

EXPLANATORY STATEMENT for
ASIC CORPORATIONS (PROFESSIONAL STANDARDS—
TRANSITIONAL) INSTRUMENT 2018/894

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (ASIC) makes *ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894* under subsection 926A(2) of the *Corporations Act 2001* (Act).

Subsection 926A(2) of the Act provides that ASIC may exempt a person or a financial product or class of persons or financial products from all or specified provisions of Part 7.6 of the Act (other than Divisions 4 and 8); or declare that Part 7.6 of the Act (other than Divisions 4 and 8) applies in relation to a person or a financial product or class of persons or financial products as if specified provisions were omitted, modified or varied. Subsection 926A(6)(b) further specifies that this power also applies to any of the transitional provisions in Part 10.23A that relate to Part 7.6 of the Act (other than Divisions 4 and 8).

1. Background

- 1.1. The Act was amended by the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* to introduce several measures to raise the education, training and ethical standards of financial advisers (the professional standards reforms).
- 1.2. The professional standards reforms contained in the Act apply to ‘relevant providers’. A relevant provider is an individual who is authorised to provide personal advice to retail clients on more complex financial products (called ‘relevant financial products’).
- 1.3. Under the professional standards reforms, all relevant providers (apart from limited service time-share advisers) must:
 - have a bachelor or higher degree, or equivalent qualification approved by the Financial Adviser Standards and Ethics Authority (FASEA) (degree requirement);
 - pass an exam approved by FASEA (exam requirement); and

- unless they are existing providers, complete a year of work and training (year of work and training requirement). (An ‘existing provider’ is a person who is a relevant provider at any time between 1 January 2016 and 1 January 2019, and is not prohibited from providing advice on 1 January 2019.)
- 1.4. These education and training standards are set out in section 921B of the Act. Sections 921C and 1546C of the Act specify what requirements apply to whom and when they apply.
 - 1.5. Relevant providers must also meet continuing professional development (CPD) requirements each year (CPD requirement), comply with a Code of Ethics and be covered by a compliance scheme that monitors and enforces compliance with the Code of Ethics.
 - 1.6. From 1 January 2019, only relevant providers who meet the new standards in the Act can call themselves a ‘financial adviser’ or ‘financial planner’ or similar terms. Transitional arrangements apply to ‘existing providers’, which can include certain people who provided advice in a foreign country.
 - 1.7. The transitional arrangements for existing providers mean they have until 1 January 2021 to meet the exam requirement and until 1 January 2024 to meet the degree requirement. From 1 January 2019, new entrants, called ‘provisional relevant providers’, must meet these requirements before they can be authorised to provide personal advice to retail clients on relevant financial products. Provisional relevant providers must also comply with the year of work and training and cannot call themselves a financial adviser (or similar term). Existing providers do not have to undertake a year of work and training and can continue to call themselves a financial adviser (or similar term) from 1 January 2019, provided they satisfy the relevant requirements that apply to them at any given time.
 - 1.8. The Act imposes obligations on Australian financial services licensees (licensees) to notify ASIC of certain information and for ASIC to keep a register of these details. To support these new reforms, significant changes are required to the Register of Relevant Providers (known as the ‘Financial Advisers Register’) and ASIC’s associated IT systems to allow licensees to comply with their obligations.

2. Purpose of the instrument

- 2.1. This instrument changes the reporting dates for a number of disclosure obligations in the transition to the professional standards reforms.
- 2.2. This instrument also makes minor technical amendments to the Act to address unintended consequences and to ensure the professional standards reforms apply to as intended. In particular, they ensure the Act applies consistently to individuals.

Changes to reporting dates

- 2.3. The revised schedule for reporting to ASIC that is set out below is intended to simplify licensees' disclosure obligations and enable ASIC to implement the required IT systems changes more effectively.
- 2.4. Under the Act, licensees must notify ASIC of certain new information. This includes information about provisional relevant providers, a licensee's CPD year and any failures by relevant providers to comply with their CPD requirements, relevant providers who have met the exam requirement, and the principal place of business and compliance scheme membership of their relevant providers (earliest notifications).
- 2.5. This instrument aligns licensees' earliest notifications to 15 November 2019. This new information will be displayed on the Register of Relevant Providers from this date onwards.
- 2.6. The changes do not affect relevant providers' and licensees' substantive obligations under the Act. Relevant providers and licensees must still comply with the new education and training standards and licensees must keep appropriate records for compliance purposes. Licensees will still be required to:
 - comply with the requirements for provisional relevant providers from 1 January 2019, including ensuring each provisional relevant provider has met the degree requirement, met the exam requirement and has met or is undertaking the year of work and training requirement;
 - maintain appropriate records about the provisional relevant provider (for example, name, product authorisations if given and when their year of work and training commenced);
 - comply with CPD requirements and maintain appropriate records (for example, the start date of the CPD year and any failures by relevant providers to comply with CPD requirements); and
 - ensure existing providers who they have authorised pass the exam before 1 January 2021.
- 2.7. Between 1 January 2019 and 14 November 2019, licensees do not need to tell ASIC about:
 - any provisional relevant providers they have authorised;
 - the start date of their CPD year;
 - failure(s) by their relevant providers to comply with CPD requirements; and

- existing providers that have passed the exam.
- 2.8. Licensees will have 30 business days from 15 November 2019 to tell ASIC this information.

