 – Corporations Act

* 1. The commencement of Schedule 2 to the Bill is intended to align with the roll out of the Australian Business Registry System, a modern technology platform administered by the Australian Taxation Office, which is to replace the existing registers administered by ASIC.
  2. Schedule 1 to the Bill establishes Stage 1 registration, which requires financial services licensees to apply to ASIC to register their financial advisers. Schedule 2 to the Bill provides for Stage 2 registration, which requires eligible individual advisers to apply to the Registrar to register themselves. This change to individual registration by financial advisers is consistent with the professionalisation of financial advisers.
  3. To ensure a seamless transition from Stage 1 registration to Stage 2 registration, transitional arrangements will be in place for persons who are already registered as financial advisers at the commencement of Schedule 2 of the Bill. Persons who are already registered as financial advisers at the commencement of Schedule 2 are taken to be registered from the commencement of Schedule 2 until the earliest of the following:
* the cancellation time specified in a registration prohibition order in force against the person (if any);
* the time when a banning order against the person takes effect (if any); and
* the end of the next 30 June after the Schedule 2 commencement time.

***[Schedule 2, item 10, section 1684W(1) of the Corporations Act]***

* 1. Schedule 2 of the Bill defines ‘Schedule 2 commencement time’ to mean the start of the day Schedule 2 to the amending Act commences. ***[Schedule 2, item 10,*** ***section 1684W(2) of the Corporations Act]***
  2. This means that persons who are already registered as financial advisers immediately before Schedule 2 commences are able to provide financial advice until the end of that financial year without contravening a restricted civil penalty provision. This provides these persons with a transitional period (from the commencement of Schedule 2 until 30 June of that financial year) to register themselves with the Registrar. From 1 July after Schedule 2 commences, these persons contravene a restricted civil penalty provision if they provide personal financial advice while unregistered. ***[Schedule 2, items 1 and 10, sections 921Y and 1684W(2) of the Corporations Act]***
  3. For example, if Stage 2 registration commences on   
     1 October 2024, all financial advisers who are already registered immediately before this date will be taken to be registered for the purposes of Stage 2 registration until 30 June 2025.
  4. Persons who are not registered as financial advisers immediately before Schedule 2 commences are required to be registered before they can provide personal financial advice following the commencement of Schedule 2. This is regardless of whether the person has become a financial adviser for the first time on, or after, Schedule 2 commences, or for some other reason (e.g. a registration prohibition order was in force against them) they are not registered immediately before Schedule 2 commences. From the commencement of Schedule 2, the provision of financial advice while unregistered is a contravention of a restricted civil penalty provision. ***[Schedule 2, item 1, section 921Y of the Corporations Act]***
  5. For example, if Stage 2 registration commences on 1 October 2024, and a person satisfies the education and training standards to be a financial adviser on 1 December 2024 – this person must be registered by the Registrar before they can commence providing personal advice to retail clients in relation to relevant financial products. Note, the provision of financial advice is also contingent on the adviser being authorised by a financial services licensee (or authorised representative of a licensee) to provide financial advice on behalf of the licensee.

1. Statement of Compatibility with Human Rights

## Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021*

* 1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview

* 1. The Bill implements the Government’s response to recommendation 2.10 of the Financial Services Royal Commission Final Report by:
* expanding the role of the Financial Services and Credit Panel within ASIC to operate as the single disciplinary body for financial advisers to ensure that less serious misconduct does not go unaddressed;
* creating new penalties and sanctions for financial advisers who have breached their obligations under the Corporations Act;
* introducing a new registration system for financial advisers to improve the accountability and transparency of the financial services sector; and
* transferring functions from FASEA to the Minister responsible for administering the Corporations Act and to ASIC to streamline the regulation of financial advisers.
  1. The Bill also implements the Government’s response to recommendation 7.1 of the Tax Practitioners Board Review by introducing a single registration and disciplinary system under the Corporations Act for financial advisers who provide tax (financial) advice services and removing duplicate regulation.

