FINANCIAL PLANNING ASSOCIATION of AUSTRALIA

9 July 2020

Senator Slade Brockman
Chair
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Email: economics.sen@aph.gov.au

Dear Senator Brockman,

Re: SEC Inquiry into Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021

The Financial Planning Association of Australia (FPA) welcomes the opportunity to comment on *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021.*

The FPA welcomes the establishment of a new disciplinary function for relevant providers. This reform is an essential component of the work to create a new professional framework for relevant providers which commenced with the establishment of the Financial Adviser Standards and Ethics Authority (FASEA) in 2017.

The FPA supports the recognition in the Bill of the need to reduce duplication in the regulation of financial advice, the winding up of the Financial Adviser Standards and Ethics Authority (FASEA) and the removal of the duplicate oversight of the Tax Practitioners Board (TPB). The design of the disciplinary function within ASIC by building on the existing Financial Services and Credit Panel (FSCP) has the potential to be a substantial improvement over current disciplinary arrangements.

The FPA welcomes the requirement for all relevant providers to be registered however, it is critical that the obligation should rest with the individual practitioner, not with their Australian Financial Services Licensee as per the requirement in the legislation.

The creation of a personal registration is an essential component of any professional framework and is commonplace in professions as diverse as health practitioners, lawyers, architects and tax agents. A personal registration becomes a valued symbol that a practitioner has completed their professional qualifications, is in good standing in the community and whose behaviour is guided by adherence to the profession's ethical principles. The benefits of registration are largely lost if it is tied to a relevant provider's employment, duplicates the authorisation process under the Corporations Act licensing regime, and is treated as another administrative task to be completed by their licensee.

The FPA acknowledges the efforts of The Treasury in identifying a solution to enable personal registration within the scope of the Government's new Business Register project being established within the Australian Taxation Office.

The FPA looks forward to the Committee's consideration of its recommendations.

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If you have any queries or comments, please do not hesitate to contact me at

Yours sincerely

Ben Marshan CFP® LRS®
Head of Policy and Professional Standards
Financial Planning Association of Australia[1]

[1] The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first "policy pillar" is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally.
- We are recognised as a professional body by the Tax Practitioners Board.

Tax Agent Services Act

In his second reading speech of the Bill to the House of Representatives, the Assistant Treasurer, The Hon. Mr Michael Sukkar MP, stated:

> *The bill will also provide that tax (financial) advisers will no longer be regulated by the Tax Practitioners Board but instead, be regulated only under the Corporations Act 2001.*

The FPA welcomes this announced change and the improvements made to the Bill to address this issue from the consultation draft. The financial planning profession is highly regulated. At present, one piece of personal financial advice will be regulated by 9 regulators - ASIC, TPB, AUSTRAC, Office of the Australian Information Commissioner (Privacy), APRA, ATO, FASEA, the ACCC (under the consumer data rights framework) and shortly - the new statutory financial adviser disciplinary body proposed in this Bill - all administering Acts and regulatory requirements imposing different compliance requirements on financial planners. In addition, the same piece of advice will have oversight and interpretation by the Courts, the Australian Financial Complaints Authority (AFCA), Australian financial service licensees and professional bodies such as the Financial Planning Association. The FPA, therefore, supports measures that will simplify this regulatory and conduct oversight for the profession.

We note, however, that while the Bill removes the concept of a tax (financial) adviser to the benefit of the majority of the financial planning profession, their businesses and their Australian Financial Services Licensees (licensees), there may be circumstances where a licensee still requires TPB registration because they provide a tax agent service (which would currently be called a tax (financial) advice service).

To understand this issue, it is important to explain the structure of the licencing regime for financial advice providers under the Corporations Act.

Regulatory overview of financial advice

A financial planner (also known as a financial adviser) is a person or authorised representative of an organisation licensed by ASIC to provide personal financial advice.

Financial advice is regulated under the Corporations Act 2001 (Cth) as 'financial product advice'. A financial planner must either hold an Australian Financial Services Licence (AFSL) or provide financial advice as a representative of an AFSL holder (a licensee).

A financial planner is often referred to as a 'representative'. A 'representative' of an AFS licensee is:

- An 'authorised representative' of the licensee;
- An employee or director of the licensee;
- An employee or director of a related body corporate of the licensee.

AFSL holders are subject to general licensee obligations, conduct and disclosure obligations as well as additional obligations for providers of financial product advice to retail clients. There are also some obligations that apply directly to representatives.

Financial planning is also regulated under the Tax Agent Services Act 2010 as a tax (financial) advice service. A tax (financial) adviser must be registered directly with the Tax Practitioners Board (TPB) or an individual must operate within a registered business under the supervision of an individually registered tax (financial) adviser.

Further, as mentioned above, at present there are a total of 9 regulators and four additional disciplinary systems a financial planner operates under.

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Business models

The licensing regime has led to the development of a variety of business models in the advice profession.

Dealer groups

Financial planners can operate in advice groups (also known as dealer groups or licensees). Under this structure, a corporate entity in the group will hold an AFSL, permitting the financial planners who are members of the advice group to operate as its authorised representatives and provide financial advice to consumers on its behalf.

