

Part 2: Winding up of FASEA, tax (financial) advice and other measures

Posted by Cowell Clarke Financial Services Team 13 May 2021

The Federal Government is consulting on its *Financial Sector Reform (Hayne Royal Commission Response—A New Disciplinary System for Financial Advisers) Bill 2021* ("**Bill**") which will wind up Financial Adviser Standards and Ethics Authority ("**FASEA**") as well create new penalties and sanctions which apply to financial advisers found to have breached their obligations.

Part 1 of this update covers the introduction of the single disciplinary body and the functions of the Financial Services and Credit Panel ("**Panel**").

Consultation for the Bill will close on 14 May 2021.

Annual registration of financial advisers

The legislation implements recommendation 2.10 of the Royal Commission and introduces an obligation for financial services licensee to register all financial advisers, and this registration must be renewed annually. The requirement will commence from 1 January 2022; however, it will not be an offence to provide financial advice while unregistered until 1 January 2023.

ASIC may determine the 'registration year' of a licensee (or class of licensees). For example, ASIC may determine that the registration year for all existing financial services licensees with a licence number ending in the number '3' commences on 1 April of each year and ends on 31 March of the following year.

Registration of a financial adviser

AFS licensee will be required to apply to ASIC to register a financial adviser on the *Register of Relevant Providers (Financial Advisers Register)* ("**FA Register**") and a fee will be payable upon lodgement of the application. The submission to ASIC must be in the approved form, and must include:

- a written declaration by the adviser that they are a fit and proper person to provide financial advice;
- a written declaration by the licensee on whether it is aware of any reason why the adviser might not be a fit and proper person to provide financial advice (this is not required if the adviser is also the licensee);
- a written declaration by the licensee that the adviser has met the education and training standards; and
- if the financial adviser provides tax (financial) advice services – a written declaration by the licensee that the adviser has met the additional education and training standard for the provision of tax (financial) advice services.

The requirement to make an assessment on whether the adviser is fit and proper is not intended to require the licensee to undertake additional investigation, but rather is to be based on the information already available to it.

Once the fee and application have been lodged, ASIC must register the adviser by recording that the adviser is registered on the FA Register. Once this is completed, ASIC must give written notice of the registration to the financial adviser and the licensee. The registration will come into force once ASIC records that the adviser is registered and will remain in force until the earliest of:

- the end of the licensee's registration year in which the application was made;
- the cancellation time specified in a registration prohibition order in force against an adviser;
- the time when a banning order against a financial adviser takes effect; or
- if the adviser is not also the licensee – the day the licensee ceases to authorise the adviser to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products.

ASIC can refuse to register an adviser if the adviser is banned or disqualified, has not complied with the education and training standards or is subject to a registration prohibition order.

What information will be available on the FA Register?

In addition to the information currently on the FA Register, ASIC must also include information on the following:

- whether the adviser's registration is in force;
- the end date until which the registration or renewal remains in force; and
- whether the adviser provides, or is to provide, tax (financial) advice services.

Impact of a Panel decision on registration

If a Panel makes an instrument imposing a registration suspension, at the end of the suspension period, the adviser's registration is automatically reinstated at the end of the period.

If a Panel makes an instrument imposing a registration prohibition order against an adviser, the 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. The licensee may apply to ASIC to register the adviser on, shortly before, or after the end of the prohibition end date.

Registration requirements for tax advisers

A licensee is required to state within the application for registration on the FA Register whether the adviser provides tax (financial) advice services, and ASIC is required to record this information on the FA Register. If the adviser has not complied with the additional education and training standards, ASIC will refuse to register the adviser.

Where the adviser is an already existing adviser on the FA Register, and then completes the additional training and education requirements to provide tax (financial) advice services, the licensee can lodge a notice to ASIC that the adviser is to provide tax (financial) services and provide details of such completion.

Applicable penalties

Contravention	Individual	Corporation
Providing personal advice to a retail client in relation to relevant financial products while unregistered	60 penalty units	300 penalty units
Providing a tax (financial) advice service without meeting the additional education and training standards	250 penalty units	1,250 penalty units
Providing a tax (financial) advice service without being a registered tax agent under the <i>Tax Agent Services Act 2009</i>	250 penalty units	1,250 penalty units

A penalty unit is \$222 at the date of this alert.

Winding up of FASEA

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. This part of the Bill removes the power for the Minister to appoint a standards setting body and instead, from 1 January 2022 the Minister may do the following:

- approve bachelor or higher degrees or equivalent qualifications, required for a person to be a financial adviser;
- approve the financial adviser exam;
- set continuing professional development requirements;
- set requirements for work and training requirements;
- set requirements for provisional financial advisers; and
- make a Code of Ethics.

FASEA will be wound up.

The transitional period in the Bill will preserve the legislation instruments made by FASEA, meaning advisers will need to continue to meet the education and training standards and the Code of Ethics until such time as the Minister amends these standards, or makes new standards.

What functions will ASIC perform?

ASIC may approve applications for foreign qualifications broadly consistent with the domestic qualification requirements approved by the Minister, and it will also be responsible for administering the adviser's exam approved by the Minister. ASIC will also receive the reports from licensees in the circumstances where a financial adviser does not complete the CPD requirement during the licensee's CPD year.

Tax (financial) advice services

This part of the Bill implements recommendation 7.1 of the Tax Practitioners Board Review by implementing a single registration and disciplinary system for financial advisers who provide tax (financial) advice services. These amendments permit financial advisers who have met the additional education and training standards within the Corporations Act, to provide tax (financial) advice services without needing to be registered under the *Tax Agent Services Act 2009*.

What is a tax (financial) advice service?

A tax (financial) advice service is defined within the *Tax Agent Services Act 2009* as a tax service provided by a financial services licensee or representative of a 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.

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

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 also complied with the additional education and training standard under the Corporations Act; or
- where the tax (financial) advice service is provided on a person or entity's behalf – the person providing the advice must either be a registered tax agent or a qualified tax relevant provider. This provides for the case where tax (financial) advice services are provided on behalf of a financial services licensee or an authorised representative of a financial services licensee.

The Minister has the power to make legislative instruments determining the degrees, qualifications, courses, work and continuing professional development required to provide tax (financial) advice services. It was decided that it is appropriate to use delegated legislation to prescribe the education and training requirements to ensure that the standards can be updated regularly.

Applicable penalties

Contravention	Individual	Corporation
A person or entity knowingly provides a tax (financial) services that is not a BAS services for a fee or reward but did not comply with the requirements above (i.e. Registration under the Tax Agent Services Act etc)	250 penalty units	1,250 penalty units
A person advertises that they will provide a tax (financial) service but are not either a registered tax agent or a qualified tax relevant provider	50 penalty units	250 penalty units
Financial adviser fails to comply with the continuing professional development requirement for the provision of tax (financial) advice	A Financial Services and Credit Panel may be convened to take disciplinary action against the financial adviser	N/A



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