### Human rights implications

* 1. This Bill engages the following rights:
* Article 14 of the International Covenant on Civil and Political Rights (ICCPR);
* Article 15 of the ICCPR;
* Article 17 of the ICCPR;
* Article 19 of the ICCPR; and
* Article 6 of the International Convention on Economic, Social and Cultural Rights (ICESR).

***Strict liability offences***

* 1. The strict liability offences in this Bill may engage the right to a fair trial, as well as the presumption of innocence in Article 14 of the ICCPR. Article 14 of the ICCPR provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
  2. The Bill introduces the following new strict liability offences:
* a person fails to comply with a summons – 50 penalty units;
* a person fails to comply with a requirement to take an oath or make an affirmation – 50 penalty units;
* a person fails to answer a question or produce a document – 50 penalty units;
* a person is present at a hearing, or part of a Financial Services and Credit Panel hearing, that is to be conducted in private without permission – 30 penalty units;
* publication of evidence, or matters contained in documents lodged with a Financial Services and Credit Panel and a direction restricting the publication of that evidence or those matters is in force –120 penalty units; and
* a financial adviser provides personal advice to retail clients in relation to relevant financial products while unregistered, and at the time, the financial services licensee, on whose behalf that advice is provided, has not ceased to authorise the person – 20 penalty units.
  1. Strict liability offences engage with this right as they involve the imposition of criminal liability without a mental fault element. However, strict liability offences are compatible with the presumption of innocence if they are reasonable, necessary and proportionate in pursuit of a legitimate objective.
  2. Strict liability offences are appropriate in these circumstances, as they are necessary to strongly deter misconduct that can result in serious financial detriment for consumers of financial services and reduce non-compliance by ensuring that the panel can efficiently and expeditiously deal with low‑level offending. This in turn bolsters the integrity of the regulatory regime for financial advisers and maintains public confidence in the regime.
  3. The offence provisions for being present at a hearing of a Financial Services and Credit Panel without permission or publication of material restricted by the panel are the same as the offence provisions that currently apply to hearings conducted by ASIC under Divisions 6 and 7 of Part 3 of the ASIC Act.
  4. Each of the remaining strict liability offences (for failing to comply with a summons, take an oath or make an affirmation, to answer a question or produce a document and for continuing to authorise a financial adviser who is unregistered (for Stage 1 registration only)) impose a penalty that is below the amount recommended in the Guide to Framing Commonwealth Offences, which provides that fines for strict liability offences should not exceed 60 penalty units for individuals or 300 penalty units for a body corporate.
  5. The application of strict liability preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for persons who may be accused of such offences.
  6. According to the Guide to Framing Commonwealth Offences, strict liability does not apply to offences punishable by imprisonment.
  7. These new strict liability offences apply prospectively, therefore upholding article 15 of the ICCPR. A Financial Services and Credit Panel has the power to consider matters where the relevant conduct occurs on and after the commencement of the legislation on 1 January 2022.   
     Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence for any act or omission which did not constitute a criminal offence at the time when it was committed.
  8. Given the need to deter misconduct, and the potential harm that could arise from non-compliance with these obligations, these new strict liability offences are considered a reasonable and proportionate means of achieving the legitimate objective of strengthening the regulation of the financial advice industry.

