

## **EXPLANATORY STATEMENT**

*Australian Securities and Investments Commission Act 2001*  
*Corporations Act 2001*  
*Tax Agent Services Act 2009*

*Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021*

The following provisions provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Acts to be prescribed:

- subsection 139(1) and section 166 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- paragraph 912D(4)(b), subsections 922Q(3) and 1345A(1) and paragraph 1684B(a) of the *Corporations Act 2001* (Corporations Act); and
- paragraph 20-5(1)(b), section 20-10, paragraph 20-20(2)(b) and subsection 90-5(2) of the *Tax Agent Services Act 2009* (TAS Act).

The ASIC Act confers functions and powers on the Australian Securities and Investments Commission (ASIC) and establishes the Financial Services and Credit Panel (FSCP). The Corporations Act provides for the regulation of the financial services sector, including financial advisers. The TAS Act establishes the Tax Practitioners Board (TPB) and provides for the registration and regulation of tax agents and Business Activity Statement (BAS) agents.

The purpose of the *Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021* (the Regulations) is to support the amendments in the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (the Better Advice Act), which received Royal Assent on 28 October 2021. The Better Advice Act implements:

- the Government's response to recommendation 2.10 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Financial Services Royal Commission) by:
  - expanding the role of the FSCP within ASIC to operate as the single disciplinary body for financial advisers to ensure that less serious misconduct does not go unaddressed;
  - creating new penalties and sanctions for financial advisers who have breached their obligations under the Corporations Act;
  - introducing a new registration system for financial advisers to improve the accountability and transparency of the financial services sector; and
  - transferring functions from the Financial Adviser Standards and Ethics Authority (FASEA) to the Minister responsible for administering the Corporations Act and to ASIC to streamline the regulation of financial advisers; and

- the Government's response to recommendation 7.1 of the Independent Review of the TPB by introducing a single registration and disciplinary system for the provision of tax (financial) advice services.

The Regulations amend the *Australian Securities and Investments Commission Regulations 2001*, the *Corporations Regulations 2001* and the *Tax Agent Services Regulations 2009* to:

- prescribe criteria for when ASIC must convene an FSCP;
- set allowances for witnesses summoned to appear at a hearing of an FSCP;
- provide that specified civil penalty provisions are not taken to be significant (and therefore may not be reportable) under the breach reporting regime;
- prescribe sanctions that must be included on the Register of Relevant Providers;
- provide for the Minister to be able to delegate the functions and powers to approve foreign qualifications to officers in the Department of Treasury;
- extend the deadline for certain existing providers to pass the financial adviser exam;
- set requirements (including eligibility criteria, fees and transitional provisions) for non-relevant providers (individuals, companies and partnerships) who provide tax (financial) advice services to be registered as tax agents under the TAS Act; and
- make consequential amendments to the *Tax Agent Services Regulations 2009* to remove references to tax (financial) advisers and recognised tax (financial) adviser associations.

Public consultation took place between 29 September 2021 and 15 October 2021. During this time, Treasury held three roundtables with industry stakeholders and received 17 written submissions. Consultation resulted in the following changes to the Regulations:

- postponing the requirement for existing tax (financial) advisers to be registered as tax agents from 1 October 2022 to 1 January 2023;
- creating a new pathway for members of recognised tax agent associations to be registered as tax agents in order to provide tax (financial) advice services; and
- providing for recognised tax (financial) adviser associations to be deemed as recognised tax agent associations from 1 January 2022.

Details of the Regulations are set out in [Attachment A](#).

The Regulations commence on 1 January 2022. The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Final Reports of the Financial Services Royal Commission and the Independent Review of the TPB have been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government

decision to implement this reform and are available from the Department of Prime Minister and Cabinet's website.

A statement of Compatibility with Human Rights is at [Attachment B](#).

**Details of the *Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021***

Please note that throughout this explanatory statement, the term ‘financial adviser’ is used instead of ‘relevant provider’. ‘Relevant provider’ is defined in section 910A of the Corporations Act as an individual who is authorised to provide personal advice to retail clients, as the financial services licensee or on behalf of the licensee, in relation to relevant financial products. A relevant provider may 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 related body corporate of a licensee.

**Section 1 – Name of the Regulations**

This section provides that the name of the Regulations is the *Financial Sector Reform Amendment (Hayne Royal Commission Response—Better Advice) Regulations 2021* (the Regulations).

**Section 2 – Commencement**

The Regulations commence on 1 January 2022.

**Section 3 – Authority**

The Regulations are made under the following Acts:

- the *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- the *Corporations Act 2001* (the Corporations Act); and
- the *Tax Agent Services Act 2009* (TAS Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in the Schedule to this instrument will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms.

## **Amendments to the Australian Securities and Investments Commission Regulations 2001**

The Regulations amend the *Australian Securities and Investments Commission Regulations 2001* (the ASIC Regulations) to specify the circumstances when ASIC must convene an FSCP and prescribe the allowances and expenses that must be paid to a witness who is given a summons to appear at an FSCP hearing.

### **Items 1, 2 and 3 – Convening an FSCP and FSCP witness allowances**

#### *Convening an FSCP*

Subsection 139(21) of the ASIC Act provides ASIC with discretion to determine when to convene an FSCP. Subsection 139(2) of the ASIC Act also requires ASIC to convene an FSCP in circumstances prescribed in the regulations.

Item 1 of the Regulations inserts section 12N of the ASIC Regulations to prescribe the circumstances in which ASIC must convene an FSCP. This power for regulations to prescribe when ASIC must convene an FSCP is necessary to ensure that the administration of the FSCP is flexible and responsive.