Such financial planners provide financial advice to consumers under both the AFSL and the commercial brand of the dealer group and/or their own business trading name. In return, dealer groups provide their members centralised back office services and support.

Aligned/non-aligned

Financial planners (and dealer groups) can be classified as either being independent, non-aligned, or aligned with a financial institution, such as a bank, financial product provider, or a wealth management services provider.

For aligned financial planners, the alignment can occur in various ways, including via vertical ownership structures, contractual relationships, and permitted benefits.

Business model examples

- Large licensees will have multiple (some as many as 60 or more) practices (small businesses) located across Australia operating under one licence; some large licensees have both employed planners and corporate authorised representatives operating under their licence.
- Corporate authorised representatives are authorised under a licensee and employ planners (authorised representatives) to provide advice under their corporate authorised representative status.
- Small or boutique licensees are often one or two financial planners or a collective of several corporate authorised representatives operating a small business under their own licence
- Authorised representatives are commonly sole traders operating a small financial planning practice under the licence of a large or medium licensee.
- Employed planners

Regulation of tax (financial) advisers

When the TASA regime was introduced in 2008 it included the following exemption for financial planners in the Explanatory Memorandum:

> *2.36 Where it is reasonable to expect that advice is to be relied upon for purposes other than to satisfy tax obligations (eg, for the preparation and lodgment of a return), such as making an informed financial or business decision, assessing risks or determining income tax provisions in an audited account, the advice is not a tax agent service. This applies to, for example, certain advice provided by a financial services licensee under the Corporations Act 2001 (Corporations Act) on the tax implications of financial products or financial transactions, or advice relating to ascertaining tax liabilities for the purpose of calculating a future income stream. It would also include advice provided by an actuary on a risk assessment of a particular product or entity that takes into account the tax implications.*
>
> *See Attachment 1 for the examples which were included in the Explanatory Memorandum.*

Tax (financial) advice and tax (financial) advisers were brought into the Tax Practitioners Board (TPB) regulatory regime in 2013 based on an assessment by the Government that financial planners were providing limited tax advice in the normal course of providing a financial service to consumers. It is undeniable that there are tax implications that financial planners must consider when identifying appropriate advice strategies and recommendations for each client. Ensuring the competency of financial planners and the oversight of ethical services in relation to the tax implications therefore act as an important consumer protection mechanism.

The model developed by Government at the time was a co-regulatory model which was intended to create a "...framework best meets the objectives of ensuring the consistent regulation of all forms of tax advice and minimising the compliance costs on entities in the financial services industry". While the TPB has made significant positive progress in engaging and understanding financial planners as part of their regulatory work, it is generally acknowledged by the TPB and the profession that the TPB operates as a secondary regulator to ASIC and has identified minimal regulatory gap or risk for consumers with the provision of tax (financial) advice services by financial planners.

Further, the merging of a regulatory framework based on corporations being responsible for the delivery of financial services into a regulator who is focused on regulating the individual practitioner has not been a neat fit. The difference between a tax (financial) advice service and a financial advice service is not sufficient for the TPB to have been able to provide separate, distinct or additional protective regulatory standards or guidance to the financial planning profession. This is evident from TPB regulatory guidance broadly quoting obligations set by the Corporations Act 2001 or ASIC. This is further the case with the more recent implementation of the Financial Advisers Standards and Ethics Authority (FASEA) and the implementation of its standards. In numerous examples, the TPB has acknowledged and interpreted that there are few gaps in their regulatory regime which are not covered by the Corporations Act 2001 or the FASEA standards.

Finally, in relation to arguably the most important function of a regulator, consumer protection, the cases the TPB has brought against tax (financial) advisers to this point in time appear to be primarily in relation to breaches of laws which carry their own penalty regimes (for example failing to lodge tax returns), failing to complete the duplicate (and in some instances quadrupling) registration obligations, or failing to notify the TPB of a termination of registration on ceasing practice. These specific examples do not seem sufficient to require a regulatory framework covering tax (financial) advice services and the regulatory inefficiency and cost which it creates. We would also point out that consumers do not recognise the term tax (financial) adviser or tax (financial) advice service in the same way they identify with the professional services provided by a financial planner, accountant, or lawyer, and maintaining the terms just continues to increase consumer confusion.

In saying this, there are differences and there are gaps between the requirements in the Corporations Act 2001/FASEA standards and those in the TASA. The TPB regulatory regime has a specific focus on complying with tax implications of services provided by professionals to ensure consumers are appropriately protected. This protection requires specific knowledge and experience which is demonstrated in the differences between Corporations Act 2001/FASEA standards and those in the TASA.

The TPB has expressed concern that specific tax topics and matters may not be given the necessary focus in the education and training standards for financial planners given the breadth of knowledge required to provide financial advice. While tax matters may be captured under each of the FASEA standards, tax may not be adequately referenced to the satisfaction of the TPB which has resulted in the current situation of duplicated standards being imposed on financial planners, specifically two entry and ongoing education standards. This situation will not change under the Bill as it maintains the definition of tax (financial) adviser and gives the Minister powers to make standards for 'relevant providers' and make separate standards for 'qualified tax relevant providers'. Equally the Bill still requires financial planners to maintain an additional registration either as 'qualified tax relevant providers' via ASIC or as a full tax agent with the TPB.