Minor technical issues

- 2.9. The instrument addresses unintended consequences and ensures the professional standards reforms apply as intended. The following technical issues are addressed to reflect the policy intent of the Act:
- It clarifies that the group of persons who do not have access to the transitional provisions in section 1546B because they were prohibited from providing advice on 1 January 2019 includes a person who was subject to an enforceable undertaking where they undertook to not provide financial product advice or financial services in any capacity at that time.
 - It provides that from 1 January 2019 individuals who are prohibited from providing financial services on 1 January 2019 cannot be granted a licence or be authorised to provide personal advice to retail clients in relation to relevant financial products unless they meet the education and training standards.
 - It addresses the situation where an existing provider is not a relevant provider. The Act imposes obligations on an existing provider to meet certain education and training standards by specified future dates. These subsections appear to presuppose that an existing provider will be a relevant provider by these future dates. This will be the case in many circumstances but will not always be the case, for example, where an existing provider has retired.
 - It applies the education and training standards to a person who was a relevant provider before 1 January 2016 but who was not a relevant provider between 1 January 2016 and 1 January 2019. A person within this class of persons, and who becomes a relevant provider after 1 January 2019 is not subject to the education and training standards at all. The modifications deal with those circumstances.

3. Operation of the instrument

Part 1 – Preliminary

- 3.1. Section 1 provides that the name of the legislative instrument is to be *ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894*.
- 3.2. Section 2 provides that the instrument commences on the day after it is registered on the Federal Register of Legislation.
- 3.3. Section 3 provides that the instrument is made under subsection 926A(2) of the Act.

- 3.4. Section 4 outlines relevant definitions for key terms used in the instrument. ‘Act’ is defined as meaning the *Corporations Act 2001*.

Part 2 – Declaration

Section 5

- 3.5. Section 5 of the instrument provides that licensees are not required to lodge any notices with ASIC about provisional relevant providers who join the industry from 1 January 2019 until on and after 15 November 2019. Licensees who have authorised a provisional relevant provider between 1 January 2019 and 14 November 2019 will have 30 business days from 15 November 2019 to notify ASIC of the authorisation and other information as required by the Act. As a result, provisional relevant providers can only be added to the Register of Relevant Providers from 15 November 2019.

Section 6

- 3.6. Section 6 of the instrument provides that licensees do not need to lodge a notice under section 922HB about a relevant provider who has failed to comply with the CPD requirements between 1 January 2019 and 14 November 2019. Licensees will have 30 business days from 15 November 2019 to notify ASIC of non-compliance with the CPD requirements between 1 January 2019 and 14 November 2019, which means these notices must be lodged with ASIC before 1 January 2020.

Section 7

- 3.7. Section 7 of the instrument provides that a licensee does not have to notify ASIC of the start date of a licensee’s CPD year until 15 November 2019. Licensees will have 30 business days from 15 November 2019 to notify ASIC of this information in accordance with the notice provision in section 922HA of the Act. This means licensees must lodge the notice with ASIC before 1 January 2020.

Section 8

- 3.8. Section 8 of the instrument provides that licensees do not have to lodge a notice about an existing provider that has passed the exam requirement between 1 January 2019 and 14 November 2019 until on or after 15 November 2019. Licensees will have 30 business days from 15 November 2019 to notify ASIC of any of their existing providers of whom they are aware have passed the exam between 1 January 2019 and 14 November 2019. This means the notice about these existing providers must be lodged before 1 January 2020.

Section 9

- 3.9. Section 9 of the instrument provides that a licensee must notify ASIC of the principal place of business and compliance scheme membership of their relevant providers in

the same notice, and in the first notice they lodge with ASIC, on and after 15 November 2019. The notice must be lodged before 1 January 2020.

