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FINANCIAL SECTOR REFORM (HAYNE ROYAL COMMISSION RESPONSE -  
A NEW DISCIPLINARY SYSTEM FOR FINANCIAL ADVISERS) BILL 2021

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# **Glossary**

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The following abbreviations and acronyms are used throughout this exposure draft explanatory material

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
AAT	Administrative Appeals Tribunal
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Bill	<i>Financial Sector Reform (Hayne Royal Commission Response - A New Disciplinary System for Financial Advisers) Bill 2021</i>
Corporations Act	<i>Corporations Act 2001</i>
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 <i>A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i> , September 2011 edition
Tax Practitioners Board Review	Independent Review of the Tax Practitioners Board

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# **Chapter 1**

## ***A new disciplinary system for financial advisers***

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### **Outline of chapter**

1.1 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, which apply to financial advisers and financial services licensees found to have breached their obligations under the Corporations Act;
- introducing a new annual 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.

1.2 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***

1.3 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.

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1.4 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.

1.5 Recommendation 2.10 of the Financial Services Royal Commission Final Report 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.

1.6 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.

1.7 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***

1.8 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.

1.9 On 27 November 2020, the Government released the final report of the Tax Practitioners Board Review 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.

1.10 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.

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## Summary of new law

### *Single disciplinary body for financial advisers*

1.11 The Bill implements recommendation 2.10 of the Financial Services Royal Commission Final Report by establishing a single disciplinary body for relevant providers.

1.12 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 a financial services licence or on behalf of the licensee. In this explanatory document, the term ‘financial adviser’ is used instead of ‘relevant provider’.

1.13 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.

1.14 ASIC is required to convene a Financial Services and Credit Panel if ASIC reasonably believes that a financial adviser has failed to comply with his or her obligations under the Corporations Act, and for which ASIC does not make a banning order.

1.15 A Financial Services and Credit Panel is required to comprise 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.

1.16 The list of eligible persons 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.

1.17 Once convened, a Financial Services and Credit Panel may issue an infringement notice, impose an administrative sanction, or both. The types of administrative sanctions that a panel can impose are warnings or reprimands, directions to undertake specified training, supervision, counselling or reporting and orders suspending or cancelling an adviser’s registration. A Financial Services and Credit Panel may also recommend that ASIC seek a civil penalty for certain breaches of the financial services law.

1.18 However, before a Financial Services and Credit Panel can issue an infringement notice or impose an administrative sanction, the panel must give the financial adviser a notice with the details of the relevant circumstances, the proposed sanction and the adviser’s right to request a hearing or make a submission to the panel.

1.19 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.

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### ***Registration of financial advisers***

1.20 From 1 January 2023, a financial adviser will need to be registered on the Register of Relevant Provider (Financial Advisers Register) to provide personal advice to retail clients in relation to relevant financial products. A financial adviser’s registration will need to be renewed annually.

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

1.21 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.

1.22 The Minister will be responsible for making education and training standards and the Code of Ethics. ASIC will be responsible for approving foreign qualifications broadly consistent with the domestic qualifications approved by the Minister and for administering the financial adviser examination approved by the Minister.

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

1.23 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.

1.24 From 1 January 2022, financial advisers who meet the education and training standard to provide tax (financial) advice services may do so without being registered under the *Tax Agent Services Act 2009*.

1.25 A person or entity who provides tax agent services or BAS services must continue to be a registered tax agent or registered BAS agent under the *Tax Agent Services Act 2009*.

## **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
<b>Single disciplinary body for financial advisers</b>	
ASIC must convene a Financial Services and Credit Panel if it reasonably believes that a financial adviser has breached their obligations under the Corporations Act, and for which ASIC does not make, or propose to make, a banning order. Once convened, a panel can:	ASIC may make banning orders for serious breaches of the Corporations Act.

<i>New law</i>	<i>Current law</i>
<ul style="list-style-type: none"> <li>• issue an infringement notice or recommend that ASIC seek a civil penalty; and/or</li> <li>• impose an administrative sanction.</li> </ul>	
<b>Registration of financial advisers</b>	
In addition to authorising a person to provide financial advice, the financial services licensee is required to register (and annually renew) the financial adviser.	A financial services licensee is required to authorise a person to provide financial advice on their behalf.
<b>Wind up of FASEA and transfer of its standards functions to the Minister and ASIC</b>	
<p>The Minister may make education and training standards and a Code of Ethics.</p> <p>ASIC may approve foreign qualifications that are broadly consistent with the domestic qualifications approved by the Minister and administer an exam for financial advisers approved by the Minister.</p>	<p>The Minister may establish a standards body by legislative instrument.</p> <p>The standards body is responsible for performing all of the standards-setting functions, including determining who will administer the financial adviser exam.</p>
<b>Regulation of tax (financial) advisers</b>	
To provide tax (financial) advice services, a person must either be a registered tax agent, or a financial adviser who has met the education and training standards to provide tax (financial) advice services under the Corporations Act.	<p>Financial advisers who provide tax (financial) advice services must:</p> <ul style="list-style-type: none"> <li>• be registered as a tax (financial) adviser under the <i>Tax Agent Services Act 2009</i>, which includes meeting the <i>Tax Agent Services Act 2009</i> education and experience requirements;</li> <li>• comply with the Code of Professional Conduct under the <i>Tax Agent Services Act 2009</i>;</li> <li>• be authorised as a financial adviser under the Corporations Act, which includes meeting Corporations Act education and training standards; and</li> <li>• comply with the Code of Ethics under the Corporations Act.</li> </ul>

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## Detailed explanation of new law

1.26 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?*

1.27 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.

1.28 The Financial Services and Credit Panel is a panel convened by ASIC, and is comprised of an ASIC staff member, who will be the Chair of the panel, and at least two external members. *[Items 1, 12 and 16, section 5 of the ASIC Act and sections 9 and 910A of the Corporations Act]*

1.29 From 1 January 2022, a Financial Services and Credit Panel can be convened to take action against a financial adviser for an act or an omission that occurs, or a circumstance that arises, on or after 1 January 2022. *[Item 84, sections 1684A and 1684B of the Corporations Act]*

1.30 From 1 January 2022, ASIC must convene a Financial Services and Credit Panel if ASIC reasonably believes that a person has contravened a restricted civil penalty provision or that a specified circumstance exists or has occurred, which would affect the person's ability to provide financial advice, and ASIC does not make, or propose to make, a banning order for this matter. *[Items 11 and 84, section 139 of the ASIC Act and sections 1684A and 1684B of the Corporations Act]*

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

1.31 Each Financial Services and Credit Panel must comprise of a Chair, who is a staff member of ASIC, and at least two other members. *[Items 2, 3 and 11, sections 5 and 139 of the ASIC Act]*

1.32 ASIC must appoint the Chair and the other members by written instrument. *[Item 11, section 140(1) of the ASIC Act]*

1.33 The members, other than the Chair, must be appointed from a list of eligible persons approved by the Minister. *[Item 11, sections 140(2) and 140(3) of the ASIC Act]*

