



FINANCIAL  
SERVICES  
COUNCIL

# Tax Practitioners Board Review Discussion Paper

FSC Submission

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## 1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing almost \$3 trillion on behalf of more than 14.8 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

## 2. Regulation of Tax Financial Advisers (Chapter 10)

In relation to the regulation of Tax Financial Advisers (**TFAs**), discussed in Chapter 10, the FSC recommends that Option 2 be adopted for the following reasons.

### 2.1. Minimises regulatory burden and costs on TFAs

Option 2 ensures oversight of tax advice provided by financial advisers (under ASIC) while removing the need for duplication of regulators and unnecessary cost.

Under this Option, the regulatory regime would be significantly simplified by:

- Requiring advisers to be authorised for the provision of financial advice services (including tax (financial) advice) under one licensing regime regulated solely by ASIC.
- Having only one registration.
- Requiring adherence to just one Code of Ethics (inclusive of conduct).
- having regulatory oversight by one code monitoring body.

This is consistent with the philosophy expressed in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Hayne Royal Commission**) that financial services law should be simplified. The provision of a tax (financial) advice service is provided in the course of financial advice usually given by an Australian Financial Service (**AFS**) licensee or representative. Financial advisers are excluded from providing the services typically provided by registered tax agents, unless they are registered as tax agents with the Tax Practitioners Board (**TPB**).

The regulatory environment has significantly changed since the implementation of the TASA (2009) regime and regulation by the TPB from 2014. Specifically, the combination of:

- the new education and ongoing professional development requirements;
- a new adviser exam;
- the FASEA Code of Ethics from 1 January 2020;

- the Code Monitoring Body (**CMB**) framework;
- Life Insurance Framework (LIF) reforms;
- the reforms arising from the recommendations of the Hayne Royal Commission;
- the creation of AFCA from 1 November 2018; and
- the increased regulatory activity of ASIC

Option 2 is further supported by the following recent announcement from the Government, in line with the recommendations of the Hayne Royal Commission:

*The Government is also creating a new disciplinary system for financial advisers that will include a single, central disciplinary body. The new body will be responsible for the registration, monitoring and sanctioning of financial advisers. This Royal Commission recommendation builds on the Government's professional standards reforms to raise the educational, training and ethical standards of financial advisers. The Government will proceed with monitoring of the Code of Ethics introduced as part of those reforms, which require financial advisers, from 15 November 2019, to subscribe to a code monitoring body that will enforce the Code of Ethics from 1 January 2020.<sup>1</sup>*

These changes, in their totality, supersede the need for the role of the TPB as a secondary regulator of financial advisers.

For the 2017–18 financial year, ASIC introduced a Supervisory Levy, which is applicable to AFS Licensees and is in part determined by the number of financial advisers listed on the ASIC Financial Adviser Register (**FAR**). The indicative levy payable per adviser for 2018–2019 is \$907. The TPB increased their registration fee to \$550 (subject to CPI indexation), covering a 3 year period. Further:

- It is likely that an ASIC approved Code Monitoring Body will also charge fees for membership, noting that financial advisers must be a member of such a body from 1 January 2020.
- Licensees and/or their financial advisers will incur significant costs associated with meeting the FASEA compulsory exam and education requirements.
- The introduction of a pre-funded Compensation Scheme of Last Resort (**CSLR**) will impose additional costs on the advice industry.
- FASEA is also expected to move to an industry funding model in the next few years which will add further costs for financial advisers.

Given the argument above, the imposition of another regulatory cost is unnecessary and may result in the cost of advice increasing for consumers for no tangible benefit, reducing the accessibility of advice at a time when over half of all Australians arguably have an unmet advice need.<sup>2</sup>

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<sup>1</sup> See Page 6 of *Restoring Trust in Australia's Financial System – Financial Services Royal Commission Implementation Roadmap*, August 2019

<sup>2</sup> Investment Trends Financial Advice Report 2018

## 2.2. Adviser registration under Option 2

Under Option 2, adviser registration takes place under the FAR, and there is no need for separate registration. This removes the need for separate registration and different registration cycle with the TPB. The FAR already contains information on financial advisers that is duplicated by the TPB Register. From 15 November 2019, the FAR will also contain:

- additional information on the individual's membership of an ASIC approved Code Monitoring Body;
- completed education that meets FASEA's new education standards; and
- attestation on whether a financial adviser has complied with their ongoing Continuing Professional Development (**CPD**) obligations.

This will fully negate the need for a financial adviser's details to be duplicated on a secondary register.