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Given the Government's intent is for there to be a single set of standards for the financial planning profession, the modifications to TASA in the Bill do not appear to achieve this outcome for a number of reasons. Firstly, the drafting of the Bill fails to meet the Government's intention of creating a single set of professional standards for financial planners and a single regulatory regime. To achieve a single regulatory regime, financial planners should be removed from the TASA entirely.

Secondly, the drafting will still requires AFSL's and Corporate Authorised Representatives (CARs) to register with the TPB, but as full tax agents. As discussed below, this itself has many challenges. Firstly, AFSL's and CAR's rely on having a sufficient number of individual tax agents to meet the sufficient number test and register with the TPB. If relevant providers are unable to are unable to register with the TPB from 1 January 2022 because they meet the standards for tax (financial) adviser not tax agents, this obligation cannot be met. Secondly, the Bill will not remove the obligation for these registered AFSLs and CARs to comply with the TPB Code of Professional Practice and therefore require their practitioners to also comply. As a result, relevant providers operating under an AFSL or CAR (which is all of them) will likely still be caught by a second, duplicate set of professional standards.

TPB registration requirements remain under the Bill

Section 50-17(e) and s50-18(e) of the Bill makes it a civil penalty for providing or advertising (respectively) a tax (financial) advice service if not registered or qualified:

> *in the case of the tax (financial) advice service provided on your behalf by another person—that other person is not a registered tax agent or a qualified tax relevant provider;*

This creates a standard that removes existing TPB registration options and forces some advice companies and their relevant providers to register with the TPB as full tax agents. For example:

<u>Wholesale advisers</u>
Providers of personal financial advice to wholesale clients ('wholesale advisers') fall outside the definition of 'relevant provider' (s910A) and are therefore exempt from the education and professional standards (s921B) and the requirement to be registered on the ASIC Register. However, under the Bill, wholesale advisers are still required to be registered with the TPB because the services they provide are captured under the definition of tax (financial) advice service, which does not distinguish between retail and wholesale clients.

Due to the removal of the tax (financial) adviser registration options discussed below, wholesale advisers will be required to upgrade their registration to full tax agent.

<u>Automated Advice Providers</u>
Providers of personal financial advice which use technology to provide the advice (often referred to as automated advice or Robo-advice) fall outside the definition of 'relevant provider' (s910A) and are therefore exempt from the education and professional standards (s921B) and the requirement to be registered on the ASIC Register. However, under the Bill, licensees offering automated advice are still required to be registered with the TPB because the services they provide are captured under the definition of tax (financial) advice service, which does not distinguish between personal or automated advice services.

<u>Exempt Products</u>
Providers of personal financial advice on exempt products fall outside the definition of 'relevant provider' (s910A) and are therefore exempt from the education and professional standards (s921B) and the

requirement to be registered on the ASIC Register. However, under the Bill, licensees offering advice on exempt products are still required to be registered with the TPB because the services they provide are captured under the definition of tax (financial) advice service, which does not distinguish between what products an advice service covers.

Licensees and relevant providers

All financial advice licensees and relevant providers who provide a tax (financial) advice service are currently required to register with the TPB either directly or under a sufficient number and supervisory model. The impact of the drafting of the Bill on these licensees is currently unclear.

However, as discussed in the following section, the Bill removes the TPB registration options and forces licensees to ensure all their relevant providers who provider a tax (financial) advice service to either meet the qualified tax relevant provider requirements or to register and be regulated as a full tax agent. Licensee's relevant providers will no longer be able to meet the requirements under supervisory arrangements when providing tax (financial) advice services.

This change may force some licensees to register as full tax agents with a sufficient number of the relevant providers it authorises also registered as full tax agents, and continue to be regulated by the TPB but for accounting type services which they do not provide. Given most tax agents are able to register under an experience pathway with a recognised professional association rather than requiring specific education or experience, this creates a risk to consumers that a registered tax agent is able to provide a broader range of services than they would currently be able to provide as a tax (financial) adviser, including preparation of tax returns and representation of clients to the ATO Commissioner. We do not believe this is the intent of TASA or this Bill but is a consequence of the removal of tax (financial) advice from the Bill.

Increased standards for providing tax (financial) advice services

Section 20-5 of the TASA sets the eligibility requirements for registration as a tax agent and tax (financial) advice service. For companies this includes s20-5(3)(d)(i) and (iii):

> *(i) in the case of registration as a registered tax agent--a sufficient number of individuals, being registered tax agents, to provide tax agent services to a competent standard and to carry out supervisory arrangements; or*
>
> *(iii) in the case of registration as a registered tax (financial) adviser--taking into account the requirements of paragraphs 912A(1)(d) to (f) of the Corporations Act 2001 , a sufficient number of individuals, being registered tax agents or registered tax (financial) advisers, to provide tax (financial) advice services to a competent standard, and to carry out supervisory arrangements;*

The supervisory arrangements allow companies to provide services by registering an appropriate number of representatives, rather than all their representatives.