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1.34 The Minister may appoint a person to the list of eligible persons by making a written determination. To be appointed to this 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; or
- taxation

*[Item 11, sections 141(1) and (2) of the ASIC Act]*

1.35 Given its expertise in tax-related matters, the Minister may consult with the Tax Practitioners Board to identify eligible persons with relevant taxation expertise. *[Items 4 and 11, sections 5 and 141(3) of the ASIC Act]*

1.36 A written determination made by the Minister 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 in character as it does not determine or alter the law, but rather applies the law to particular individuals, who are eligible to be appointed as members of a Financial Services and Credit Panel. *[Item 11, section 141(4) of the ASIC Act]*

1.37 The application of section 33(4) 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.

1.38 Once appointed by ASIC as a member of a Financial Services and Credit Panel, members must act in accordance with any terms and conditions set by ASIC. *[Item 11, section 146 of the ASIC Act]*

1.39 Given that a Financial Services and Credit Panel includes industry participants, it is important that conflicts of interest are appropriately managed. A person appointed by ASIC to a panel must disclose to ASIC any direct or indirect financial or other interests, such as personal relationships, which conflict, or could conflict, with the member’s duties. *[Item 11, section 142 of the ASIC Act]*

1.40 A member of a Financial Services and Credit Panel may resign as a member of a panel or have their appointment terminated by ASIC. *[Item 11, sections 144 and 145 of the ASIC Act]*

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1.41 ASIC may replace a member of the panel (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. *[Item 11, section 140 of the ASIC Act]*

1.42 If the Chair of a Financial Services and Credit Panel resigns or is terminated, ASIC may replace them by appointing another ASIC staff member as Chair of the panel.

1.43 Members of a Financial Services and Credit Panel will be paid an allowance. The allowance amount will be determined by the Remuneration Tribunal, or if there is no such determination, by the Minister. *[Item 11, section 143 of the ASIC Act]*

1.44 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*. *[Item 11, section 147 of the ASIC Act]*

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

1.45 The 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’. *[Items 43 and 72B, sections 921L and 1317DATB of the Corporations Act]*

1.46 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 a 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.

*[Item 4, section 5 of the ASIC Act]*

1.47 The Financial Services and Credit Panel will not have the power to take action against financial services licensees or authorised representatives of financial services licensees.

1.48 If a financial services licensee or authorised representative is also a financial adviser, the Financial Services and Credit Panel will have the power to take action against the individual if the relevant conduct occurs in the course of that person performing their duties as a financial

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adviser, not in the course of performing their duties as a financial services licensee or authorised representative.

1.49 Disciplinary action involving financial services licensees and authorised representatives of financial services licensees will continue to be administered by ASIC, using ASIC's existing powers under the Corporations legislation, which include the power to make a banning order and commence criminal or civil proceedings.

1.50 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?***

1.51 The Bill creates the power for a Financial Services and Credit Panel to take action against financial advisers who do not comply with their obligations under the Corporations Act, or in situations where a specified circumstance exists or has occurred.

1.52 If ASIC reasonably believes that a financial adviser has contravened a 'restricted civil penalty provision' and does not make, or propose to make, a banning order, ASIC must convene a Financial Services and Credit Panel to decide whether or not to take action against a financial adviser. *[Item 11, section 139 of the ASIC Act]*

1.53 A 'restricted civil penalty provision' refers to certain provisions, which if contravened, allow a Financial Services and Credit Panel to issue an infringement notice or recommend to ASIC that it seek a civil penalty. A failure to comply with any of the following requirements is a contravention of a restricted civil penalty provision:

- the education and training standards;
- the Code of Ethics;
- the obligations of a provisional financial adviser, or the supervisor of a provisional financial adviser;
- an administrative sanction imposed by a Financial Services and Credit Panel; and
- being registered as a financial adviser.

*[Items 4, 12, 20, 43 and 73, section 5 of the ASIC Act and sections 9, 910A, 921Q(3) and 1317E of the Corporations Act]*

1.54 ASIC must also convene a Financial Services and Credit Panel if ASIC reasonably believes that a specified circumstance exists or has occurred and for which ASIC does not make, or propose to make, a banning order. *[Item 11, section 139 of the ASIC Act]*

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1.55 The requirement for ASIC to ‘reasonably believe’ 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’.

1.56 The ‘specified circumstances’ 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 financial advice. In cases where these ‘specified circumstances’ exist or have occurred, a Financial Services and Credit Panel may impose an administrative sanction.

1.57 These specified circumstances exist or have occurred where:

- the financial adviser becomes insolvent;
- the financial adviser is convicted of fraud;
- the Financial Services and Credit Panel reasonably believes that the financial adviser is not a fit and proper person to provide financial advice;
- the Financial Services and Credit 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
- a financial adviser has been an officer of a corporation that has been unable to pay its debts.

*[Item 43, section 921L(1) of the Corporations Act]*

1.58 The matters for which a Financial Services and Credit Panel may impose an administrative sanction against a financial adviser are predominantly the same as the matters for which ASIC may make a banning order. However, unlike ASIC’s power to make a banning order, a Financial Services and Credit Panel may:

- take action against a financial adviser for a breach of the Code of Ethics; and
- not take action against the financial services licensee or an authorised representative of a financial services licensee.

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1.59 ASIC may also 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 the Financial Services and Credit Panel. *[Items 7, 23 to 26 and 86 to 89, section 102 of the ASIC Act, section 920A of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]*

1.60 As noted above, one of the matters for which a Financial Services and Credit Panel may impose an administrative sanction is if the panel reasonably believes that a financial adviser is not a fit and proper person to provide financial advice. *[Item 43, section 921L(1)(c) of the Corporations Act]*

1.61 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*, has been convicted of an offence in the last ten years; or has been the subject of disciplinary action by a Financial Services and Credit Panel in the last ten years. *[Item 43, section 921R of the Corporations Act]*

1.62 These matters are adapted from the fit and proper person test that ASIC must apply in determining whether to grant a financial services licence or make a banning order. The matters to which the Financial Services and Credit Panel must have regard are slightly different to the matters to which ASIC must have regard, as the panel does not have the power to take action against financial services licensees. These differences reflect that financial advisers are required to individuals, while a financial services licensee can also be a body corporate and have a broader range of obligations under the Corporations Act.

1.63 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?***

1.64 The Chair of a Financial Services and Credit Panel must convene meetings, as required, to perform and exercise the panel's disciplinary functions and powers. *[Items 7 and 11, sections 102 and 148(1) of the ASIC Act]*

1.65 Meetings of the 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. *[Item 11, section 152A of the ASIC Act]*

1.66 Meetings may be convened at any time, but must not be convened if the Chair has a conflict of interest. A meeting of a Financial

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Services and Credit Panel, unlike a hearing, would not be conducted in the presence of the financial adviser or their representatives. *[Item 11, section 148 of the ASIC Act]*

1.67 The Chair of a Financial Services and Credit Panel must preside at all meetings of the panel. If the Chair has a conflict of interest, ASIC may terminate the Chair's appointment and appoint another ASIC staff member as Chair. *[Item 11, sections 140, 148 and 149 of the ASIC Act]*

1.68 If a person is terminated as Chair of the Financial Services and Credit Panel, that person may be appointed as Chair of a future Financial Services and Credit Panel.