The circumstances which require peer review by an FSCP are:

- where ASIC is aware that a financial adviser has become insolvent under administration or has been convicted of fraud, or where ASIC reasonably believes that the person is not a fit and proper person to provide financial advice (paragraphs 12N(2)(a)(c) of the ASIC Regulations);
- where the adviser fails to meet the education and training requirements, fails to approve a Statement of Advice prepared by a provisional financial adviser, or provides personal financial advice while unregistered (paragraph 12N(2)(d) of the ASIC Regulations);
- where ASIC reasonably believes that the adviser has breached a financial services law (other than those already covered by paragraphs 12N(2)(a) – (d) of the ASIC Regulations), or has been involved in another person’s breach of a financial services law, and ASIC forms a reasonable belief that the breach is serious (paragraphs 12N(2)(e) and (f) of the ASIC Regulations); and
- where the adviser has at least twice been linked to a refusal or failure to give effect to a determination made by the Australian Financial Complaints Authority (AFCA) and ASIC reasonably believes that the consequences of those refusals or failures is serious (new paragraph 12N(2)(g) of the ASIC Regulations).

In each of the circumstances listed in paragraphs 12N(2)(a) – (d) of the ASIC Regulations, the matter must, in every case, be referred to an FSCP, regardless of the seriousness of the circumstances.

For the purposes of paragraphs 12N(2)(e), (f) and (g) of the ASIC Regulations, ASIC must form a reasonable belief that the consequences of the breach or circumstances are serious. A breach or circumstance is serious if it results in material loss or damage to a client, material benefit to the financial adviser, or involves dishonesty or fraud. In determining whether a loss or damage suffered by a client is material, ASIC will consider the client’s circumstances, including their financial circumstances.

Section 1684H of the Corporations Act provides that the FSCP's power to take action against a financial adviser only applies to an act or omission by a financial adviser that occurs, or a circumstance that arises, on or after 1 January 2022. This means that ASIC is not required to convene an FSCP if it becomes aware, for example, that a financial adviser is convicted of fraud in December 2021.

However, an exception to the requirement for ASIC to convene an FSCP applies if ASIC takes other action against a financial adviser. In that case, ASIC is not required to convene an FSCP, even if a circumstance prescribed in section 12N of the ASIC Regulations exists. For example, if ASIC exercises, or proposes to exercise, its powers against an adviser for a breach of a financial services law by making a banning order, ASIC is not also required to convene an FSCP for that breach.

#### **Example 1**

Sid makes a complaint to ASIC that he has suffered a financial loss as a result of implementing advice provided by a financial adviser. ASIC will assess whether the loss Sid has suffered is material, having regard to Sid's circumstances, including his financial circumstances. This may include considering a number of factors such as Sid's savings, annual income, existing investment portfolio, family commitments, employment security and expected retirement age. If ASIC investigates the matter and forms a reasonable belief that Sid's financial adviser has contravened a financial services law and that this breach has caused Sid to suffer a material loss, ASIC must refer the matter to the FSCP under subsection 139(2) of the ASIC Act (unless ASIC proposes to exercise its own enforcement powers).

#### *Allowances and expenses for witnesses at FSCP hearings*

Section 165 of the ASIC Act provides that the Chair of an FSCP may summon a person to appear at a hearing of the panel to give evidence or produce specified documents. The power to summon witnesses enables the panel to obtain access to all of the information it needs to make a decision on a disciplinary matter.

Section 166 of the ASIC Act provides that a person summoned to appear at a hearing of an FSCP is entitled to be paid the allowances and expenses prescribed in the regulations. The financial adviser who is the subject of the disciplinary proceedings may attend an FSCP hearing but cannot be given a summons to appear and are therefore not entitled to any allowance.

If a summons is made on behalf of an FSCP, the allowance is payable by ASIC. However, if a summons is made at the request of the affected financial adviser, the allowances and expenses are to be paid by the affected financial adviser.

Item 1 of the Regulations inserts section 12P of the ASIC Regulations, which provides that a person summoned by the Chair of an FSCP is entitled to be paid allowances and expenses in accordance with the requirements in Schedule 2 to the ASIC Regulations.

Items 2 and 3 of the Regulations amend Schedule 2 to the ASIC Regulations and provide that a person summoned to appear at an FSCP hearing is entitled to:

- if the person does not receive wages, salary or fees because of his or her attendance at the hearing - an amount equal to the wages, salary or fees the person would have received had they not been required to attend the hearing; or
- otherwise —a specified amount for each day the person attends the hearing; and

- a reasonable amount for travel, meals and accommodation, as required.

These allowances and expenses are the same as the allowances and expenses required to be paid to a witness who is given a summons to appear at a hearing of ASIC, the Company Auditor's Disciplinary Board and the Takeovers Panel.

## **Amendments to the Corporations Regulations 2001**

The Regulations amend the *Corporations Regulations 2001* (the Corporations Regulations) to:

- prescribe that contraventions of certain civil penalty provisions are not reportable situations for the purposes of the Corporations Act breach reporting regime;
- prescribe the sanctions that must be included on the Register of Relevant Providers (also known as the Financial Advisers Register);
- extend the deadline for certain existing providers to pass the financial adviser exam; and
- provide for the Minister to be able to delegate specified functions and powers to officers in the Department of Treasury.

### **Item 4 – Civil penalty provisions that are not taken to be *significant* under the breach reporting regime**

The breach reporting requirements in section 912D of the Corporations Act were introduced in Schedule 11 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* and commenced on 1 October 2021. Subsection 912D(1) of the Corporations Act provides that a financial services licensee is required to report to ASIC if there is a ‘reportable situation’, such as that the licensee, or a representative of the licensee, has breached a core obligation and the breach is significant.