The Tax Agent Services Regulations 2009 (TASR) (items 301 to 304) set the education and experience requirements to register as a tax (financial) adviser through one of the four registration options covering:

- Primary qualification
- Board approved courses
- Relevant experience

These requirements are specific and relevant to the provision of tax (financial) advice services.

	Primary qualification	Board approved courses: Australian taxation law	Board approved courses: Commercial law	Relevant experience
301 Tertiary qualifications	Degree or post-graduate award in a relevant discipline	✓	✓	Equivalent of 12 months in the past 5 years
302 Diploma or higher award	Diploma or higher award in a relevant discipline	✓	✓	Equivalent of 18 months in the past 5 years
303 Work experience	✗	✓	✓	Equivalent of 3 years in the past 5 years
304 Membership of professional association	Voting member of a recognised tax (financial) adviser or tax agent association	✗	✗	Equivalent of 6 years in the past 8 years

The TASR contains similar registration options for tax agents and BAS agents.

However, under the amendments in the Bill, these registration options will be removed for tax (financial) advisers, but will remain for tax agents and BAS agents.

Additionally, section 921BB of the Bill gives the Minister the power to set education, training and continuing professional development requirements for qualified tax relevant providers in addition to these requirements for providing personal financial advice under the existing FASEA standards. It is unclear from the drafting of s921BB whether the education requirements for qualified tax relevant providers will be higher than those currently required to provide a tax (financial) advice service under the TPB registration pathways.

Increased costs for providing tax (financial) advice services

The changes in the Bill will undeniably lead to an increase in the education standards for some existing registered tax (financial) advisers. This will be due to either the need to upgrade individual and company registrations to full tax agent, or because they can no longer rely on the TASR registration pathways for providing tax (financial) advice service.

Concerningly, those providers who will be forced to continue to register with the TPB as tax agents will incur an increase in the registration costs.

The current application fee to register with the TPB as a tax (financial) adviser (individual or company) is $563. However, the application fee to register as a tax agent is (individual or company) $704. The application fee is subject to a consumer price index adjustment on 1 July each year. This will be in addition to the other regulatory fees they incur including the ASIC levy which has increased by 168 per cent in the past two years.

Financial advice providers registered as tax agents will also face the burden of the costs incurred in ensuring compliance with the regulatory requirements of the TASA regime, but for accounting type services which they do not provide.

Continuation of dual regulation for current registration

Up to the commencement of the Bill on 1 January 2022, including the day prior to commencement, tax (financial) advisers must ensure their TPB registration is current and they abide by the TASA requirements.

Section 139(2)(b) of the Bill requires the relevant provider's old TASA registration to continue to be in force on and after 1 January 2022 until the end of the old registration period. This means that relevant providers will continue to be confronted with the cost of dual regulation under the TPB and ASIC for the remaining duration of their three registration period. Section 140 of the Bill applies the TASA requirements to applications made but not approved before 1 January 2022, and for the resulting duration of the three year registration period.

The continuation of the dual regulation is demonstrated under s141(1)(b) of the Bill which states that if a registration in place on or after 1 January 2022 is suspended for a period under subsection 30-25(1) of the old Act as it continues to apply to the registration under those items, during the suspension period the person is taken not to be a qualified tax relevant provider for the purposes of paragraphs 50-17(d) and 50-18(c) of the *Tax Agent Services Act 2009*, as inserted by Division 1 of this Part.

This clearly shows that relevant providers will still be regulated by the TPB and is in direct contrast to the Minister's statement that tax (financial) advisers will be *"regulated only under the Corporations Act 2001".*

While item 122 of the Bill removes the power of the Board to register, investigate and impose sanctions on tax (financial) advisers from Jan 2022, s30-25(1) permits the TPB to suspend the registration of a tax (financial) adviser whose registration remains current on or after 1 January 2022, for non-compliance that occurred before January 2022 but was not identified until after 2022 for as long as the tax (financial) adviser's TPB registration period is in force (ie until the current 3 year registration period expires). For many tax (financial) advisers this may be as long as the end of 2024. For the TPB to be able to do this planners would need to continue to meet the TPB requirements and provide annual declarations and evidence - that is continue to be regulated.

Additionally note that most tax (finanancial) advisers renewal period coincides with the current 6 month period between 1 July 2021 and 30 December 2021 meaning a payment for a 3 year registration is required without an understand of the cost to register with FSCP to make a comparison. Further, AFSLs and CARs will be required to pay for their registration without the benefit of the deemed registration with ASIC, effectively paying a 3 year registration for a 6 month period.

Single set of standards

The FPA supports the Government's aim to deliver a single set of professional standards for financial planners. To achieve this intent, it is important to consider the existing FASEA standards and identify any gaps in relation to the tax laws taken into account when providing financial advice in the best interest of clients.