***Civil penalties***

* 1. The Bill introduces new civil penalty provisions, which may engage the right to a fair trial, as well as the presumption of innocence in Articles 14 and 15 of the ICCPR. Article 14(2) of the ICCPR recognises that all people have the right to be presumed innocent until proven guilty according to the law.
  2. The Bill introduces the following new civil penalty provisions into the Corporations Act and provides that for contraventions of these provisions a Financial Services and Credit Panel can make an instrument taking administrative action against the adviser, issue an infringement notice or make a recommendation to ASIC to apply for a civil penalty:
* comply with education and training standards for financial advisers;
* comply with the additional education and training standards (if any) for the provision of tax (financial) advice services;
* comply with the requirements for provisional financial advisers and supervisors of provisional financial advisers;
* comply with a direction or order made by a Financial Services and Credit Panel;
* be registered while providing financial advice; and
* cease to authorise a person to provide financial advice on the licensee’s behalf at the time a financial adviser provides financial advice while unregistered – this civil penalty provision applies to financial services licensees.
  1. ASIC may apply to the court for a civil penalty for alleged contraventions of these civil penalty provisions, either as an alternative to, or in addition to an instrument taking administrative action against the adviser for the matter, subject to consideration being given to the nature, purpose and severity of the penalty.
  2. If a court makes a declaration of contravention, the maximum penalty for a contravention of these civil penalty provisions, as for other existing civil penalty provisions in the Corporations Act, is the greater of 5,000 penalty units for individuals, or if the court can determine the benefit derived and detriment avoided because of the contravention–that amount multiplied by three. Consistent with the existing civil penalty regime in the Corporations Act, it is expected that the maximum penalty will only be applied in the most serious cases, as determined by the court.
  3. These civil penalty provisions are regulatory and protective in nature and are aimed at encouraging compliance by financial advisers and financial service licensees. The purpose of these provisions is to ensure the integrity of the new disciplinary system for financial advisers.
  4. The civil penalty provisions contained in this Bill are not ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary, and they do not result in the same stigma or condemnation as criminal offences. Further, the provisions do not apply to the general public, but to a sector or class of regulated people (financial advisers and financial services licensees) who should be aware of their obligations under the Corporations Act.
  5. These civil penalty provisions apply prospectively for conduct that occurs on or after commencement of the legislation on   
     1 January 2022 and therefore upholds article 15 of the ICCPR.

***Infringement notices***

* 1. The Bill may engage the right to a fair and public hearing in Article 14 of the ICCPR by extending the existing infringement notice regime in Part 9.4AB of the Corporations Act to provide for the Financial Services and Credit Panel to be able to issue infringement notices where a financial adviser is alleged to have contravened a restricted civil penalty provision.
  2. Infringement notices are part of a range of administrative and civil sanctions available to a Financial Services and Credit Panel as part of the creation of a new disciplinary system for financial advisers. This is intended to enable a Financial Services and Credit Panel to impose a sanction that is appropriate and proportionate to the nature, severity and consequences of the alleged contravention.
  3. In accordance with the Guide to Framing Commonwealth Offences, infringement notices are not available for matters punishable by imprisonment.
  4. However, if a Financial Services and Credit Panel reasonably believes that a financial adviser has contravened a restricted civil penalty provision, the panel cannot issue an infringement notice unless the panel gives the financial adviser a proposed action notice, which includes:
* details of the alleged contravention;
* the infringement notice amount;
* the adviser’s right to request a hearing or make a submission within 28 days of the notice being given; and
* when the details of the infringement notice would be included on the Register of Relevant Providers (Financial Advisers Register).
  1. If a financial adviser requests a hearing, or makes a submission, in response to a proposed action notice, the panel must hold a hearing or consider the submission before it is able to take action. In this way, the Bill does not limit the adviser’s right to a fair and public hearing by a competent, independent and impartial adjudicator.
  2. Furthermore, if an infringement notice is issued, the adviser has the right to request the withdrawal of the notice.
  3. The Bill also protects the right of the adviser to refuse to comply with an infringement notice by providing that details of the infringement notice may only to be made publicly available on the Register of Relevant Providers (Financial Advisers Register) if the adviser has complied with the infringement notice within the payment period. In such a case, ASIC must publish all of the following information:
* details of the infringement notice;
* a statement that the adviser has complied with the notice;
* a statement that compliance with the notice is not an admission of guilt or liability; and
* a statement that the financial adviser is not regarded as having contravened the provision specified in the notice.
  1. As for the existing infringement notice scheme under the Corporations Act, a financial adviser may choose not to pay the infringement notice, which may result in ASIC commencing court proceedings for a declaration of contravention and pecuniary penalty in relation to the alleged contravention of a restricted civil penalty provision.
  2. Given these protections, the new infringement notice scheme in this Bill is considered a reasonable and proportionate means of achieving the legitimate objective of introducing a new disciplinary system for financial advisers.