1.69 If a member (other than the Chair) has 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 the 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. *[Item 11, sections 150 and 154 of the ASIC Act]*

1.70 A quorum is made up of a majority of members of the 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. *[Item 11, section 151 of the ASIC Act]*

1.71 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. *[Item 11, section 152 of the ASIC Act]*

1.72 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. *[Item 11, section 155 of the ASIC Act]*

1.73 In making disciplinary decisions, a Financial Services and Credit Panel must take into account evidence given at a hearing, a submission lodged with the panel before the day of a hearing, or a submission made in response to a proposed action notice. *[Item 11, section 157 of the ASIC Act]*

1.74 A Financial Services and Credit Panel may regulate the conduct of its meetings as it considers appropriate. *[Item 11, section 153 of the ASIC Act]*

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

1.75 If a financial adviser contravenes a restricted civil penalty provision or a specified circumstances exists or has occurred, a Financial Services and Credit Panel may take action against the financial adviser.

1.76 The action that a Financial Services and Credit Panel may take against the financial adviser depends on the nature of the contravention.

***Administrative sanctions***

1.77 If a specified circumstance exists or has occurred, a panel may make an instrument imposing one or more administrative sanctions against the relevant provider. On the other hand, if a financial adviser contravenes a restricted civil penalty provision, a panel may impose an administrative sanction and/or either issue an infringement notice or make a recommendation that ASIC apply to the Court for a civil penalty.

1.78 If a specified circumstance exists or has occurred, the administrative sanctions that a Financial Services and Credit Panel may impose against a financial adviser include warnings or reprimands; directions to undertake specified training, counselling, supervision or reporting certain matters to ASIC; and orders suspending or prohibiting a financial adviser's registration. *[Item 43, section 921M of the Corporations Act]*

1.79 A warning, reprimand, 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 apply the law to particular financial advisers. *[Item 43, section 921L(4) of the Corporations Act]*

1.80 If a specified circumstance exists or has occurred, a Financial Services and Credit Panel cannot make an instrument imposing one or more administrative sanctions 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);
- a statement about whether the panel proposes to direct ASIC to include the details of the instrument on the Register of Relevant Providers (Financial Advisers Register) - and, if so, information on the adviser's right

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to request a hearing or make a submission about this within the response period; and

- 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, if stated, include the details of the instrument on the Register of Relevant Providers (Financial Advisers Register).

*[Items 4, 12, 20 and 43, sections 5, 9, 910A, 921L and 921PA of the Corporations Act]*

1.81 Within 28 days of being given the 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.

*[Item 43, section 921PA of the Corporations Act]*

1.82 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, and if stated in the notice, may also direct ASIC to include the details of the instrument on the Register of Relevant Providers (Financial Advisers Register). *[Item 43, sections 921L and 921PB of the Corporations Act]*

1.83 If the financial adviser requests a hearing, the Financial Services and Credit Panel must hold a hearing. However, even if a financial adviser requests a hearing, the financial adviser can decide not to appear at the hearing. Where a person requests a hearing but does not appear, a hearing is still taken to be held for the purposes of the panel's decision-making processes. *[Item 11, sections 156 and 161 of the ASIC Act]*

1.84 If a hearing is held or the financial adviser makes a submission within the response period, the panel's decision must be informed by the evidence given at the hearing or the submission. *[Item 43, section 921L(2) of the Corporations Act]*

1.85 If the financial adviser requests a hearing or makes a submission within the response period, the Financial Services and Credit Panel cannot make an instrument imposing an administrative sanctions unless it holds a hearing or takes into account the submission. After the hearing is held or submission is considered, the panel may decide to:

- take no further action against the financial adviser; or

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- make the instrument specified in the proposed action notice; or
  - make a different instrument to the one mentioned in the proposed action notice; and
  - if the financial adviser is alleged to have contravened a restricted civil penalty provision - issue an infringement notice or make a recommendation to ASIC that it apply to the Court for a civil penalty, whether or not this was mentioned in the proposed action notice.

*[Items 43 and 72B, sections 921L(2), 921Q and 1317DATB of the Corporations Act]*

1.86 If a Financial Services and Credit Panel makes an instrument against the financial adviser, the panel must give a copy of the instrument and a statement of reasons to the financial adviser, the financial services licensee (if the financial 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. *[Item 43, section 921N of the Corporations Act]*

1.87 A copy of an instrument made against the financial adviser is required to be provided to ASIC in all cases. However, the giving of this notice does not have the effect of requiring ASIC to include the details of the instrument on the Register of Relevant Providers (Financial Advisers Register).

1.88 The requirement to give a copy of the instrument to the financial adviser along with a statement of reasons is consistent with the requirements for reviewable decisions under the Corporations Act, which require the decision-maker (in this case, the Financial Services and Credit Panel) to take reasonable steps to give the affected person written notice of the decision and the person's rights to have that decision reviewed by the AAT.

1.89 If the Financial Services and Credit Panel decides to make an instrument against the financial adviser, the panel must also decide whether or not the details of the instrument should be included on the Register of Relevant Provider (Financial Advisers Register). *[Item 43 section 921PB of the Corporations Act]*

1.90 The Financial Services and Credit Panel can only decide to direct ASIC to include the details of an instrument on the Register of Relevant Providers (Financial Advisers Register) if the panel has given the financial adviser a proposed action notice about the specified circumstance, decides to make an instrument against the relevant provider and if:

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- the proposed action notice stated that the panel intended to include the details of the instrument on the Register – the financial adviser did not request a hearing or make a submission, or the panel held a hearing in response to a request by the adviser or took into account a submission and decided to include the details of the instrument on the Register; or
  - the proposed action notice stated that the panel did not intend to include the details of the instrument on the Register – the panel held a hearing in response to a request by the financial adviser or took into account a submission made by the adviser and decided to include the details of the instrument on the Register.

*[Item 43, section 921PB of the Corporations Act]*

1.91 A financial adviser must comply with an instrument imposing an administrative sanction made by a Financial Services and Credit Panel. A failure to comply with an instrument is a contravention of a restricted civil penalty provision, in response to which a panel can make another instrument (for a contravention of a financial services law), and either issue an infringement notice or make a recommendation that ASIC apply to the Court for a civil penalty. *[Item 43, section 921M(2) of the Corporations Act]*

### ***Infringement notices***

1.92 If a Financial Services and Credit Panel reasonably believes that a financial adviser has contravened a restricted civil penalty provision, the panel may take one or both of the following actions:

- make an instrument imposing one or more administrative sanctions against the financial adviser for a contravention of a financial services law; and/or
- give the financial adviser an infringement notice or make a recommendation to ASIC that it apply to the Court for a civil penalty for the alleged contravention of a restricted civil penalty provision.