We note from the Consultation Paper that consumers are largely unaware of their rights of using a registered tax professional, nor of the existence of the TPB, with the TPB agreeing that they need to increase their own visibility. We therefore query the utility of financial advisers having to be registered under the TPB as well as the FAR.

## 2.3. Code of Conduct

Under Option 2, there is no need for a separate TPB Code of Professional Conduct – financial advisers and AFS licensees are required to adhere to the FASEA Code from 1 January 2020. This means there will be sufficient governance and oversight of adviser obligations under the Financial Planners and Advisers Code of Ethics.

Compliance with other Codes of Ethics is redundant, and having two (or more) codes would be costly and confusing for all, including consumers.

Therefore, the FSC supports removing the requirement for TFAs to meet a second overlapping code of conduct, which will mean advisers only need to adhere to one code (see further discussion on Codes in section 5.3 below).

## 2.4. Consumer benefit

Option 2 would limit consumer confusion about who to deal with. For any particular individual adviser, they would be either fully regulated by TPB, or by ASIC, and there would be no overlap.

The Australian Financial Complaints Authority (**AFCA**) commenced on 1 November 2018 as the dispute resolution scheme for financial services, bringing together complaints that previously would have been handled by the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal under a 'one stop shop'.<sup>3</sup> The consumer protection provisions provided to consumers by the TPB are limited to

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<sup>3</sup> See <https://www.afca.org.au/public/redirect.jsp?id=5394>

those who use a tax or BAS agent. There is no protection against losses incurred by consumers as a result of the provision of a tax (financial) advice service, as these are dealt with by AFCA. Therefore, there is no material benefit for consumers by the continuation of the requirement for financial advisers to be registered as a TFA.

### 3. Other Options & general comments

The comments below indicate some of the FSC's concerns with options other than the FSC's preferred option 2. We would seek further consultation with the TPB Review or Treasury before any decision is made to implement these other options.

#### 3.1. Option 1, and Options 3 to 6

The FSC has concerns about Options 1 and 3–6. These options will result in three regulatory bodies to supervise the conduct of TFAs, namely the TPB, the Code Monitoring Body (**CMB**) and the Single Disciplinary Body (**SDB**). This is costly and unnecessary regulatory duplication which will cause consumer confusion. These Options reduce or remove the benefits of Option 2 outlined earlier in this submission.

If the TPB Review considers that there should be some degree of duplication of regulation of TFAs, the FSC recommends that no decision should be made on this issue until the details of the SDB are decided and legislated.

We also recommend, that among the other options, advisers should opt-in to TFA registration (under Options 5 and 6) as an opt in model is more consistent with the various commitments that an adviser would need to meet to be a TFA. We consider that not all advisers are TFAs and therefore an opt-in model is preferable to an opt out model (the opt out model implies that all advisers should be TFAs by default unless expressly opting out).

#### 3.2. Option 7: *de minimis* exemptions

The FSC does not support the proposal in Option 7 to introduce an exemption for financial advisers that provide incidental tax advice, and conversely for tax advisers who provide incidental financial advice. As noted, the latter part of Option 7 would reintroduce the “accountants’ exemption” – it is this part of Option 7 that is of significant concern to the FSC.

Arguably, under the previous accountants’ exemption, the definition of ‘incidental’ was broad, meaning the exemption actually resulted in a substantial amount of financial advice that was not regulated in line with other types of financial advice.

This exemption allowed recognised accountants to provide financial product advice about acquiring or disposing of an interest in a self-managed superannuation fund (**SMSF**) without being covered by an AFS licence and meeting relevant competency requirements to give such advice.

The current licensing regime enables those who were previously providing advice under the accountants’ exemption to provide similar services under a limited financial services licensing regime. This regime ensures that those who recommend clients establish an SMSF

do so under the existing financial services laws including the requirement to adhere to the Best Interest Duty. This requires the advice provider to analyse the client's existing situation and ensure that the establishment of the SMSF and contributions made to superannuation are done so in the client's best interest. Further, the consumer also receives a consolidated summary of their advice in the form of a Statement of Advice clearly identifying how the advice meets the consumers objectives and is in the client's best interests. Additionally, the consumer is also protected should any inappropriate advice have been provided, such that the financial services provider is required to remediate the loss.

Very high conduct and consumer obligations are imposed on financial advice providers which serve to protect consumers. These obligations and safeguards are not provided to consumers if the limited licensing regime is removed and Option 7 is implemented.

We note that further to our previous submission (of 11 April 2019) that our proposal is not to remove all TFA requirements from financial advisers but to fold them into the ASIC and FASEA Code of Ethics requirements such that any duplication is removed.