While breach reporting is one mechanism by which matters may be referred to ASIC, there are other mechanisms that ASIC can use to become aware of a breach or relevant circumstance, including its own investigations and monitoring work, AFCA reports, consumer complaints and other reports from licensees.

Whether or not a breach is reportable does not determine whether ASIC or an FSCP is able to take action against a financial adviser and is also not relevant for the purposes of determining whether or not a matter is required to be considered by an FSCP.

Subsection 912D(4) of the Corporations Act provides that a breach of a core obligation is taken to be ‘significant’ in certain circumstances, including if the breach is a contravention of a civil penalty provision. However, subsection 912D(4) also provides that regulations may prescribe where a contravention of a civil penalty provision is not ‘significant’.

The Better Advice Act creates the following new civil penalty provisions, which will automatically be considered significant under the breach reporting regime from 1 January 2022 by virtue of their status as civil penalty provisions:

- failure to comply with education and training standards for financial advisers (subsection 921BA(5) of the Corporations Act);
- failure to comply with the CPD requirements for the provision of tax (financial) advice services (subsection 921BB(4) of the Corporations Act);
- failure to comply with the Code of Ethics (subsection 921E(3) of the Corporations Act);



- failure to comply with the requirements for provisional financial advisers and supervisors of provisional financial advisers (subsection 921F(8) of the Corporations Act);
- failure to comply with a direction or order made by an FSCP (subsection 921L(2) of the Corporations Act);
- providing financial advice while unregistered (section 921Y of the Corporations Act); and
- failure by a financial services licensee to cease to authorise a person to provide financial advice on the licensee's behalf at the time a financial adviser provides financial advice while unregistered (subsection 921Z(4) of the Corporations Act).

Item 4 of the Regulations amends section 7.6.02A of the Corporations Regulations to prescribe that contraventions of the following civil penalty provisions in the Better Advice Act are not significant for the purposes of the breach reporting requirements in paragraph 912D(4)(b) of the Corporations Act:

- failure to comply with CPD requirements for financial advisers (subsection 921BA(4) of the Corporations Act);
- failure to comply with CPD requirements for the provision of tax (financial) advice services (subsection 921BB(4) of the Corporations Act); and
- failure to comply with the Code of Ethics (subsection 921E(3) of the Corporations Act).

Breaches of the CPD requirements are excluded from the breach reporting regime as they are already required to be reported to ASIC by financial services licensees under section 922HB of the Corporations Act.

Breaches of the Code of Ethics are excluded as Standard 1 of the Code of Ethics requires financial advisers to act in accordance with all applicable laws. If breaches of the Code of Ethics were included in the breach reporting regime, all breaches of the financial services laws, no matter how minor would be reportable by virtue of a breach of the Code of Ethics being a civil penalty provision.

However, these breaches may still be reportable under the breach reporting regime if one of the other circumstances in the deemed significance test in subsection 912D(4) of the Corporations Act applies, or if the breach is otherwise significant under the test in subsection 912D(5) of the Corporations Act.

#### **Example 2**

Harry is a financial adviser who has engaged in deceptive conduct in the course of providing financial advice by falsely representing that he has no affiliation with the issuer of a financial product he recommended, when in fact, the product issuer owns Harry's authorising financial services licensee.

Harry has breached standard 9 of the Code of Ethics and may also have contravened other financial services laws. While a breach of the Code of Ethics is not a reportable situation in itself, because the breach also involved misleading or deceptive conduct it is taken to be significant and is therefore reportable under paragraph 912D(4)(c) of the Corporations Act. Harry's licensee must report the breach to ASIC within 30 days of becoming aware of it.

### **Example 3**

Jane is a financial adviser who has failed to maintain adequate client records resulting in missing and inaccurate documents.

This is a breach of standard 8 of the Code of Ethics. Jane's licensee undertakes annual file reviews and in the last two reviews, has warned Jane to comply with the requirement to maintain complete and accurate records of clients. Jane's licensee undertakes its next annual file review and again finds Jane has failed to maintain adequate client records during the year. Taking into account the number and frequency of similar breaches, Jane's licensee determines that the breach is significant, in accordance with paragraph 912D(5)(a) of the Corporations Act and reports the matter to ASIC within 30 days.

### **Item 5 – Inclusion of instrument details on the Financial Advisers Register**

Section 922Q of the Corporations Act sets out the matters that must be included on the Financial Advisers Register. Subsection 922Q(3) of the Corporations Act provides for regulations to be made prescribing which instruments must be included on the Financial Advisers Register. The Financial Advisers Register is publicly accessible from ASIC's Moneysmart website ([www.moneysmart.gov.au](http://www.moneysmart.gov.au)).

Item 5 of the Regulations inserts section 7.6.06D of the Corporations Regulations. This section prescribes that the following kinds of instruments must also be included on the Financial Advisers Register:

- registration suspension orders or registration prohibition orders made by an FSCP under subsection 921K(1) of the Corporations Act; and
- directions to undertake specified training, counselling or supervision or to report specified matters to ASIC, unless it is the first time an instrument has been made against the financial adviser under subsection 921K(1) of the Corporations Act.

The requirements apply in addition to the existing requirement in section 922Q of the Corporations Act for ASIC to enter details about each person who is or was a financial adviser.

Warnings or reprimands issued by ASIC or an FSCP under section 921S or 921T of the Corporations Act will not be included on the Financial Advisers Register.

### **Example 4**

In June 2023, an FSCP directs Bob, a financial adviser, to undertake training under subsection 921K(1) of the Corporations Act.

As this is the first sanction an FSCP has made against Bob under subsection 921K(1) of the Corporations Act, the details of this direction must not be included on the Financial Advisers Register.