*[Items 43 and 67A, sections 921, 921Q and 1317DAM of the Corporations Act]*

1.93 As for the process of imposing an administrative sanctions, 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, infringement notice amount, whether the panel proposes to direct ASIC to include the details of the infringement notice on the Register of Relevant Providers (Financial Advisers Register) and inform the adviser of his or her right to request a hearing or make a submission

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within 28 days of the notice being given. *[Items 43 and 72B, sections 921PA and 1317DATB of the Corporations Act]*

1.94 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 take into account the submission. *[Item 11, sections 156 and 157 of the ASIC Act]*

1.95 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.

1.96 If the financial adviser does not request a hearing or make a submission within the specified timeframe, the Financial Services and Credit Panel may take the action specified in the proposed action notice. *[Items 67AA, 67A, 67B, 67C, 72A and 72B, sections 1317DAM, 1317DAPA, 1317DATA and 1317DATB of the Corporations Act]*

1.97 As for the process for administrative sanctions, 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; or
- make an instrument imposing an administrative sanction for a contravention of a financial services law, whether or not this was mentioned in the proposed action notice.

*[Items 43, 67A and 72B, sections 921L, 921Q, 1317DAM and 1317DATB of the Corporations Act]*

1.98 If the Financial Services and Credit Panel decides to issue an infringement notice for the alleged contravention of a restricted civil penalty provision, the panel must also decide whether or not the details of the infringement notice should be included on the Register of Relevant Provider (Financial Advisers Register). *[Items 43 and 65, sections 921PB and 922Q(2)(uf) of the Corporations Act]*

1.99 The Financial Services and Credit Panel can only decide to direct ASIC to include the details of an instrument on the Register of Relevant Providers (Financial Advisers Register) if the panel has given

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the financial adviser a proposed action notice about the relevant contravention, decided to issue an infringement notice and if:

- the proposed action notice stated that the panel intended to include the details of the infringement notice on the Register – the financial adviser did not request a hearing or make a submission, or the panel held a hearing in response to a request by the adviser or took into account a submission and decided to include the details of the infringement notice on the Register; or
- the proposed action notice stated that the panel did not intend to include the details of the infringement notice on the Register – the panel held a hearing in response to a request by the financial adviser or took into account a submission made by the adviser and decided to include the details of the infringement notice on the Register.

*[Item 43, section 921PB of the Corporations Act]*

1.100 An infringement notice must be given within 12 months after the day on which the alleged contravention of a restricted civil penalty provision took place. *[Item 67B, section 1317DAM(2) of the Corporations Act]*

1.101 The infringement notice amount for an alleged contravention of a restricted civil penalty provision is 12 penalty units for a single contravention. *[Items 70 to 72, section 1317DAP of the Corporations Act]*

1.102 For multiple alleged contraventions of a restricted civil penalty provision, the infringement notice amount is 12 penalty units multiplied by the number of contraventions. *[Item 72, section 1317DAP of the Corporations Act]*

1.103 Two or more infringement notices can be given under the infringement notice regime. *[Item 72D, section 1317DAV of the Corporations Act]*

### ***Civil penalties***

1.104 Instead of issuing an infringement notice for an alleged contravention of a restricted civil penalty provision, a Financial Services and Credit Panel may make a recommendation that ASIC apply to the Court for a civil penalty. *[Item 43, section 921Q of the Corporations Act]*

1.105 Unlike other civil penalty provisions in the Corporations Act, ASIC must not apply to the Court for a civil penalty for an alleged contravention of a restricted civil penalty provision unless a Financial Services and Credit Panel has made a recommendation that ASIC do so. This ensures that Financial Services and Credit Panels have a central role in decision-making concerning civil penalty actions for these contraventions. *[Items 43 and 74, sections 921Q and 1317J of the Corporations Act]*

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1.106 The exception 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 situations, ASIC may apply to the Court for a civil penalty without the need for a recommendation from a panel. *[Item 74, section 1317J of the Corporations Act]*

1.107 If ASIC decides not to follow a recommendation made by a Financial Services and Credit Panel, 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. *[Item 10, section 136(1)(da) of the ASIC Act]*

1.108 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.

1.109 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). *[Item 65, section 922Q(2)(ug) of the Corporations Act]*

### ***Financial Services and Credit Panel hearings***

1.110 In certain circumstances a Financial Services and Credit Panel is required to hold hearings to support the performance and exercise of the panel's functions and powers.

1.111 The Financial Services and Credit Panel must hold a hearing if:

- 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 financial adviser requests a hearing in response to a proposed action notice.

*[Items 11, 25, 43, 72B and 88, section 156 of the ASIC Act, sections 920A, 921L, 920PB and 1317DATB of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]*

1.112 The Financial Services and Credit Panel may also hold a hearing to inform its decision on whether to vary or revoke an instrument

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imposing an administrative sanction against a financial adviser. However, this hearing is to be held at the discretion of the panel, rather than at the request of a financial adviser. *[Item 11, section 156 of the ASIC Act]*

1.113 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. *[Item 11, section 159 of the ASIC Act]*

1.114 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 a hearing uses technology, all of the participants in the hearing, including the members of the panel, can use this technology to participate in the hearing. *[Item 11, section 158 of the ASIC Act]*

1.115 A 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 the hearing, the person may, before the day of the hearing, make any written submissions to the panel that the person wishes the panel to take into account in making the proposed decision. *[Item 11, section 161 of the ASIC Act]*

1.116 The purpose of the 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 panel will make a decision on any information and documents before it.

1.117 The 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. *[Item 11, section 162 of the ASIC Act]*

1.118 A hearing must be conducted with as little formality and technicality, and expedition, as can be achieved while still allowing proper consideration of the matter. While the rules of natural justice must be observed, the concepts of 'burden of proof' and rules of evidence are not applicable. 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. *[Item 11, sections 158 and 164 of the ASIC Act]*

1.119 A Financial Services and Credit Panel hearing is intended to serve as an inquiry to determine the facts and to assist the panel make an informed decision.

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1.120 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. 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. ASIC staff members may also be present at a hearing. *[Item 11, sections 160 and 163 of the ASIC Act]*

1.121 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. *[Item 11, section 164 of the ASIC Act]*

1.122 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.

*[Item 11, section 165 of the ASIC Act]*

1.123 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. The 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. *[Item 11, section 166 of the ASIC Act]*

1.124 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. *[Item 11, section 171A of the ASIC Act]*

1.125 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. *[Item 11, section 171B of the ASIC Act]*

1.126 The Bill creates new offence provisions to protect the integrity of Financial Services and Credit Panel hearings.

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1.127 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 the same as the equivalent penalties for ASIC hearings. *[Item 11, section 167 of the ASIC Act]*

1.128 It is an offence to give evidence at a hearing that is false or misleading in a material particular, 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 the same as the existing penalty for giving false or misleading evidence at an ASIC hearing. *[Item 11, section 168 of the ASIC Act]*

1.129 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.

1.130 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.

1.131 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

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publication of that evidence or those matters is in force – the penalty is 120 penalty units.

*[Item 11, sections 169, 170 and 171 of the ASIC Act]*

1.132 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 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.