### 3.3. Consequential changes

Under all options considered for regulation of TFAs, some further legislative and regulatory changes would be required. Under any option involving ASIC regulating tax advice, appropriate changes will need to be made to the Corporations Act and section 90-15 of the Tax Agent Services Act 2009. The focus of ASIC (and any other relevant regulator) will need to be broadened to cover tax advice.

### 3.4. Professional Indemnity insurance

One of the registration requirements for TFAs is they must maintain Professional Indemnity (PI) insurance that meets the TPB's requirements during the period of registration as a TFA. The TPB's PI insurance requirements are generally consistent with the ASIC's requirements for **AFS** licensees, with the following differences:

1. The TPB require PI insurance coverage to include tax advice. ASIC's requirements do not extend to tax advice.
2. The TPB's PI insurance requirements apply to all representatives who are registered with them (including authorised representatives) and not just AFS licensees.

In effect, these differences are non-consequential as financial advisers are not permitted to provide tax advice (as in those tax advice services provided by registered tax agents or BAS agents) and an AFS licensee's PI Policy covers all representatives authorised by them. It could be argued that without the additional burden of being subject to regulation by the TPB, that PI insurance premiums could be lesser (or not rise as much) due to the diminished risk of being subject to a claim under a prior co-regulatory regime.

### 3.5. Registration with both ASIC and TPB

If an Option is chosen that involves registration of TFAs with both ASIC and the TPB, then the FSC recommends that the burden of this dual registration be minimised – for example by

having one form used for both TPB and ASIC registration, the same data requests for both and the same annual tasks/forms for ongoing registrants.

Financial advisers are currently licensed via the ASIC Portal. The ASIC Portal could be updated to include a field (yes/no) box with a description such as “is the person required to be registered by the TPB?” The TPB receive an electronic copy of ASIC’s “Professionals Register” each week, and this is a way for the TPB to match up their records with ASIC’s, and then register the adviser. Some licensees employ salaried advisers but do not register their advisers as “authorised representatives”, instead the advisers are registered on the FAR. Therefore, both the ASIC register and the FAR could be sent to the TPB for registration purposes.

The TPB can take up to 60 days to approve an application, whereas the ASIC Portal registration is much faster. There is a good case for bringing these timeframes closer together, although the FSC would have significant concerns if the ASIC registration were delayed. In other words, the FSC recommends that the TPB timeframes be accelerated rather than the ASIC timeframes be delayed.

#### 4. Qualifications and education (Chapter 5)

Option 2 in Chapter 10 does not make any commentary in relation to education requirements. However, in important cases detailed below the FASEA standards supersede the TPB education standards.

Current TPB requirements for TFAs are they must have completed a TPB approved course in tax law and commercial law unless the TFA is exempted under Option 304 (the ‘membership of professional body’ option – see table below).

Existing TFAs will have met the education requirements under the TPB, so in removing the TFA framework for existing financial advisers, existing TFAs would be deemed to have met the TPB knowledge requirements. The remaining membership categories under Standard Options 301–303 require TPB approved Australian tax law and commercial law subjects. The TPB “primary qualification” requirement for option 302 (i.e. Diploma) and option 303 (i.e. no qualification) are below the AQF7 minimum standard required within the FASEAs approved Education pathways (i.e. degree or higher).

FASEA has incorporated the Australian tax law in the FASEA curriculum for approved financial planning degrees. We support this approach given it is intended to provide specific tax education to new entrants which would assist with the provision of tax related financial advice.

To become a registered TFA, an applicant must meet certain eligibility criteria, including the requirements prescribed by the Tax Agent Services Regulations 2009 (**TASR**). In certain cases, one such requirement is that an applicant seeking registration must have successfully completed a course in Australian taxation law and a course in commercial law that is approved by the Board. Applicants may apply to register or renew their registration as a TFA through one of the four options (items 301 to 304) set out in the TASR. Only those registering or renewing their registration under item 304 are currently exempt from the



requirement to complete Board approved courses in Australian taxation law and a course in commercial law. Option 304 takes into account the TFA's relevant experience and membership of a TPB approved professional association.

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

Reference: <https://www.tpb.gov.au/qualifications-and-experience-tax-financial-advisers>

A Board approved course includes those courses completed at AQF6 level (i.e. Advanced Diploma). With the transition period for the implementation of the FASEA education standards for *existing advisers* having commenced 1 January 2019, all courses to meet the FASEA education standards must be completed at AQF7 (bachelor degree) level or higher. This includes provision for:

- specified bridging courses at AQF8 level; and
- specified graduate diplomas at AQF8 level (or similar courses); and
- appropriate recognition of relevant providers' prior learning and qualifications.