FASEA Code of Ethics

Both the FPA and the TPB have mapped the FASEA Code of Ethics with the TASA Code of Conduct. This mapping indicates that the standards are consistent and cover the same principles with no significant gaps.

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FASEA Education

The FASEA education standard for new advisers includes a tax course (as approved by the TPB) and a course in commercial law (as approved by the TPB) at AQF7 level or above. For existing advisers, the FASEA education pathways include recognition of RPL and bridging courses to make up the education equivalence of the degree requirement. The TPB's existing registration pathways include education and experience requirements.

FASEA Continuing Professional Development

The TPB acknowledges the FASEA standard in its recently released Exposure Draft CPE Policy. The FASEA CPD standard requires individual learning objectives to be set based on the financial planner's knowledge and service offerings to maintain competency and grow knowledge. Tax laws would be captured under FASEA's four CPD categories and specific tax topics could be included in an individual's CPD Plan where necessary (which operates in practice already).

FASEA Professional Year

To commence a professional year (PY), the individual must meet the FASEA education standard under the new entrant pathway, including the completion of a tax course (as approved by the TPB) and a course in commercial law (as approved by the TPB) at AQF7 level or above. Tax laws would be captured under FASEA's PY standard which requires an individual to meet certain learning outcomes in four distinct quarters.

FASEA Exam

The FASEA exam standard already tests the practical application of financial planner' knowledge in Financial Advice Regulatory and Legal requirements including chapter seven of the *Corporations Act 2001*, anti-money laundering, privacy and importantly the TASA requirements.

Given the alignment between the TASA and FASEA standards, the FPA is concerned that the Bill maintains the status quo of duplicated standards, duplicated registration requirements of 'relevant provider' and 'qualified tax relevant provider' and therefore duplicated compliance costs, adding significantly to the complexity of the regulatory regime with no additional consumer benefit.

FPA recommendation

The amendments in the Bill do not achieve the Government's objective of removing the requirement to be registered with the TPB, as stated by the Assistant Treasurer. The passing of the Bill as currently drafted will unfairly increase the current registration requirements and costs for many financial advice providers - that is both relevant providers and companies, and maintain dual regulation for many AFSLs and financial planners.

The FPA strongly recommends:

- **that the Bill remove all potential requirements for AFSLs and CARs to register with the TPB from the TASA by:**
  - **Repealing the definition of tax (financial) advice service, and**
  - **Reinstating the 2008 exemption for financial advice providers who are licensed under the Corporations Act.**
- **that the Minister is given the power to establish a single set of standards for financial planners only.**

Single disciplinary body for financial advisers

Quorum of FSCP

Section 139 of the Bill requires that Financial Services and Credit Panels convened by ASIC must consist of a Chair (who must be an ASIC staff member) and at least 2 other members. A quorum at a meeting of a Panel is constituted by a majority of members of the panel (s151(1)). This means a quorum of three is permitted.

However, if a panel member discloses a conflict of interest at a Panel meeting (ie. after a Panel has been identified and convened), s150(4) requires that the member must not be present during any deliberation by the Panel on the matter; and must not take part in any decision of the Panel with respect to the matter. In such circumstances, the remaining members of the panel at the meeting constitute a quorum for the purpose of any deliberation or decision at that meeting with respect to that matter (s151(2)). The Chair of the Panel has a deliberative vote and a casting vote under s152(2).

The combination of these provisions eradicate any views of the Panel in circumstances where a member of a three person Panel must not participate due to a disclosure of a conflict of interest. As ASIC has a casting vote, ASIC's view will override any view of the remaining Panel member.

While removing conflicted members from an FSCP is essential, there is no obligation for ASIC to replace the member who discloses a conflict of interest during a meeting of a Panel after a Panel has been convened. As a result, matters could be decided by only the ASIC chair.

This brings into question the fairness and credibility of decisions made by an FSCP in such circumstances and creates a risk of running panels with insufficiently qualified members.

> **Given the seriousness of misconduct decisions, the FPA considers it would be appropriate for the legislation to require a minimum of two FSCP members (in addition to the Chair) present for all deliberations, with additional members appointed to replace any that have stood aside due to conflicts of interest.**

Notifying stakeholders about investigations

The Bill provides few requirements for ASIC or the FSCPs to notify relevant stakeholders about investigations they are undertaking. At present, the only time a relevant provider is made aware that there is a disciplinary matter concerning them being considered is when an FSCP issues a proposed action notice under section 921M. This gives a relevant provider 28 days to respond, either with a written submission or by requesting a hearing.

While there are circumstances in which an FSCP investigation should be confidential while evidence is being collected, the FPA considers that it would be appropriate in most circumstances for ASIC to notify a relevant provider before an FSCP begins considering a matter related to them. This would allow a relevant provider to cooperate more fully with the FSCP and to direct them to evidence that may assist them in making a more accurate determination in the first instance, rather than relying on the relevant provider to respond after the FSCP has already made a determination on the matter.

The FPA recommends that the legislation require ASIC to notify a relevant provider as soon as practical after it decides to convene an FSCP to consider a disciplinary matter concerning the planner and for ASIC to also notify the planner's AFSL and professional association.