1.133 In all but one of these cases, the penalties for these strict liability offences are below the maximum penalty amount for strict liability offences specified in the Guide to Framing Commonwealth Offences. The exception is the penalty for publication of evidence or matters contained in documents restricted by the 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 a Financial Services and Credit 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.

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

1.134 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. *[Items 6 and 11, sections 93AA and 171D(1) of the ASIC Act]*

1.135 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). *[Item 63, section 922Q(2)(q) of the Corporations Act]*

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1.136 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 may ask a Financial Services and Credit Panel to decide whether to consent to the variation or withdrawal of the undertaking. *[Item 11, section 171D(2), (3) and (4) of the ASIC Act]*

1.137 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.

*[Item 11, sections 171D(5) and (6) of the ASIC Act]*

***Can a financial adviser appeal or review the decision of a Financial Services and Credit Panel to impose an administrative sanction?***

1.138 A decision by a Financial Services and Credit Panel to make an instrument imposing an administrative sanction is a reviewable decision. This means that the financial adviser may apply to the AAT for a merits review. *[Item 43, section 921RA of the Corporations Act]*

1.139 In addition to being able to apply for a merits review, a financial adviser can also make an application to ASIC for a Financial Services and Credit Panel to vary or revoke a direction or order made against the financial adviser. If the financial adviser makes an application, ASIC may decide not to make a request to a Financial Services and Credit Panel for a decision. However, ASIC's decision is also subject to merits review. *Item 43, sections 921P(3) and (4) of the Corporations Act]*

1.140 ASIC may also request 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. *[Item 43, section 921P(2) of the Corporations Act]*

1.141 In response to a request, a Financial Services and Credit Panel may decide to do one of the following:

- revoke the instrument;

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- 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.

*[Item 43, section 921P(5) of the Corporations Act]*

1.142 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 Financial Services and Credit Panel decides to vary or revoke the instrument, the Chair must also give written notice of the panel’s decision to the financial services licensee and ASIC. *[Item 43, sections 921P(6) and (7) of the Corporations Act]*

1.143 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 subject to merits review by the AAT. *[Item 43, section 921RA of the Corporations Act]*

1.144 If the details of the original instrument made by the Financial Services and Credit Panel were 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 Register. *[Item 65, section 922Q of the Corporations Act]*

1.145 The financial adviser may also apply to the AAT for a review of the Financial Services and Credit Panel’s original decision to include the details of an instrument made by the panel on the Register of Relevant Providers (Financial Advisers Register). *[Item 43, section 921RA 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?***

1.146 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.

1.147 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.

1.148 However, if the Financial Services and Credit Panel decides to direct ASIC to include the details of the infringement notice on the

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Register of Relevant Providers (Financial Advisers Register), the financial adviser does have the right to apply to the AAT for a review of this decision. *[Item 43 and 65, section 921RA of the Corporations Act]*

1.149 Within 28 days of being given the infringement notice, a financial adviser can make a request, via ASIC, for a Financial Services and Credit Panel to withdraw an infringement notice. ASIC may also initiate a request for the 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. *[Item 72B, sections 1317DATD(1) and (2) of the Corporations Act]*

1.150 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. *[Item 72B, sections 1317DATD(3) and (5) of the Corporations Act]*

1.151 When deciding whether or not to withdraw the infringement notice, the Financial Services and Credit Panel:

- must take into account any written representations seeking the withdrawal that were given by the person to ASIC; 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.

*[Item 72B, section 1317DATD(4) of the Corporations Act]*

1.152 If the Financial Services and Credit Panel withdraws the infringement notice and the person has already paid all or part of the amount stated in the infringement notice, ASIC must refund the amount already paid. *[Item 72B, section 1317DATD(6) of the Corporations Act]*

1.153 If the infringement notice is withdrawn, the Financial Services and Credit Panel may also make a recommendation to ASIC to apply to the Court for a civil penalty for the alleged contravention of a restricted

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civil penalty provision. *[Items 43 and 74, sections 921Q and 1317J of the Corporations Act]*

1.154 If the 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.

*[Item 72B, section 1317DATC(2) of the Corporations Act]*

1.155 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 civil proceedings for the alleged contravention of a restricted civil penalty provision; or
- refuse to pay - ASIC may decide to apply to the court for a civil penalty for the alleged contravention of a restricted civil penalty provision.

1.156 The Financial Services and Credit Panel's decision not to withdraw an infringement notice is not reviewable.

1.157 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.

*[Items 43 and 72D, sections 921Q and 1317DAV of the Corporations Act]*

1.158 ASIC can make an application to the Court for an alleged contravention of a restricted civil penalty provision in the following circumstances – if the 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.

*[Items 43, 72D and 74, sections 921Q, 1317DAV and 1317J of the Corporations Act]*

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1.159 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.

1.160 The issue of an infringement notice does not limit a court's discretion to determine the amount of a penalty to be imposed on a person who is found to have contravened a restricted civil penalty provision. *[Item 72D, section 1317DAV of the Corporations Act]*

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

1.161 The infringement notice 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 or to pay in instalments. *[Item 67D, section 1317DAP(1)(k) of the Corporations Act]*

1.162 A financial adviser has 28 days after the day on which the infringement notice is given to pay, unless this payment period is extended by the Chair of the Financial Services and Credit Panel. *[Item 72B, section 1317DATC(2) of the Corporations Act]*

1.163 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 make an arrangement for the financial adviser to pay the infringement notice in instalments. *[Item 72B, sections 1317DATC) of the Corporations Act]*

1.164 The Chair 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. *[Item 72B, section 1317DATC of the Corporations Act]*

1.165 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;
- seven days after the day the request is taken to be refused.

*[Item 72B, section 1317DATC of the Corporations Act]*

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1.166 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. *[Item 72B, section 1317DATC(2) of the Corporations Act]*

1.167 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.

*[Item 72B, section 1317DATC of the Corporations Act]*

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

1.168 In addition to being required to convene an FSCP in certain circumstances, ASIC may also 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 the Financial Services and Credit Panel. *[Items 7, 11, 23 to 26 and 86 to 89, sections 102 and 139 of the ASIC Act, section 920A of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]*

1.169 The delegation of ASIC's power to make a banning order to the Financial Services and Credit Panel codifies existing 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.

1.170 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. *[Items 23 to 26 and 86 to 89, section 920A of the Corporations Act and section 80 of the National Consumer Credit Protection Act 2009]*

1.171 If ASIC convenes a Financial Services and Credit Panel, ASIC is required to provide staff and support facilities to the Financial Services and Credit Panel for the effective performance and exercise of the panel's functions and powers. *[Item 5, section 11 of the ASIC Act]*

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1.172 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 performance of ASIC's standards functions, including applications for approval of foreign qualifications and the administration of the financial adviser exam; 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.

*[Item 10, section 136 of the ASIC Act]*

1.173 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. *[Item 8, section 127 of the ASIC Act]*

1.174 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.

*[Item 11, section 171C of the ASIC Act]*

1.175 Given the potentially sensitive nature of the 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

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an offence. The penalty for this offence is two years imprisonment.  
*[Item 11, section 171C(1) of the ASIC Act]*

1.176 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*.