### **Example 5**

In August 2023, an FSCP makes a registration suspension order under subsection 921K(1) of the Corporations Act against Sam, a financial adviser. The registration suspension order is for a period of three months from August to November 2023. In July 2024, for a separate breach of a financial services law, an FSCP makes a direction requiring Sam to undertake additional training under subsection 921K(1) of the Corporations Act.

Details of both sanctions must be listed on the Financial Advisers Register. In all circumstances, registration suspension orders must be included on the Financial Advisers Register, as it usually indicates that a breach is serious. The details of the direction to undertake additional training must also be included on the Financial Advisers Register as this is not the first time an FSCP has made a sanction under subsection 921K(1) of the Corporations Act.

### **Example 6**

In December 2023, ASIC gives Jess a warning letter under section 921S of the Corporations Act. Details of the warning letter must not be included on the Financial Advisers Register.

### **Example 7**

In October 2023, an FSCP issues Pat an infringement notice under subsection 1317DAM(1) of the Corporations Act for an alleged contravention of a restricted civil penalty provision. In December 2023, for a separate matter, an FSCP imposes a direction requiring Pat to report specified matters to ASIC under subsection 921K(1) of the Corporations Act.

If Pat pays the infringement notice amount within the payment period, ASIC must include the following information on the Financial Advisers Register in accordance with the requirements in paragraph 922Q(2)(ud) of the Corporations Act:

- details of the notice;
- that Pat has complied with the notice; and
- statements that compliance with the notice is not an admission of guilt or liability and that Pat is not regarded as having contravened the restricted civil penalty provision specified in the notice.

The details of the direction to report specified matters to ASIC must not be included on the Financial Advisers Register, as it is the first time an FSCP has made a sanction against Pat under subsection 921K(1) of the Corporations Act.

Infringement notices are not issued under subsection 921K(1) of the Corporations Act and therefore do not count towards determining whether or not the direction must be listed on the Financial Advisers Register.

## **Item 6 – Extension of time to pass the financial adviser exam**

Section 1684B of the Corporations Act provides that an existing provider must pass the financial adviser exam by the exam cut-off day, which is either 1 January 2022, or the date prescribed by regulations (if any).

Section 1546A of the Corporations Act defines ‘existing provider’ as a person who:

- was a financial adviser at any time between 1 January 2016 and 1 January 2019 and was not banned, disqualified or subject to an enforceable undertaking under section 93AA of the ASIC Act to not provide financial product advice or a financial service on 1 January 2019; or
- at any time between 1 January 2016 and 1 January 2019, provided personal advice in a foreign country to retail clients in relation to relevant financial products and was not prohibited under the law of the foreign country from providing such advice on 1 January 2019.

Item 6 of the Regulation inserts section 7.6.07B of the Corporations Regulations to extend the exam cut-off day to 1 October 2022 for an existing provider who has sat the exam at least twice before 1 January 2022. This means that the exam cut-off day is:

- 1 January 2022 - for an existing provider who has not sat the exam at all, or has only sat it once, before 1 January 2022; or
- 1 October 2022 – for an existing provider who has sat the exam two or more times before 1 January 2022.

An existing provider, who is authorised as a financial adviser on their exam cut-off day, and who fails to pass the exam by the exam cut-off day, will need to satisfy all of

the education and training standards, as if they were a new entrant, before they can be authorised to provide financial advice again. This means that, if they have not already done so, the person would need to complete an approved degree or an equivalent qualification, undertake specified work and training requirements and pass the exam.

On the other hand, an existing provider, who is not authorised as a financial adviser on their exam cut-off day, only needs to pass the financial adviser exam before they are able to be authorised again to provide financial advice.

#### **Example 8**

Jamie has been authorised by his financial services licensee to provide financial advice since June 2017 and is an existing provider. Jamie is on leave between October 2021 and October 2022. During his leave, Jamie's financial services licensee ceases to authorise Jamie and notifies ASIC of this change to Jamie's circumstances under section 922H of the Corporations Act.

Before Jamie can return to work and resume providing financial advice in October 2022, Jamie must pass the financial adviser exam and be authorised by a financial services licensee.

#### **Item 7 – Delegation of functions for approval of foreign qualifications**

Section 1345A of the Corporations Act provides that the Minister may delegate any of the Minister's functions and powers under the Corporations Act that are prescribed by regulations to an officer of the Department of Treasury (the Department).

Item 7 of the Regulations amends section 9.5.01 of the Corporations Regulations to enable the Minister to delegate the following functions and powers to an officer of the Department:

- approving, or refusing to approve, foreign qualifications (subsection 921G(2) of the Corporations Act); and
- specifying courses for persons who have applied for approval of their foreign qualification (subsection 921G(4) of the Corporations Act).

These functions and powers may be delegated to the following officers in the Department:

- the Secretary;
- a Deputy Secretary; or
- an SES employee.

In delegating these functions to the Department, the Minister may impose directions, on how these powers and functions are to be performed and exercised.

The delegation of the Minister's power to approve foreign qualifications and specify courses for persons who have completed foreign qualifications is intended to support the efficient performance and exercise of this administrative function, while still ensuring that the delegation is only exercised by persons who are appropriately trained and qualified. The delegation of these functions powers to senior officers of the Department ensures that there is appropriate consideration of the exercise of the functions and powers at a senior level in the Department.

## **Amendments to the Tax Agent Services Regulations 2009**

The Better Advice Act implements recommendation 7.1 of the Independent Review of the TPB by removing the requirement for financial advisers who provide tax (financial) advice services to be registered under the TAS Act from 1 January 2022. Instead, financial advisers who provide tax (financial) advice services are regulated under the Corporations Act.