Information sharing provisions

In addition to notifying the relevant provider, the FPA considers it would be appropriate for ASIC to notify the planner's Australian Financial Services Licensee (AFSL) and if the planner is a member of a professional association, that association. AFSLs and professional associations are both important stakeholders in the operation of a disciplinary system, in many instances sharing complaints and evidence with ASIC (and other regulators).

Sharing information will ensure these stakeholders are able to take action to support the FSCP's consideration of that matter, as well as to potentially identify other related matters that also need attention.

The FPA has entered MOUs with other regulators to facilitate this transfer of information and this should be a feature of the FSCP model.

Item 8 of the Bill amends the ASIC Act to permit the Regulator to share information with a FSCP and the TPB under s127(2A) of that Act.

The FPA recommends that the Bill amend the ASIC Act to permit ASIC to share information on disciplinary matters with relevant AFSLs and professional associations.

Publishing sanctions on the FAR

The Bill gives discretion to an FSCP to publish a sanction that it has imposed on a relevant provider on the Financial Adviser Register. There is an argument that this power should be used sparingly as publication of a sanction is, in effect, an additional sanction as it involves publicly shaming the relevant provider. However, it is vital that the new disciplinary function is transparent in its decision-making and gives confidence to the financial planning profession and the general public that misconduct is being addressed.

This outcome is best achieved by publishing the results of the FSCPs disciplinary hearings. The FPA is of the view that the interests of transparency outweigh the arguments against publication for all but the most minor of beaches. In addition to the sanction imposed, the FSCPs should publish a short rationale for their decisions.

However, the FPA notes paragraph 1.92 of the Explanatory Memorandum states:

> *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]***

The FPA opposes the publication of minor breaches that result in a warning or reprimand being given by a Panel or by ASIC. Such a breach could be an administrative error that caused no financial loss to a consumer and is appropriately addressed in a timely manner by the planner. To incentivise corrective behaviour, warnings and reprimands should not be published where a relevant provider has taken appropriate steps to address the underlying issue. This level of breach does not match the reputational damage that could be caused to the relevant provider by the publication of the warning or reprimand on the public FAR.

Limiting the length of time for which a sanction is listed on the Financial Adviser Register (FAR) would also provide an incentive for relevant providers who have received a sanction for misconduct to change their behaviour. For example, in the same manner that some criminal convictions are spent after a period of good behaviour, the same could be done for sanctions listed on the FAR. A period of five or seven years may be appropriate, or a range depending on the severity of the sanction being imposed.

The FPA recommends the legislation and Explanatory Memorandum should be amended to :

- **restrict the publication of warnings or reprimands given by a panel or by ASIC where steps are taken by the relevant provider to address the matter referred to in the warning or reprimand, and**
- **include provisions to allow the sanctions published on the FAR be spent after an appropriate length of time.**

Withdrawal requests

A person who has been given an infringement notice by the FSCP has 28 days to make written representations to ASIC seeking the withdrawal of the notice under s1317DATC of the Bill. If ASIC determines a Panel should consider the withdrawal request, s1317DATC(3) requires the FSCP to make a decision on the request and provide a notice of its decision to the person within 14 days.

However, provision (5) of that section negates both the need for a panel to consider a withdrawal request and for a notice of the decision to be provided. If no notice of a decision is given to the person within 14 days, the person must presume the withdrawal request has been refused and the infringement notice must be paid within the payment period, which is 7 days as per s1317DATB(6).

This process lacks certainty and procedural fairness if a notification of the decision regarding the withdrawal request is not provided to the person. This puts the relevant provider at risk of wondering if the notice of the decision has been delayed, potentially holding off on paying the infringement notice and risk exceeding the 7 day payment period. If the person exceeds the payment period they may be presumed as not complying with the infringement notice under s1317DAV. A notice of a decision should be required to be given for all withdrawal requests.

Natural justice would also suggest that all withdrawal requests where a change in any of the circumstances on the basis of which the notice was given to the person, should be considered by a Panel.

The FPA recommends the legislation be amended to require:

- **the FSCP to consider all withdrawal requests where a change in any of the circumstances on the basis of which the notice was given to the person, and**
- **a notice of a decision to be required to be given for all withdrawal requests, including requests not considered and requests refused by a Panel.**

Registration of financial advisers

Two stage Registration process

Individual registration is a critical component of a professional framework. It was central to recommendation 2.10 of the Financial Services Royal Commission and is currently required by the Corporations Act 2001 as part of the FASEA reforms, albeit with ASIC taking a temporary no-action position while the Government develops its response to the Royal Commission recommendation.

The FPA acknowledges the pending implementation of the new Australian Business Registry Service administered by the Australian Taxation Office and supports the proposed two-staged registration process for relevant providers, as described in paragraphs 1.22 to 1.24 of the Explanatory Memorandum.

The FPA strongly supports a model in which registration is the personal responsibility of each relevant provider and is unconnected from their employment. A professional registration should demonstrate that the relevant provider has met their professional requirements, are in good standing and are ready to be engaged by an AFSL or financial planning business. A relevant provider's registration should then follow them throughout their career and be a valued symbol of their professional status and commitment to uphold professional values.