## **Part 2 - Registration of financial advisers**

1.177 The Bill implements recommendation 2.10 of the Financial Services Royal Commission Final Report, which recommended that all financial advisers who provide personal financial advice to retail clients be registered. *[Item 43, section 921S of the Corporations Act]*

1.178 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. *[Item 43, sections 921U, 921V and 921W of the Corporations Act]*

1.179 A financial adviser's registration must be renewed annually. *[Item 43, sections 921Y and 921Z of the Corporations Act]*

### ***What is the process for registering financial advisers?***

1.180 A financial services licensee is required to apply to ASIC to register a financial adviser. If the financial adviser is also the financial services licensee, the licensee is required to submit an application to register themselves. *[Item 43, sections 921U and 921V of the Corporations Act]*

1.181 An application for registration must be submitted to ASIC in the approved form and include:

- a written declaration by the financial adviser that they are a fit and proper person to provide financial advice;
- 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 the 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

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and training standard for the provision of tax (financial) advice services.

*[Item 43, sections 921U and 921V of the Corporations Act]*

1.182 The requirement that the financial services licensee make a declaration about whether they have reason to believe that 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 by the panel.

1.183 If either the financial adviser or the financial services licensee provide false or misleading information in the application for registration, or the declarations provided with those applications, they commit an offence and contravene a civil penalty provision under sections 1308(1) and 1308(4) of the Corporations Act. *[Item 43, sections 921U and 921V of the Corporations Act]*

1.184 A declaration by the 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 financial advice, ASIC must convene a Financial Services and Credit Panel to decide whether to make an instrument imposing an administrative sanction action against the financial adviser.

1.185 This process ensures that financial services licensees are encouraged to disclose any information available to them, while also ensuring that financial advisers are subject to disciplinary action only after an investigation and formal decision-making process, rather than mere suspicion.

1.186 A fee upon lodgement of an application for registration is payable. The fee amount is to be prescribed in the *Corporations (Fees) Regulations 2001*.

1.187 ASIC must register a financial adviser by recording that the adviser is registered on the Register of Relevant Providers (Financial Advisers Register), which is maintained by ASIC under section 922A of the Corporations Act. Immediately 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). *[Item 43, sections 921X(1), (4) and (5) of the Corporations Act]*

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1.188 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 end of the financial services licensee’s registration year in which the application was made;
- 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.

*[Items 13 and 43, sections 910A, 921Y(1) and 921Z(1) of the Corporations Act]*

1.189 The financial services licensee is required to renew a financial adviser’s registration annually by submitting an application for registration renewal in the approved form. This form will include the same declarations regarding fitness and propriety and education and training as for the initial registration. ASIC must renew a financial adviser’s registration unless one or more grounds for refusal applies. *[Item 43, sections 921W and 921X of the Corporations Act]*

1.190 A renewed registration comes into force immediately after the end of the financial services licensee’s registration year in which the application is made to ensure that there is no gap or delay that affects the provision of financial services. If ASIC renews a financial adviser’s registration, it must update the Register of Relevant Providers (Financial Advisers Register). ASIC is not required to give written notice following lodgement of an application for registration renewal, unless ASIC refuses to renew the financial adviser’s registration. *[Items 43 and 65, sections 921Y, 921Z and 922Q of the Corporations Act]*

1.191 A fee upon lodgement of an application for registration renewal is payable. The fee amount is to be prescribed in the *Corporations (Fees) Regulations 2001*.

### ***ASIC must refuse to register a financial adviser in certain circumstances***

1.192 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 or disqualified, has not complied with the education and training standards or is subject to a registration prohibition order. *[Item 43, sections 921X(2) and (3) of the Corporations Act]*

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1.193 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 days after making the decision and specify the grounds for the refusal. *[Item 43, sections 921X(6) and (7) of the Corporations Act]*

***What information will be available on the Financial Advisers Register?***

1.194 The Register of Relevant Providers (Financial Advisers Register) already 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.

1.195 If ASIC registers a financial adviser, ASIC must also include the following information on the Register:

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

*[Item 65, section 922Q of the Corporations Act]*

***When do the new registration requirements commence?***

1.196 The new registration system for financial advisers commences from 1 January 2022. However, it will not become an offence to provide financial advice while unregistered until 1 January 2023. This ensures that there is a transition period before penalties apply. *[Items 43 and 84, sections 921S and 1684C of the Corporations Act]*

1.197 ASIC may, by legislative instrument, determine the 'registration year' of a financial services licensee (or a class of licensees), which is to be a 12-month period beginning on a specified day and each subsequent 12-month period. 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. *[Items 20 and 43, sections 910A and 921ZA of the Corporations Act]*

1.198 For existing financial services licensees, their registration year will commence for the first time in the 2022 calendar year. For new financial services licensees, their registration year will commence for the first time in the calendar year their Australian financial services licence is granted.

1.199 ASIC's power to make a legislative instrument determining a licensee's registration year is appropriate as it is a procedural issue, which

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provides for the phased implementation of the registration system, and does not deal with substantive policy questions. This legislative instrument is disallowable and subject to sunseting, and therefore subject to parliamentary scrutiny and periodic review.

### ***The penalties for giving financial advice while unregistered***

1.200 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. *[Item 43, section 921S of the Corporations Act]*

1.201 If ASIC reasonably believes that a financial adviser has contravened this provision, ASIC must convene a Financial Services and Credit Panel to determine whether disciplinary action is required. *[Items 43 and 67A, sections 921Q and 1317DAM of the Corporations Act]*

1.202 If a financial adviser provides 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. *[Item 43, section 921T of the Corporations Act]*

1.203 If a financial services licensee contravenes this requirement, the licensee 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 civil penalty provision by issuing an infringement notice (the infringement notice amount is 10 penalty units), or commencing criminal or civil proceedings, rests exclusively with ASIC. *[Items 43, 73 and 85, sections 921T and 1317E and Schedule 3 of the Corporations Act]*

1.204 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 also 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 not exceed 60 penalty units for individuals or 300 penalty units for a body corporate.

1.205 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 an offence provision is half the maximum penalty that a court could impose on the person for the contravention. The infringement notice amount for this strict liability

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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.

***What impact do disciplinary sanctions have on a financial adviser's registration?***

1.206 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. *[Items 20, 22 and 43, sections 910A and 921M 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's registration status is updated on the Financial Advisers Register.

Lyn may 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.

1.207 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. The financial services licensee may apply to ASIC to register the financial adviser on, or shortly before, or after the prohibition end day. However, if ASIC registers the adviser, the registration takes effect when ASIC records that the financial 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. *[Items 20 and 43, sections 910A, 921M, 921X(3), 921Y(3) and 921Z(3) of the Corporations Act]*

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### **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. James' registration status is updated on the Financial Advisers Register. 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 financial advice on its behalf immediately after receiving notice of the registration prohibition order.

James' licensee may make an application to ASIC to register James. After 1 March 2024, ASIC must register James (unless there is a valid grounds for refusal) by recording that James is registered on the Financial Advisers Register and, immediately afterwards, give James and his licensee a written notice of registration. James may begin providing financial advice again once he has received the notice of registration.