From 1 January 2022, individuals who provide tax (financial) advice services for a fee or reward must either be:

- qualified tax relevant providers (regulated under the Corporations Act) – if they provide personal advice to retail clients in relation to relevant financial products; or
- registered tax agents (regulated under the TAS Act) – if they provide tax (financial) advice services other than personal advice to retail clients in relation to relevant financial products (e.g. they only provide advice to wholesale clients).

### *Qualified tax relevant providers*

A financial adviser provides a tax (financial) advice service if, as part of providing personal advice to retail clients in relation to relevant financial products, the adviser provides advice about tax liabilities, obligations or entitlements that arise, or could arise, under the relevant taxation laws that the client could rely on to identify their liabilities or claim any entitlements.

As previously mentioned, in this explanatory statement, all references to ‘financial adviser’ should be taken as references to ‘relevant provider’, as defined in section 910A of the Corporations Act.

To provide tax (financial) advice services, a financial adviser must be a qualified tax relevant provider. A qualified tax relevant provider is a financial adviser who has met the additional education and training standards determined by the Minister under subsection 921BB(1) of the Corporations Act. The requirements to be a qualified tax relevant provider are prescribed in Part 3 of the *Corporations (Relevant Providers—Education and Training Standards) Determination 2021*.

### *Registered tax agents - individuals*

Individuals who provide tax (financial) advice services for a fee or reward, other than personal advice to retail clients in relation to relevant financial products (i.e. are not financial advisers) must be registered as tax agents.

The Regulations create alternative pathways to support new entrants to be registered as tax agents to provide tax (financial) advice services. These alternative pathways for being registered as a tax agent replicate the eligibility requirements to be registered as a tax (financial) adviser that were in the TAS Regulations immediately before 1 January 2022.

The Regulations also create transitional arrangements for existing tax (financial) advisers, who were registered as tax (financial) advisers immediately before 1 January 2022.

### *Registered tax agents – companies and partnerships*

From 1 January 2022, companies and partnerships (financial services licensees and corporate authorised representatives) that provide tax (financial) advice services for a fee or reward must either:

- be registered as tax agents, in accordance with the requirements in section 20-5 of the TAS Act; or
- ensure that each of the individual advisers who provide tax (financial) advice services on their behalf is either a qualified tax relevant provider or a registered tax agent.

The requirements for companies and partnerships to be registered as tax agents remain the same as they were prior to 1 January 2022.

Transitional arrangements are also available for companies and partnerships that were registered tax (financial) advisers immediately before 1 January 2022.

### Transitional arrangements for existing tax (financial) advisers

#### **Items 30 and 31 – Services that are taken *not* to be tax agent services**

As mentioned above, from 1 January 2022, an individual who provides tax (financial) advice services for a fee or reward must either be a qualified tax relevant provider or a registered tax agent.

The Regulations only include requirements for being registered as a tax agent under the TAS Regulations and, as a result, only apply to tax (financial) advice services provided by non-financial advisers. This includes services that are provided:

- other than by an individual (i.e. a company or partnership);
- to wholesale clients only;
- as part of the provision of robo-advice; or
- about financial products other than ‘relevant financial products’, as defined in section 910A of the Corporations Act.

From 1 January 2022, non-financial advisers (individuals, partnerships and companies) must be registered as tax agents to provide, or continue to provide, tax (financial) advice services for a fee or reward.

To ensure a smooth transition to the new requirements, transitional arrangements are needed to facilitate the registration of non-financial advisers as tax agents who were registered as tax (financial) advisers immediately before 1 January 2022.

Paragraph 13(1)(m) of the TAS Regulations provides that non-financial advisers (individuals, partnerships and companies) who were registered as tax (financial) advisers immediately before 1 January 2022 can continue to provide tax (financial) advice services between 1 January 2022 and 31 December 2022 without being registered as a tax agent.

This enables qualifying individuals and entities to continue providing tax (financial) advice services while waiting for their new tax agent registration to come into force. This temporary exemption is also intended to provide the TPB with sufficient time to put in place the necessary IT and associated systems and processes to effectively and efficiently manage these new applications for registration as a tax agent.

To achieve this, items 30 and 31 of the Regulations amend section 13 of the TAS Regulations to provide that a tax (financial) advice service is *not* a tax agent service if it is provided between 1 January 2022 and 31 December 2022 by an individual, partnership or company that was a registered tax (financial) adviser immediately before 1 January 2022 and was not a financial adviser.

This amendment to section 13 of the TAS Regulations is made under subsection 90-5(2) of the TAS Act, which provides for regulations to be made specifying that a prescribed service is *not* a tax agent service. A service that is not a tax agent service is also not a ‘tax (financial) advice service’ as defined in section 90-15 of the TAS Act.

The exemption in paragraph 13(1)(m) of the TAS Regulations does not apply (or ends early) if a person has applied to be registered as a tax agent on or after 1 January 2022 and:

- the TPB approves their application – the exemption ends on the day the individual, partnership or company’s registration as a tax agent comes into force; or
  - From the day the non-financial adviser’s registration as a tax agent comes into force, the individual, partnership or company is required to comply with the requirements in the TAS Act, including the Code of Professional Conduct;
- the TPB refuses their application – the exemption ends on the day the individual, partnership or company is notified of the TPB’s decision to refuse their application for registration as a tax agent.
  - In accordance with existing requirements, if the TPB refuses an application for registration as a tax agent, the individual, partnership or company may make an application under paragraph 70-10(a) of the TAS Act to the Administrative Appeals Tribunal for review of the TPB’s decision.

While the exemption applies, non-financial advisers who provide tax (financial) advice services while unregistered are not in contravention of the TAS Act.