***The right against self-incrimination***

* 1. The new information-gathering powers in the Bill may engage the right against self-incrimination under Article 14(3)(g) of the ICCPR because they provide that a Financial Services and Credit Panel may require:
* a person to appear before the panel at a hearing to give evidence or produce specified documents, or both; and
* a person appearing at the hearing to answer a question put to the person or produce a document.
  1. These provisions do not apply to a financial adviser who is the subject of the hearing, but only to witnesses who have access to information or documents pertinent to the proceedings.
  2. In circumstances where a hearing is held (e.g. before making a banning order), the adviser may choose to attend the hearing, not attend the hearing and be represented at the hearing by a lawyer or another approved person, make one or more written submissions to the panel before the day of the hearing, or take no action.
  3. In regard to witnesses, a Financial Services and Credit Panel has the power to give a written summons to a person to appear at a hearing, answer questions and/or produce specified documents. This provision is not intended to abrogate the privilege against self-incrimination.
  4. Engaging the right against self-incrimination in this way is necessary and justified as the public benefit in removing the liberty outweighs the loss to the individual. The information sought from witnesses may only be available from certain individuals and is critical to the panel being able to perform its regulatory functions. The panel’s regulatory functions are important to protect consumers and others by taking disciplinary action against financial advisers for misconduct and ensure the integrity of Australia’s financial advice sector.
  5. However, individual rights against self-incrimination are protected by ensuring that information obtained by the panel using these powers cannot be used against the individual in criminal proceedings or in proceedings where the person may be liable to a criminal penalty.
  6. The Bill also protects the rights of persons by granting the Financial Services and Credit Panel the power to restrict the publication of evidence given before the panel or matters contained in documents lodged with the panel. In determining whether to exercise this power, the panel must have regard to whether the evidence or material concerns the commission, alleged, or suspected commission of an offence against an Australian law. The publication of evidence or material when such a direction is in force is an offence of strict liability, the penalty for which is 120 penalty units.
  7. The Bill also protects persons and businesses from possible damage to their reputation by making the unauthorised use or disclosure of information by members, or former members, of a Financial Services and Credit Panel an offence. The penalty for this offence is two years imprisonment.
  8. Overall, the information gathering powers in the Bill are considered to be consistent with the right against self-incrimination under Article 14(3)(g) of the ICCPR.

***Right to privacy***

* 1. The Bill engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR because it provides for:
* ASIC to disclose information to a Financial Services and Credit Panel and the Tax Practitioners Board;
* a Financial Services and Credit Panel to disclose information to ASIC, the Tax Practitioners Board and another Financial Services and Credit Panel as required or permitted by a law of the Commonwealth or state or territory, or for the purposes of performing the panel’s functions or exercising its powers; and
* the Tax Practitioners Board to disclose information to a Financial Services and Credit Panel for the purposes of the panel performing its functions or exercising its powers.
  1. The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.
  2. The amendments establish a mutual information sharing arrangement between ASIC, a Financial Services and Credit Panel and the Tax Practitioners Board to improve the ability of each of these bodies to perform their functions and to conduct timely compliance activity and better protect the integrity of Australia’s financial and taxation advice sector. These amendments are considered a reasonable change as they will allow these bodies to work together more effectively to ensure compliance with financial services and taxation laws. These new provisions are also appropriate as they will ensure that the process for sharing information is consistent with other existing disclosure provisions in the ASIC Act and the *Tax Agent Services Act 2009*.
  3. Any information that is shared between ASIC, a Financial Services and Credit Panel and the Tax Practitioners Board is subject to strict protections and requires all reasonable measures to be taken to protect confidential information from unauthorised disclosure. This protection is reinforced by offence provisions, which provide that current or former members of a Financial Services and Credit Panel or the Tax Practitioners Board commit an offence if they use or disclose information other than as authorised. The penalty for these offences is two years imprisonment.