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

1.208 A financial services licensee may specify in the application for registration or renewal that the financial adviser provides, or is to provide, tax (financial) advice services, if the adviser has complied with the additional education and training standard for the provision of tax (financial) advice services and the licensee has made a declaration to this effect. *[Items 34, 42 and 43, sections 921B(6), 921H, 921U, 921V, 921W and 921X of the Corporations Act]*

1.209 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 tax (financial) advice services. *[Item 65, section 922Q of the Corporations Act]*

1.210 If a financial services licensee states in an application for registration or renewal that the financial adviser is to provide tax (financial) advice services, but the adviser has not complied with the additional education and training standard, ASIC must refuse to register the financial adviser. If the financial adviser otherwise satisfies the requirements for registration, the financial services licensee may lodge another application to register the adviser, but the financial adviser would not be able to provide tax (financial) advice services. *[Item 43, section 921X(2) of the Corporations Act]*

1.211 A person contravenes a civil penalty provision under the *Tax Agent Services Act 2009* if they provide tax (financial) advice services

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without either meeting the additional education and training standard or being 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. [Item 102, section 50-17 of the *Tax Agent Services Act 2009*]

1.212 If, after they have been registered as a financial adviser, a person completes the additional education and training requirements to provide tax (financial) advice services, the financial services licensee can lodge a notice under section 922H of the Corporations Act notifying ASIC that the financial adviser is to provide tax (financial) advice services and providing details of the education and training that the adviser has completed. 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. [Item 65, section 922Q of the Corporations Act]

1.213 Transitional provisions in the Bill provide that a person registered as a tax (financial) adviser under the *Tax Agent Services Act 2009* is taken to be registered as a financial adviser until the end of the period determined by the Tax Practitioners Board, unless the person's registration as a tax (financial) adviser is suspended for that period (*see the section headed 'Application and transitional provisions'*). [Item 84, section 1684L of the Corporations Act]

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

1.214 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.

1.215 This Bill removes the power for the Minister to appoint a standards setting body by repealing Division 8C of Part 7.6 of the Corporations Act, 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 an exam, that a person must pass in order to be a financial adviser;
- set continuing professional development requirements to be completed in a financial services licensee's CPD year;
- set requirements for work and training requirements;

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- set requirements for provisional financial advisers; and
  - make a Code of Ethics.

*[Items 27, 31, 32, 35 to 42 and 84, sections 921B, 921D, 921E, 921F, 921G and 1684E to 1684J of the Corporations Act]*

1.216 The repeal of Division 8C of Part 7.6 of the Corporations Act, which takes effect on 1 January 2022 and includes repealing the Minister’s power to declare a body corporate to be the standards body, has the effect of winding up FASEA. *[Item 43, Divisions 8C of the Corporations Act]*

1.217 The transition and application provisions in the Bill will preserve the legislative instruments made by FASEA, by providing that they 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. *[Item 84, sections 1684 and 1684F of the Corporations Act]*

1.218 The education and training standards do not apply if the financial adviser only provides personal advice to retail clients about a time-sharing scheme. *[Item 35, section 921D(5) of the Corporations Act]*

1.219 The legislative instruments to be made by the Minister are subject to disallowance by Parliament and sunset after ten years, and will therefore be subject to parliamentary scrutiny and periodic review.

1.220 If a financial adviser, other than a provisional financial adviser, does not complete the continuing professional development requirement during the financial services licensee’s CPD year, the financial services licensee must lodge a notice with ASIC. If ASIC reasonably believes that the adviser has failed to comply with their continuing professional development requirements, ASIC may convene a Financial Services and Credit Panel to take disciplinary action against the financial adviser. *[Items 35, 43 and 51 to 56, sections 921D, 921L and 922HB of the Corporations Act]*

1.221 This Bill also includes a power that allows the Minister to make a legislative instrument that modifies the operation of Part 7.6 of the Corporations Act by specifying a different CPD year. 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. *[Item 42, section 921G(2) of the Corporations Act]*

1.222 This limited power to make a legislative instrument 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, by requiring licensees to report non-compliance with the CPD requirement 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

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issues to be addressed require flexibility to consider individual circumstances and cannot be reasonably addressed in the primary law.

1.223 A legislative instrument made by the Minister is disallowable and subject to sunset after ten years, 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?***

1.224 From 1 January 2022, ASIC may approve applications for foreign qualifications broadly consistent with the domestic qualification requirements approved by the Minister and must administer the financial adviser's exam approved by the Minister. *[Items 29 and 42, sections 921B, 921J and 921K of the Corporations Act]*

1.225 A person who wants to be a financial adviser in Australia and who has completed a foreign qualification may apply to ASIC for approval of the foreign qualification. ASIC may approve an application if it is satisfied that the foreign qualification is equivalent to a degree or qualification approved by the Minister and the person has completed any courses that ASIC requires the person to complete. This ensures that persons who study outside Australia meet the same high standards for providing financial advice, which is important for maintaining confidence in, and the integrity of, our financial advice industry. *[Item 42, section 921J of the Corporations Act]*

1.226 The transition and application provisions in the Bill provide that foreign qualification approvals granted by FASEA will continue in force as if they were instruments made by ASIC. *[Item 84, sections 1684G, 1684H and 1684J of the Corporations Act]*

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

1.227 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 in the Corporations Act, to provide tax (financial) advice services without needing to be registered under the *Tax Agent Services Act 2009*.

1.228 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

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services' and gives it the same meaning as it has in section 90-15 of the *Tax Agent Services Act 2009*. [Item 22, section 910A of the *Corporations Act*]

1.229 The provision of tax agent services and 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 BAS agents.

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

1.230 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 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.

[Items 34, 42, 102, 115, 117 and 119, sections 921B(6) and 921H of the *Corporations Act* and sections 50-17 and 90-1 of the *Tax Agent Services Act 2009*]

1.231 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. [Item 42, section 921H of the *Corporations Act*]

1.232 This 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.

1.233 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

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consumers and the industry. The legislative instruments made by the Minister are subject to disallowance and sunset after ten years, and will therefore be subject to parliamentary scrutiny and periodic review.

1.234 The new requirements for the provision of tax (financial) advice services commence on 1 January 2022. *[Item 84, section 1684 of the Corporations Act]*

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

1.235 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 BAS service, for a fee or reward but did not comply with the requirements in *paragraph 1.230*. 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. *[Item 102, section 50-17 of the Tax Agent Services Act 2009]*

1.236 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. *[Item 102, section 50-18 of the Tax Agent Services Act 2009]*

1.237 These penalties for the provision and advertisement of tax (financial) advice services are consistent with the equivalent 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. *[Items 121 and 122 of the Tax Agent Services Act 2009]*

1.238 A financial services licensee must notify ASIC if a financial adviser who provides tax (financial) advice services fails to comply with the continuing professional development requirement by the end of the licensee's CPD year, under section 922HB of the Corporations Act. A failure by the licensee to lodge a notice under section 922HB of the Corporations Act is a contravention of a civil penalty provision under the Corporations Act. If a financial adviser fails to comply with the continuing professional development requirement for the provision of tax (financial) advice services, a Financial Services and Credit Panel may be convened to take disciplinary action against the financial adviser. *[Item 35, sections 921D(4) and (7) of the Corporations Act]*

1.239 In order to enable the effective performance and exercise of the Tax Practitioners Board and the Financial Services and Credit Panel's

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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.