However, at the end of the exemption period (either 1 January 2023, or the date the person is notified of the TPB’s decision to refuse to register the individual or entity), a non-financial adviser must be registered as a tax agent in order to continue providing tax (financial) advice services for a fee or reward. A failure to comply is a contravention of the civil penalty provision in section 50-17 of the TAS Act.

#### **Example 9**

Immediately before 1 January 2022, Nigella was a registered tax (financial) adviser who only provides advice to wholesale clients. Nigella makes an application to be registered as a tax agent on 15 September 2022.

- Between 1 January 2022 and 22 November 2022 - Nigella may continue providing tax (financial) advice services without being required to be registered as a tax agent or meet any additional requirements under paragraph 13(1)(m) of the TAS Regulations.
- From 22 November 2022 (the date Nigella’s registration as a tax agent comes into force) – Nigella must comply with the requirements in the TAS Act.

### **Example 10**

Licensee 123 Ltd (a company) is a financial services licensee that was registered as a tax (financial) adviser immediately before 1 January 2022. Licensee 123 Ltd may continue to provide tax (financial) advice services for a fee or reward and has until 1 January 2023 to either:

- be registered as a tax agent – to be registered the company must comply with the eligibility requirements in subsection 20-5(3) of the TAS Act; or
- ensure that all of its employees/representatives who provide tax (financial) advice services on its behalf are qualified tax relevant providers or registered tax agents.

### **Example 11**

Licensee ABC Ltd. (a company) holds an Australian financial services licence and is planning to launch a new app which provides financial advice on relevant financial products, including advice on the tax implications of these investments. From 1 January 2022, the company must be registered as a tax agent to provide these tax (financial) advice services.

To be eligible to be registered as a tax agent, the company must have a ‘sufficient number’ of individuals (such as employees and directors) who are able to provide tax agent services to a competent standard and to carry out supervisory arrangements. To meet this requirement, the company must have at least one representative who is a registered tax agent. However, in determining whether the company meets the sufficient number test, the TPB may also take into account the number of qualified tax relevant providers within the company who provide tax (financial) advice services.

In addition to this, and consistent with existing requirements, each of the company’s directors must be fit and proper persons; the company must not be under external administration, have been convicted of a serious taxation offence or an offence involving fraud or dishonesty within the last five years; and must be able to maintain professional indemnity insurance that meets the TPB’s requirements.

### Alternative pathways for registration as a tax agent

As mentioned above, the Corporations Act requires financial advisers who provide tax (financial) advice services to be qualified tax relevant providers. The requirements to be a qualified tax relevant provider are set out in the *Corporations (Relevant Providers—Education and Training Standards) Determination 2021*. Under the Corporations Act, a financial adviser must be a natural person, and therefore cannot be a partnership or a company.

This differs from the TAS Act, which permits partnerships and companies to be registered as tax agents. Under the new arrangements, companies and partnerships must either be registered as tax agents or ensure that all of the advisers providing tax (financial) advice services on their behalf are either qualified tax relevant providers or registered tax agents.

Similarly, the TAS Act also provides for individuals (e.g. advisers who only provide advice to wholesale clients) to provide tax (financial) advice services by being registered as tax agents. The Regulations create five new pathways for individuals (other than financial advisers) to be registered as a tax agent.

### **Items 8, 13, 15, 33, 34, 38 and 39 – Recognition of tax agent associations and eligibility criteria for registration as a tax agent**

#### *Recognised tax agent associations*

Section 20-10 of the TAS Act provides for regulations to provide for a system to allow the TPB to accredit professional associations to support the registration of individuals as tax agents and BAS agents.



Item 8 of the Regulations repeals the definition of ‘recognised tax agent association’ in section 3 of the TAS Regulations and replaces it with a new definition. The new definition provides that there are two ways for an association to become a recognised tax agent association:

- the existing mechanism – to be recognised by the TPB in accordance with the requirements in Division 2 of Part 1A of the TAS Regulations; or
- the new mechanism – tax (financial) adviser associations that were recognised by the TPB immediately before 1 January 2022 are automatically deemed to be recognised tax agent associations. This will ensure continuity for voting members of recognised tax (financial) adviser associations.

Item 13 of the Regulations amends subsection 5D(1) of the TAS Regulations to take into account the new definition of recognised tax agent association. New subsection 5D(1) of the TAS Regulations provides that if the TPB requires a recognised tax agent association to tell the TPB the reasons why it is still appropriate for the association to be a recognised tax agent association, the association must respond within 30 days after receiving the TPB’s notice. The TPB may make such a request to associations recognised under Division 2 of Part 1A of the TAS Regulations and former recognised tax (financial) adviser associations that have been deemed to be recognised tax agent associations. This ensures consistent requirements apply to all recognised tax agent associations.

Item 15 of the Regulations amends section 6 of the TAS Regulations to provide that the TPB must publish a notice on its website, which states that on 1 January 2022 an association that was a recognised tax (financial) adviser association immediately before 1 January 2022, was deemed to be a recognised tax agent association. This ensures visibility of deemed recognised tax agent associations and is consistent with the existing requirement in section 6 of the TAS Regulations for the TPB to publish its decision to recognise tax agent associations.