While Recognition of Prior Learning (**RPL**) has been allowed for with respect for credits against the FASEA requirements for *existing advisers*, all new financial advisers (i.e. *new entrants*) will need to complete a FASEA approved bachelor's degree (or equivalent) at AQF7 level or higher. In this context, the FASEA standards have superseded the TPB standards with respect to the education requirements for financial advisers.

FASEA has determined the following bridging courses for compliance with s1546B(1)(b) for existing advisers. They are:

1. Financial Advice Regulatory & Legal Obligations (Corporations Act, Anti-Money Laundering, Privacy & Tax Practitioners Board)
2. Ethics and professionalism (including the FASEA Code of Ethics and Code Monitoring Bodies)

### 3. Behavioural Finance: Client and Consumer Behaviour, Engagement and Decision Making

Source: FPS001 FASEA Education Pathways Policy (January 2019)

Depending on the pathway for the new or existing adviser, existing advisers will be required to undertake one or all of the abovenamed courses. The courses will be at an AQF8 standard and offered standalone by some education providers during the transition period (1 Jan 2019 – 1 Jan 2026) and will be embedded into relevant programs in the future by Higher Education Providers.

#### 4.1. Commercial Law

The Financial Advice Regulatory & Legal Obligations bridging course includes content relevant to the provision of financial advice services including:

- the main sources of Law and the regulatory structure of financial services law in Australia;
- the various obligations imposed on participants by financial services legislation; and
- codes of practice applicable to the financial planning profession.

It can be argued that the FASEA curriculum as stated above supersedes any TPB educational pre-requisites as it:

- specifies the main sources of law (which is the foundation of commercial law)
- specifies the applicable financial services law in Australia; and
- specifies the codes of practice relevant to the financial planning profession (including TPB).

Example: Kaplan <https://www.kaplanprofessional.edu.au/fpc001-economic-legal-and-ethical-context-for-financial-planning/>

Therefore, this would negate the need for either an existing adviser or new entrant to complete a TPB approved course in commercial law as in practical terms, they have already satisfied the FASEA standard at AQF7 or higher level (or received RPL against the Standard where applicable).

#### 4.2. Taxation Law

While taxation law is not specifically referenced in the bridging courses curriculum above, in practice, *existing advisers* who are required to complete a FASEA approved Graduate Diploma of Financial Planning qualification (as opposed to a bridging course) at AQF8 level, are likely to have completed a course in taxation law as part of that qualification, except where RPL has been provided in recognition of prior studies in taxation law. This is because “Taxation (including Tax Practitioner Board requirement)” is a core knowledge area of FASEA. The major providers of financial services education in Australia provide FASEA approved courses at AQF8 (Graduate Diploma of Financial Planning) level which include

taxation law as a core subject. This list includes Kaplan Professional, Deakin University, Swinburne University; NSW TAFE; UNSW; Griffith University, USQ, etc.<sup>4</sup>

Further, it should be noted that in determining the “relevant degree” criteria for the purposes of education pathways guidance for *existing advisers*, FASEA references “commercial law and taxation law courses (as defined by the TPB)” as included in the “designated fields of study,” which in effect, recognise the prior completion of relevant studies. Refer to 3. Glossary of *Corporations (Relevant Providers Degrees, Qualifications and Courses Standard) Determination 2018* Explanatory Statement<sup>5</sup>

*New entrants* must complete a FASEA approved degree of 24 subjects, unless the “new entrant” is a career changer with work experience, hence they can meet the FASEA education standard via the completion of a FASEA approved Graduate Diploma of Financial Planning, containing 8 subjects.

Referring to the FASEA Approved Courses by Higher Education Providers (August 2019) publication,<sup>6</sup> for the universities that offer a bachelor degree or higher, they specify that the subjects to be completed as part of the degree program include taxation law and/or commercial law (or their equivalent descriptions such as “business law” or “taxation”).

Therefore, given that any new entrant entering the financial planning profession from 1 January 2019 must have completed a FASEA approved degree (or higher), these new entrants will have completed relevant studies in both taxation law and commercial law (or equivalent) relevant to the provision of financial advice.

In both cases above, for both existing advisers and new entrants, the implementation of the FASEA education standards supersede the requirement for tax (financial) advisers to complete additional standalone TPB approved courses in taxation law and commercial law. Indeed, many existing advisers would have already completed these courses since registering under the TPB’s Transitional Option (where relevant) during their transitional registration period, or as part of their requirements when applying for TPB registration under the Standard Option.