*[Item 11, section 171C(2) of the ASIC Act]*

1.240 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. *[Item 113, section 70-40 of the Tax Agent Services Act 2009]*

1.241 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. *[Items 107 and 109, section 60-125 of the Tax Agent Services Act 2009]*

## Consequential amendments

1.242 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, where appropriate. *[Items 14, 20, 21, 28, 29, 30, 32, 33, 66 and 75 to 83, sections 910A, 921B, 923C, 1546B, 1546E and 1546ZB of the Corporations Act]*

1.243 The amended requirements for the provision of tax (financial) advice services requires 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. *[Items 90 to 101, 103 to 106, 111, 118 and 120, 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]*

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1.244 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. [Items 8A, 9, 15, 17, 18, 19, 21, 37, 43 to 50, 57 to 62, 64, 108, 110, 112, 113, 114 and 116, 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

1.245 Schedule 1 to the Bill, which amends the Corporations Act, ASIC Act, *National Consumer Credit Protection Act 2009* and the *Tax Agent Services Act 2009*, commences on 1 January 2022.

### *Corporations Act*

1.246 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 will begin operating.

1.247 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—A New Disciplinary System for Financial Advisers) Act 2021*;
- old *Tax Agent Services Act 2009* – 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 2009*; and
- registration year of a financial services licensee – means the 12-month period beginning on a specified day determined in a legislative instrument made by ASIC under section 921ZA of the amending Act.

[Item 84, section 1684 of the Corporations Act]

1.248 A Financial Services and Credit Panel can take action against a financial adviser for an act or an omission that occurs, or a circumstance that arises, on or after 1 January 2022. [Item 84, section 1684A of the Corporations Act]

1.249 A Financial Services and Credit Panel can issue an infringement notice or make a recommendation to ASIC for an alleged contravention

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by a financial adviser of a restricted civil penalty provision, for an act or omission to do an act on or after 1 January 2022. *[Item 84, section 1684B of the Corporations Act]*

1.250 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. *[Item 84, section 1684C of the Corporations Act]*

1.251 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. *[Item 84, sections 1684E and 1684F of the Corporations Act]*

1.252 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 made by ASIC. This also applies in relation to pending foreign qualification approvals that would have been given when the person completed all of the specified courses. *[Item 84, sections 1684G and 1684H of the Corporations Act]*

1.253 A determination made by FASEA about courses required to be completed for the purposes of completing a qualification equivalent to the education and training standard that is in force immediately before 1 January 2022 will continue in force on and after that day. *[Item 84, section 1684J of the Corporations Act]*

1.254 A failure by a registered tax (financial) adviser to comply with a disciplinary order made by the Tax Practitioners Board under section 30-20 of the old *Tax Agent Services Act 2009* for conduct engaged in before 1 January 2022, is to be treated as if it was an order made against a financial adviser by a Financial Services and Credit Panel. *[Item 84, section 1684K of the Corporations Act]*

1.255 A person registered as a tax (financial) adviser under the *Tax Agent Services Act 2009* is taken to be registered as a financial adviser until the end of the period determined by the Tax Practitioners Board, unless the person's registration as a tax (financial) adviser is suspended for that period under the old *Tax Agent Services Act 2009*. *[Item 84, section 1684L of the Corporations Act]*

### ***Tax Agent Services Act 2009***

1.256 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

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or an omission to perform an act. [Items 121 and 122 of the *Tax Agent Services Act 2009*]

1.257 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 2009*. [Item 121 of the *Tax Agent Services Act 2009*]

1.258 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 old registration period, unless it is terminated before the end of that period. [Item 123 of the *Tax Agent Services Act 2009*]

### **Example 1.3: Deemed registration of tax (financial) advisers**

William is a financial adviser and a registered tax (financial) adviser under the old *Tax Agent Services Act 2009*. William's tax (financial) adviser registration is valid from 6 June 2020 to 30 June 2023. William's tax (financial) adviser registration under the *Tax Agent Services Act 2009* will continue in force until 30 June 2023. In accordance with section 1684L of the *Corporations Act*, William is deemed to be registered as a financial adviser under the *Corporations Act* until 30 June 2023, without either William or his licensee having to take any further action.

1.259 If a person's tax (financial) adviser registration continues in force beyond 1 January 2022 but is suspended for a period, that person contravenes a civil penalty provision under section 50-17 of the *Tax Agent Services Act 2009* if they provide tax (financial) advice services during the suspension period and are not a registered tax agent. [Item 125 of the *Tax Agent Services Act 2009*]

1.260 At the end of a tax (financial) adviser's registration period under the old *Tax Agent Services Act 2009*, the financial services licensee may apply to renew that financial adviser's registration under the *Corporations Act*. If approved, the renewal comes into force immediately after his or her registration as a tax (financial) adviser ends and remains in force until the end of the financial services licensee's registration year, the financial adviser's registration is cancelled, the adviser is banned or is no longer authorised to provide financial advice. [Item 84, section 1684L of the *Corporations Act*]

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**Example 1.4: Renewal of registration following cessation of tax (financial) adviser registration**

May is registered as a tax (financial) adviser under the old *Tax Agent Services Act 2009*, and deemed to be registered as a financial adviser under the Corporations Act, until her registration ceases on 31 May 2023.

May's financial services licensee may apply to ASIC under the Corporations Act, to renew May's registration on or shortly before 31 May 2023. If approved, May's renewed registration as a financial adviser under the Corporations Act comes into force on 1 June 2023 and remains in force until the end of her financial services licensee's registration year, which ends on 31 October 2023. As the registration period is less than 12 months, pro rata fees will apply.

1.261 If a financial adviser has, before 1 January 2022, made an application to register (or renew their registration) as a tax (financial) adviser under the old *Tax Agent Services Act 2009* 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 and continues in force until the end of the period of registration determined under section 20-25(4) of the old *Tax Agent Services Act 2009*, unless terminated before the end of that period. [Item 124 of the *Tax Agent Services Act 2009*]

**Example 1.5: Pending application for registration as a tax (financial) adviser**

On 5 December 2021, Melanie, a financial adviser, makes an application to be registered as a tax (financial) adviser under the *Tax Agent Services Act 2009*. The Tax Practitioners Board grants Melanie's application on 15 February 2022 and specifies that Melanie's registration as a tax (financial) adviser is valid until 28 February 2025. Melanie is deemed to be registered as a financial adviser who provides tax (financial) advice under the Corporations Act until 28 February 2025.

1.262 No new applications for registration as a tax (financial) adviser under the old *Tax Agent Services Act 2009* may be submitted on or after 1 January 2022. Any new application to be registered as a tax (financial) adviser after 1 January 2022 will not be considered by the Tax Practitioners Board.