A personal registration is a common factor in other professions. For example: lawyers must register with the court and law society in their state or territory; doctors, nurses and other health practitioners must register with the Medical Board of Australia; and tax agents (which already includes most relevant providers) must register with the TPB. These are all personal registrations which reflect the practitioner having met their professional requirements and form a direct connection between the practitioner and the disciplinary function of their professional bodies.

Individual registration is a critical component of a professional framework. The FPA strongly supports the need for a personal registration for relevant providers as part of the push to improve professional standards for all relevant providers. A personal registration provides a direct connection between the practitioner and their professional obligations and standards of behaviour.

> **The FPA strongly supports the need for a personal registration for financial planners as part of the push to improve professional standards for all financial planners. A personal registration provides a direct connection between the practitioner and their professional obligations and standards of behaviour.**

Later amendments - Period of registration

Section 921ZE of Schedule 2 - Later Amendments, sets an annual renewal requirement with the period of registration set to the end of the financial year in which the person was registered, unless a cancellation or banning order applies. The renewal of a registration would commence on the day after the end of the financial year.

The FPA supports the establishment of an annual registration renewal with a set renewal date for all relevant providers.

Wind up of FASEA and transfer of its function

The FPA strongly supports the Government's decision to wind up FASEA and the potential and welcome cost-saving that this provides. By executing FASEA's functions using existing Government offices and entities, the Government could save a substantial proportion of the FASEA budget - which is set at $5 million per annum pro rata in the 2021-22 federal budget. Controlling regulatory costs such as these is an essential step in making financial advice more affordable for all Australians.

The FPA supports the removal of the power for the Minister to appoint a standard setting body, instead providing 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.

The FPA further supports the transfer of the power to approve foreign qualifications to the Minister.

The FPA would welcome the opportunity to discuss with the Treasury the outsourcing of the assessment and approval of education providers and courses, in line with the education standard, to the Financial Planning Education Council (FPEC).

The FPA would also welcome the opportunity to discuss the Minister outsourcing to the Financial Planning Education Council (FPEC) the mapping of the foreign qualifications to the education standard to help inform the Minister's assessment of those qualifications.

Transfer of functions and documents from FASEA

The FPA sports the transfer of documents from FASEA to enable the smooth transition of functions from FASEA to the Minister responsible for administering the Corporations Act and to ASIC.

In particular, the FPA supports the requirement for ASIC to 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 to ensure that prospective financial advisers have access to necessary information on the examination process.

Publication of approved courses and foreign qualifications

FASEA's FPS001 Education Pathways Policy states:

For those HEPs that seek to, and are successful in having programs and/or bridging courses approved by FASEA, their details and those of the programs and courses approved by FASEA will be included in the legislative instrument on approved programs and courses for the purposes of subsections 921B(2) and 1546B(1)(b) of the Act. This information will also be reflected in an approved degree list on the FASEA website.

Since issuing its Relevant Providers Degrees, Qualifications and Courses Standard in December 2018, FASEA has approved a wide range of courses that meet the required curriculum standards including 75 historical courses, 56 current bachelor or higher degrees and 35 bridging courses, and has updated the legislative instrument of approved courses on three occasions – March 2019, February 2020, and December 2020.

FASEA's publication and maintenance of a list of approved courses offers an interactive tool that provides a vital and more accessible list of the approved courses than the legislative instrument for education providers, the profession, those wishing to enter the financial planning profession, and consumers.

While the Bill appropriately transfers the approval of education courses to the Minister, it does not deal with FASEA's function of publishing and maintaining a list of approved courses on a public website, as required under the FASEA Education Pathways Policy.

The FPA recommends the responsibility for publishing and maintaining a list of approved courses on a public website should be placed on ASIC. ASIC is responsible for the financial adviser register which requires the listing of a financial planner's qualifications, and

MoneySmart, and is a known and trusted source of information about financial planners for both the profession and consumers.

Continuing Professional Development

The completion of Continuing Professional Development (CPD) is a responsibility placed on the individual practitioner under section 921B(5) of the Corporations Act 2001. The FASEA CPD standard requires a CPD Plan to be developed based on the learning objectives for the individual practitioner across five key categories. The FASEA Code of Ethics also places a responsibility on the individual to be competent to provide the services they provide. The FSCP's oversight of the Code includes compliance with the Code's competency value and standards nine (that all advice be offered with competence) and ten (develop, maintain and apply a high level of relevant knowledge and skills).

The current obligations in the Corporations Act 2001 for the oversight of the individual's compliance with the FASEA CPD standard is based on the entity's licensing system given the current absence of an individual adviser oversight mechanism. However, the introduction of the new adviser registration obligations and the FSCP as a single disciplinary body providing oversight of an individual adviser's compliance with the standards of the Code, creates a system that will enable the individual to certify their compliance with the CPD standard as part of the annual adviser renewal process.