Items 33 and 34 of the Regulations amend section 210 of Schedule 1 to the TAS Regulations, which sets out the requirements for recognised tax agent associations. The Regulations make the following amendments to the requirements for being a voting member of a recognised tax agent association:

- amends an existing requirement to provide that a member has a degree, post-graduate award, diploma or higher award from an Australian tertiary institution, registered training organisation or an equivalent institution in a relevant discipline (paragraphs 210(a) and (b) of Schedule 1 of the TAS Regulations); and
- Before 1 January 2022, voting members of a recognised tax agent association were required to have a degree, diploma or award in the discipline of accountancy;
- ‘Relevant discipline’ is defined in section 212 of Schedule 2 to the TAS Regulations as including a discipline related to finance, financial planning, commerce, economics, business, tax, accountancy, or law;
- This amendment expands the scope of the qualification requirements, to take into account the requirements to be a voting member of a recognised tax (financial) adviser association before 1 January 2022;

- inserts a new requirement that provides that a member has the equivalent of six years of full-time experience in providing tax (financial) advice services in the past eight years (paragraph 210(f) of Schedule 1 of the TAS Regulations);
- This amendment expands the scope of the experience requirements, to take into account the requirements to be a voting member of a recognised tax (financial) adviser association before 1 January 2022.

The requirements for recognised tax agent associations in items 8, 13, 15, 33 and 34 of the Regulations are relevant to new pathway 210 (membership of professional association—tax (financial) advice services) in Schedule 2 to the TAS Regulations.

*Eligibility criteria for individuals to register as a tax agent*

Paragraph 20-5(12)(b) of the TAS Act provides for regulations to prescribe qualification and experience requirements for individuals to be registered as a tax agent.

Item 38 of the Regulations inserts new sections 207 to 211 in Part 2 of Schedule 2 to the TAS Regulations and creates five new pathways for registration as a tax agent. These new pathways ensure that individuals (who are not financial advisers) are required to meet the same requirements to provide tax (financial) advice services under the new arrangements. These new pathways only apply to individuals (not companies or partnerships) who are not financial advisers (e.g. persons who only provide advice to wholesale clients).

Under these arrangements, to be registered as a tax agent, an individual must be over 18 years of age, a fit and proper person, maintain, or be able to maintain, professional indemnity insurance, be a licensee or a representative of a licensee (or have been a licensee or representative of a licensee within the preceding 90 days), and have met the requirements in at least one of the following pathways:

<b>Pathways</b>	<b>Qualification</b>	<b>Courses</b>	<b>Experience</b>	<b>Other</b>
<b>Pathway 207 Tertiary qualifications— tax (financial) advice services</b>	Degree or post-graduate award from an Australian (or equivalent) institution in a relevant discipline	<ul style="list-style-type: none"> <li>• TPB-approved course in commercial law; and</li> <li>• TPB-approved course in Australian taxation law</li> </ul>	Equivalent of 12 months of full-time relevant tax (financial) advice experience in the previous five years	N/A
<b>Pathway 208 Diploma or higher award— tax (financial) advice services</b>	Diploma or higher award from a registered training organisation (or equivalent institution) in	<ul style="list-style-type: none"> <li>• TPB-approved course in commercial law; and</li> <li>• TPB-approved course in Australian</li> </ul>	Equivalent of 18 months of full-time relevant tax (financial) advice experience in the previous	N/A

	a relevant discipline	taxation law	five years	
<b>Pathway 209 Work experience— tax (financial) advice services</b>	N/A	<ul style="list-style-type: none"> <li>• TPB-approved course in commercial law; and</li> <li>• TPB-approved course in Australian taxation law</li> </ul>	Equivalent of three years of full-time relevant tax (financial) advice experience in the previous five years	N/A
<b>Pathway 210 Membership of professional association— tax (financial) advice services</b>	N/A	N/A	Equivalent of six years of full-time relevant tax (financial) advice experience in the previous eight years	Voting member of a recognised tax agent association (on or after 1 January 2022)
<b>Pathway 211 Registered tax (financial) advisers</b>	N/A	N/A	N/A	<ul style="list-style-type: none"> <li>• Registered as a tax (financial) adviser immediately before 1 January 2022; and</li> <li>• Make an application to be registered as a tax agent between 1 January 2022 and 1 January 2023</li> </ul>

If the TPB grants an individual’s application for registration as a tax agent on the basis of any of these new pathways, the TPB may impose one or more conditions to which that registration is subject under subsections 20-25(5) to (7) of the TAS Act. The TPB may impose a condition that the individual may only provide tax (financial) advice services, as defined in section 90-15 of the TAS Act.

Once registered as a tax agent under the TAS Act, an individual must comply with the requirements in the TAS Act, including the Code of Professional Conduct, which is prescribed in section 30-10 of the TAS Act.

### Example 12

In March 2023, Gordon decides to provide tax (financial) advice services for the first time – Gordon must meet one of the following requirements:

- if Gordon intends to provide personal advice to retail clients in relation to relevant financial products – Gordon must become a qualified tax relevant provider under the Corporations Act - this involves:
  - meeting the education and training requirements (sections 921B and 921BB of the Corporations Act);
  - being authorised by a financial services licensee (section 921C of the Corporations Act); and
  - being registered by ASIC as a financial adviser (section 921ZC of the Corporations Act).
- if Gordon intends to only provide advice to wholesale clients or products other than relevant financial products (i.e. not be a financial adviser) – Gordon must be a registered tax agent - this involves:
  - being over 18 years of age and a fit and proper person;
  - maintaining (or being able to maintain) professional indemnity insurance that complies with the TPB requirements;
  - being (or have been within the previous 90 days) a financial services licensee or a representative of a financial services licensee; and
  - meeting one of the qualification and experience requirements in Part 2 of Schedule 2 to the TAS Regulations.
- if Gordon provides personal tax (financial) advice to retail clients and tax agent services (other than tax (financial) advice services) - Gordon must be a qualified tax relevant provider and a registered tax agent.

### Example 13

On 31 December 2021, Ainsley provides tax (financial) advice services on behalf of his employer, Licensee 111 Ltd, which is a registered tax (financial) adviser. Ainsley is a voting member of a recognised tax (financial) adviser association and has completed five consecutive years of relevant tax (financial) advice experience.