## 5. Other points for comment

### 5.1. Tax Practitioners Board Governance (Chapter 3)

This point relates to Discussion Paper Consultation Point 3.2.

If Option 2 in Chapter 10 is not adopted, meaning the TPB has at least some role to regulate TFAs, then the FSC considers the TPB Board should contain at least one member who has

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<sup>4</sup> A full list of FASEA approved courses can be accessed here: <https://www.fasea.gov.au/wp-content/uploads/2019/08/FINAL-BOOKLET-FASEA-Approved-Courses-by-HEP-updated-20190827.pdf>

<sup>5</sup> <https://www.legislation.gov.au/Details/F2018L01833/Explanatory-Statement/Text>

<sup>6</sup> <https://www.fasea.gov.au/wp-content/uploads/2019/08/FINAL-BOOKLET-FASEA-Approved-Courses-by-HEP-updated-20190827.pdf>

significant and practical experience in the provision of TFA services. However, it could be a potential conflict of interest for a FASEA Board member to be considered for a TPB Board member position, given the overlap between the two agencies (although FASEA is not a regulator). We note the preference for the TPB to maintain a degree of independence from the ATO, so to maintain this degree of independence from another government body, the TPB Board should seek a member who has significant and practical experience in the provision of TFA services, but not a person who is on the Board (or similar position) with another government body.

## 5.2. Fit and proper person test (Chapter 5)

This point relates to Discussion Paper pages 40 to 42 and Consultation Point 5.9.

The implementation of the FASEA Standards from 1 January 2019 includes a provision that a *new entrant* must complete a Professional Year with a duration of at least 12 months. The Professional Year is heavily structured, where the new entrant has to complete at least 1,500 hours of work-based supervised tasks and at least 100 hours of structured, formal training. All of this work and training must be kept accurately in a log book and before the new entrant can begin a Professional Year, a signed off Professional Year plan must be in place.

During this period, the new entrant has substantial restrictions including:

- Supervision by an experienced financial adviser.
- Clients being informed in writing before direct or indirect interaction with the new entrant.
- The new entrant must pass the FASEA Financial Adviser Exam prior to being authorised to seeing clients without direct supervision.
- The new entrant cannot be referred to as a “Provisional Financial Planner/Adviser” until they pass the Exam, and pass Quarters 1 and 2 of the Professional Year.
- Identifying and successfully resolving several ethical dilemmas.

In addition, the new entrant cannot provide advice in their own name until they have completed all requirements of the Professional Year, and ASIC are notified by the licensee that their status has changed from “Provisional Financial Planner/Adviser”.

Given the highly structured nature of the Professional Year, and considered in conjunction with the degree standard, we recommend that this satisfies the experience requirements to register as a tax (financial) adviser. This will also help to align the qualifications and experience requirements with both FASEA and the TPB.

### 5.3. Code of Professional Conduct (Chapter 6)

This point relates to Discussion Paper Consultation Point 6.1.

If the TPB are no longer relevant to financial advisers as a regulator (see FSC recommendations in relation to Chapter 10 above), then the TASA Code is also no longer relevant. The FASEA Code of Ethics contains 12 Ethical Standards, which are not only effective as standalone principles, but in totality provide a comprehensive framework governing the provision of financial advice services.

The FSC considers only one Code should apply to TFAs, as recommended in our previous submission of 11 April 2019. Our previous submission discusses some areas of overlap between the Codes.

We note in some cases, the FASEA Code goes further than the TASA Code:

- FASEA Standard 1 requires advisers to act in accordance with the “spirit of the law”.
- FASEA Standard 3 prohibits acting when there is a conflict of interest, which goes further than the TASA code which requires management of conflicts.
- FASEA Standard 12 requires individuals to hold others to account for the protection of the public interest.

### 5.4. Conclusion

As noted in this submission, the regulatory environment has changed considerably since the introduction of the TFA regime and the industry is moving towards significantly higher professional and ethical standards. The Royal Commission also made specific recommendations with respect to financial advice, and the Government have committed to implement all of these (and more). All of these measures are designed to both protect and enhance consumer outcomes. Given the education and professional standards framework now in place for financial advisers we consider that the co-regulatory approach involving the TPB is no longer necessary and that, to the extent there are any regulatory gaps between the TFA and financial adviser requirements, this can be easily folded into the ASIC and FASEA requirements. This will simplify the regulatory regime for consumers and will remove unnecessary regulatory overlap and costs from the system.