In other professions, it is the individual who is responsible for making a declaration of compliance with relevant CPD obligations and submitting evidence of CPD undertaken when required by the authorising body. For example, tax agents (a current requirement for financial planners as TFAs) and medical practitioners are required to make a declaration at the time of renewal of registration and/or annual attestation that the practitioner has complied with the CPD standard set by the Tax Practitioners Board and the Medical Board of Australia (respectively). Evidence and records of the practitioner's CPD activity must be maintained for audit purposes.

The FPA recommends a CPD compliance declaration and evidence should be submitted by the individual to ASIC through the annual registration process. To streamline requirements, the individual's CPD year should commence on the registration day.

Attachment 1 - Tax Agent Services Act 2008 and Explanatory Memorandum excerpts

Tax Agent services bill 2008

90-5 Meaning of *tax agent service*

(1) A ***tax agent service*** is any service:

(a) that relates to:

(i) ascertaining liabilities, obligations or entitlements of an entity that arise, or could arise, under a * taxation law; or

(ii) advising an entity about liabilities, obligations or entitlements of the entity or another entity that arise, or could arise, under a taxation law; or

(iii) representing an entity in their dealings with the Commissioner; and

(b) that is provided in circumstances where the entity can reasonably be expected to rely on the service for either or both of the following purposes:

(i) to satisfy liabilities or obligations that arise, or could arise, under a taxation law;

(ii) to claim entitlements that arise, or could arise, under a taxation law.

(2) A service specified in the regulations for the purposes of this subsection is not a ***tax agent service*** .

EXPLANATORY MEMORANDUM

2.36 Where it is reasonable to expect that advice is to be relied upon for purposes other than to satisfy tax obligations (eg, for the preparation and lodgment of a return), such as making an informed financial or business decision, assessing risks or determining income tax provisions in an audited account, the advice is not a tax agent service. This applies to, for example, certain advice provided by a financial services licensee under the *Corporations Act 2001* (Corporations Act) on the tax implications of financial products or financial transactions, or advice relating to ascertaining tax liabilities for the purpose of calculating a future income stream. It would also include advice provided by an actuary on a risk assessment of a particular product or entity that takes into account the tax implications.

Example 2.7

Angelia is licensed under the Corporations Act to provide a range of financial services. In accordance with the scope of her financial services licence, Angelia recommends to her client, Adam, a gearing strategy as a way to accumulate wealth over the long term. In determining whether Adam has the cash flow to afford the interest costs on borrowed funds, Angelia estimates Adam's cash flow taking into account the potential tax deductibility of interest costs, the taxable nature of the dividends, the impact of franking credits on Adam's income tax position and his eligibility for certain tax offsets.

Merely taking into account the tax consequence of Adam's circumstances in estimating his future cash flow does not constitute a tax agent service. This is incidental to the financial advice being provided and it is reasonable to expect that the advice would only be relied upon by Adam for the purpose of deciding whether to adopt the recommended financial strategy.

Example 2.8

Erica is licensed under the Corporations Act to provide a range of financial services. Caroline seeks financial advice from Erica regarding long-term wealth accumulation and an appropriate asset allocation.

Erica assesses Caroline's risk profile and recommends an asset allocation that is consistent with that profile. As part of this process, Erica recommends that Caroline sells some of her existing shares and uses the proceeds for investment in managed funds to increase diversification of her investments. In assessing which shares Caroline should sell, Erica alerts Caroline to the fact that selling certain shares could potentially raise CGT liabilities. This would not ordinarily be a tax agent service because it is provided for the purpose of advising Caroline about an appropriate asset allocation that fits her risk profile. However, if, while alerting Caroline to the CGT consequences of selling particular shares, Erica also assures Caroline that the tax advice she provides is accurate and can be relied upon without further consulting a tax agent, then Erica would be providing a tax agent service.

Example 2.9

Oliver & partners is an audit firm and a registered company auditor under the Corporations Act. As part of its audit work, Oliver & partners is required to calculate income tax provisions to be included in its clients' audited accounts.
Oliver & partners is not providing a tax agent service as it is reasonable to expect that its clients' would only rely on the service to satisfy the statutory requirements for their audited accounts.

Example 2.10

Norma is licensed under the Corporations Act to provide a range of financial services. In addition to providing advice about the tax implications of decisions about financial products, Norma provides extensive analysis of her clients' tax positions and details of the relevant entries into her clients' tax returns that would result from adopting certain financial product decisions.
She includes a disclaimer in her product disclosure statement stating that the tax advice she provides cannot be relied upon for the purpose of satisfying obligations or claiming entitlements under the taxation laws. Despite the disclaimer, because the advice is extensive and sufficiently detailed to be able to be reflected in her clients' tax returns, it is reasonable to expect her clients to rely on the advice to satisfy their obligations under the taxation laws. As such, Norma is providing a tax agent service.

2.37 Given the broad definition of a 'taxation law', a regulation-making power is provided in the Bill to give the Parliament the flexibility in the future to specify particular services that do not fall within the definition of 'tax agent service'. A similar power is provided in relation to the definition of 'BAS service'. ***[Subsections 90-5(2) and 90-10(2)]***