On 1 January 2022, the recognised tax (financial) adviser association that Ainsley is a member of is deemed to be a recognised tax agent association.

Once Ainsley has completed six years of relevant tax (financial) advice experience, Ainsley may apply to be registered as a tax agent under new pathway 210 on the basis that he is a member of a recognised tax agent association and has completed six years of relevant tax (financial) advice experience.

Item 39 of the Regulations repeals and replaces Division 2 in Part 2 of Schedule 2 to the TAS Regulations. The new Division retains the existing definition of ‘relevant experience’ and inserts new definitions of ‘relevant discipline’ and ‘relevant tax (financial) advice experience’.

‘Relevant discipline’ means a discipline related to finance, financial planning, commerce, economics, business, tax, accountancy, or law. This definition is relevant to the requirements for voting members of a recognised tax agent associations and the qualification requirements in new pathways 207 and 208.

‘Relevant tax (financial) advice experience’ is relevant to the requirements for voting members of a recognised tax agent association and the experience requirements in new pathways 207 to 210. ‘Relevant tax (financial) advice experience’ means:

- work by an individual:
  - as a registered tax (financial) adviser, or under the supervision and control of a registered tax (financial) adviser, as in force immediately before 1 January 2022; or
  - as a registered tax agent, or under the supervision and control of a registered tax agent; or
  - as a qualified tax relevant provider, or under the supervision and control of a qualified tax relevant provider; or
  - of another kind approved by the TPB; and
- that included substantial involvement in:
  - one or more of the types of tax (financial) advice services described in section 90- 15 of the TAS Act; or
  - a particular area of taxation law to which one or more of those types of tax (financial) advice services relate.

This definition has a similar meaning to the definition of ‘relevant experience’ in section 305 in Part 3 of Schedule 2 to the TAS Regulations (as in force immediately before 1 January 2022), which is repealed by these Regulations. However, the new definition of relevant tax (financial) advice experience also includes work as a qualified tax relevant provider or work under the supervision or control of a qualified tax relevant provider, to complement the changes made by the Better Advice Act.

A qualified tax relevant provider is defined in section 910A of the Corporations Act as a financial adviser who has met each of the requirements in a determination made by the Minister for the provision of tax (financial) advice services under subsection 921BB(1) of the Corporations Act (see Part 3 of the *Corporations (Relevant Providers—Education and Training Standards) Determination 2021*).

### **Item 20 – Application fees for tax agent and BAS agent registration**

Paragraph 20-20(2)(b) of the TAS Act provides for regulations to prescribe a fee for making an application for registration as a tax agent or BAS agent.

Item 20 of the Regulations repeals and replaces the table in subsection 9(1) of the TAS Regulations setting out registration fees to take into account the creation of the new eligibility pathways. These changes:

- make a consequential amendment to remove the fee for registration as a tax (financial) adviser;
- provide that the registration fee for registration as a tax agent under new pathways 207 to 210 is \$704, which is the same fee as for registration as a tax agent under existing pathways 201 to 206; and
- provide that there is no registration fee for registration as a tax agent under new pathway 211, which recognises that, at the time the new requirements came into force, these persons were already registered as tax (financial) advisers. However, this pathway will not be available after 1 January 2023.

Consistent with current requirements, all of the registration fees in subsection 9(1) of the TAS Regulations are subject to indexation in accordance with subsection 9(2) of the TAS Regulations.

## Consequential amendments

### **Items 9 to 12, 14, 16 to 19, 21 to 29, 32, 35 to 37 and 40 - Consequential amendments for tax (financial) advisers and recognised tax (financial) adviser associations**

The Regulations also make a number of consequential amendments to the TAS Regulations to remove redundant references to ‘tax (financial) adviser’ and ‘recognised tax (financial) adviser associations’, to complement the changes made in the Better Advice Act.

Items 9 to 12, 14, 16 to 19, 21 to 29, 32, 35 to 37 and 40 of the Regulations make consequential amendments to the TAS Regulations to support the changes made by the Better Advice Act to implement recommendation 7.1 of the Independent Review of the TPB. These changes remove the following references in the TAS Regulations:

- registered tax (financial) advisers – including the associated eligibility criteria, registration fees and public reporting requirements; and
- recognised tax (financial) adviser associations – the Better Advice Act provides that tax (financial) adviser organisations will no longer be able to be recognised (or continue to be recognised) from 1 January 2022;
  - On 1 January 2022, recognised tax (financial) adviser associations recognised under the TAS Regulations, as in force immediately before this day, will automatically be taken to be recognised tax agent associations.

## **Statement of Compatibility with Human Rights**

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

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

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

#### **Overview of the Legislative Instrument**

The Regulations amend the *Australian Securities and Investments Commission Regulations 2001*, the *Corporations Regulations 2001* and the *Tax Agent Services Regulations 2009* to:

- prescribe criteria for when ASIC must convene an FSCP;
- set allowances for witnesses summoned to appear at a hearing of an FSCP;
- provide that specified civil penalty provisions are not taken to be significant (and therefore may not be reportable) under the breach reporting regime;
- prescribe sanctions that must be included on the Register of Relevant Providers;
- provide for the Minister to be able to delegate the functions and powers to approve foreign qualifications to officers in the Department of Treasury;
- extend the deadline for certain existing providers to pass the financial adviser exam;
- set requirements (including eligibility criteria, fees and transitional provisions) for non-relevant providers (individuals, companies and partnerships) who provide tax (financial) advice services to be registered as tax agents under the TAS Act; and
- make consequential amendments to the *Tax Agent Services Regulations 2009* to remove references to tax (financial) advisers and recognised tax (financial) adviser associations.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.