***Right to freedom of expression***

* 1. The Bill engages the right to freedom of expression in   
     Article 19(2) of the ICCPR, which stipulates that all individuals shall have the right to freedom of expression, including the freedom to seek, receive and impart information ‘of all kinds’.
  2. Article 19(3) of the ICCPR provides that interferences with the right to freedom of expression may be permissible if they are provided by law and necessary for respect of the rights or reputations of others, for the protection of national security, public order, or public health or morals.
  3. This Bill engages these rights by:
* providing a Financial Services and Credit Panel the power to restrict the publication of evidence given to, or matters contained in documents lodged with the panel;
* making it an offence to publish evidence or information in breach of a direction that is in force; and
* making the unauthorised use or disclosure of information an offence where it was obtained in connection with the performance of the panel’s functions or the exercise of its powers by an individual who is or was a member of a Financial Services and Credit Panel.
  1. These provisions limit freedom of expression in a manner that is reasonable, necessary and proportionate to a legitimate objective, namely for respect of the rights or reputation of others, as provided for in article 19(3) of the ICCPR.
  2. The restriction on the publication of specified information or material is essential to the proper functioning of a Financial Services and Credit Panel, noting that the information is provided for the limited purpose of proceedings before the panel. Restrictions on disclosure in this context are intended to protect confidential information given for the purposes of the panel’s examination of a particular issue. In deciding whether to make an order restricting the publication of specified material, the panel must take into account considerations such as public interest and privacy concerns, including protection of the reputation of persons and businesses.
  3. It is therefore considered that the Bill is compatible with the right to freedom of expression in Articles 19(2) and (3) of the ICCPR.

***Right to work***

* 1. The Bill may engage the right to freely choose and accept work under Article 6(1) of the ICESR, which provides that everyone must be able to freely accept or choose their work and not to be unfairly deprived of work. The right to work also requires that state parties provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner pursuant to article 2(1) of the ICESCR.
  2. The Bill provides that an individual will not be able to work as a financial adviser unless they meet the education and training standards prescribed by the Minister. Additional competency requirements may also apply for persons who intend to provide tax (financial) advice services. In this way, the Bill restricts individuals from working as financial advisers unless they comply with these requirements. The restrictions are however justified as they create a minimum competency standard for the provision of financial advice, which is intended to improve the quality of advice given to consumers and instil confidence in the industry.
  3. The Bill also engages this right by introducing a fit and proper person test as part of the registration process for financial advisers. This is appropriate as it ensures that persons who provide financial advice in Australia are persons who are trustworthy and have the required integrity. Ensuring that only individuals who meet fitness and propriety requirements can be financial advisers is necessary to protect consumers given the sensitive nature of the service delivered.
  4. Participation in Australia’s financial services sector is not a right; participation is only possible if relevant standards are met and is only granted by the Commonwealth to suitable persons. A person seeking the benefit of participation in this industry will do so in the knowledge that the existence of certain circumstances may result in their registration as a financial adviser being refused, suspended or cancelled, or another administrative action being taken against them. This is appropriate as it remains necessary to protect consumers and the integrity of Australia’s financial services sector against misconduct.
  5. Including a fit and proper person test in the Bill ensures that the Regulator receives notification of any advisers who pose a potential risk and is intended to allow action to be taken to ensure the integrity of financial services to retail clients is not compromised.

### Conclusion

* 1. Accordingly, to the extent that the Bill engages rights under Articles 14, 15, 17 and 19 of the International Covenant on Civil and Political Rights and Article 6 of the International Convention on Economic, Social and Cultural Rights, it is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* as the limitations are appropriate, proportionate and achieve a legitimate objective.

1. <https://ris.pmc.gov.au/2019/09/26/government-response-financial-services-royal-commission> [↑](#footnote-ref-2)
2. <https://ris.pmc.gov.au/2020/12/03/review-tax-practitioners-board> [↑](#footnote-ref-3)