Section 10

- 3.10. Paragraph 10(a) of the instrument removes the reference in the existing provider definition to a person who on 1 January 2019 is ‘suspended’. This is because a relevant provider will not be suspended, rather they would be subject to a banning order or disqualification, which may be permanent or for a specified period of time.
- 3.11. Paragraph 10(a) of the instrument further clarifies that a person is not an existing provider if they are subject to an enforceable undertaking on 1 January 2019, under which they undertook to not provide financial product advice or financial services generally (under section 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act)). Enforceable undertakings are an alternative to ASIC taking action to ban an adviser. As the regulatory outcome for the relevant provider has to date been functionally equivalent, it should remain so and accordingly the treatment on re-entry should be the same. This amendment:
- ensures that a person who agrees to remove themselves from the industry through an enforceable undertaking because of misconduct continues to be treated in the same way as someone who is banned or disqualified; and
 - reflects the overarching policy intent of the Act that a person who is prohibited from providing advice on 1 January 2019 will not have access to the transitional arrangements for existing providers.
- 3.12. Paragraph 10(b) of the instrument provides that on and from 1 January 2019 the following people cannot be granted a licence by ASIC or be authorised by a licensee to provide personal advice to retail clients in relation to relevant financial products unless the education and training standards in section 921B have been met:
- an individual who was banned or disqualified under Division 8 of Part 7.6 of the Act on 1 January 2019, or
 - an individual who was subject to an enforceable undertaking under section 93AA of the ASIC Act under which they agreed to not provide financial product advice or financial services in any capacity on 1 January 2019, or
 - an individual who was prohibited under the law of a foreign country from providing personal advice in the foreign country to retail clients in relation to relevant financial products on 1 January 2019.
- 3.13. This gives effect to the policy intent of the Act that the above people would need to meet the new standards on and from 1 January 2019. These people will have to meet the exam requirement and degree requirement and have met or be undertaking the

year of work and training requirement, before they can be authorised to provide personal advice to retail clients in relation to relevant financial products on or after 1 January 2019. That is, they will need to meet the requirements of a provisional relevant provider if they choose to re-enter the financial services industry at the conclusion of the exclusion period.

Section 11

- 3.14. Part 10.23A of the Act, which contains the transitional provisions in relation to the professional standards reforms, uses the concepts of ‘existing provider’ and ‘relevant provider’. The definition of ‘existing provider’ in section 1546A is based on a person’s authorisation status between 1 January 2016 and 1 January 2019. There are gaps in how these concepts operate which lead to unintended consequences. The purpose of section 11 of the instrument is to ensure that the education and training standards apply as intended, and in a way that is practical and meaningful. Section 11 of the instrument makes some notional modifications to sections 1546B, 1546C and 1546D of the Act.
- 3.15. Subsections 1546B(1) and (3) of the Act impose obligations on an existing provider to meet the exam requirement and the degree requirement by specified future dates. These subsections appear to presuppose that an existing provider will be a relevant provider by these future dates. This will be the case in many circumstances but will not always be the case (for example, where an existing provider has retired, or is taking a break, from the industry in the interim). The modifications to subsections 1546B(1) and (3) deal with those circumstances.
- 3.16. For example, the notional modifications have the effect that if an existing provider retires from the industry in 2020, the existing provider does not need to pass the exam before 1 January 2021 or meet the degree requirement by 1 January 2024. The notional modifications to subsections 1546B(1) and (3) work together with the notional subsections 1546C(3A) and (3B). Together, they have the effect that if an existing provider is not a relevant provider at the relevant future dates (and so is not required to complete the exam requirement and degree requirement by the relevant dates) but they subsequently wish to return to the industry and become a relevant provider once again, they can do so but only if they have completed the exam requirement and degree requirement before they return to the industry.

Example 1

Jane is authorised between 1 May 2014 and 1 May 2020 to provide personal advice to retail clients in relation to relevant financial products. Therefore, Jane is an existing provider. Jane takes a 12-month break from the industry on 1 May 2020 (that is, she ceased to be a relevant provider voluntarily from 1 May 2020). The law as written in the Act would have required Jane to have passed the exam by 1 January 2021, even though she was not a relevant provider at that time. This result is disproportionately burdensome and does not achieve the underlying purpose of the professional

standards reforms. The modification to subsection 1546B(3) has the effect that Jane does not need to have passed the exam by 1 January 2021. However, the new notional subsection 1546C(3A) has the effect that Jane cannot be authorised as a relevant provider from 1 May 2021 unless she has met the exam requirement.

Example 2

Mike is authorised from 1 May 2014 to 1 May 2023 to provide personal advice to retail clients in relation to relevant financial products. Therefore, Mike is an existing provider. Mike was required to pass the exam by 1 January 2021 and has done so. Mike takes a 12-month break from the industry on 1 May 2023 (that is, he ceased to be a relevant provider voluntarily from 1 May 2023). The law as written in the Act would have required Mike to have completed the degree (or equivalent) requirement by 1 January 2024, even though he was not a relevant provider at that time. This result is disproportionately burdensome and does not achieve the underlying purpose of the professional standards reforms.

The modification to subsection 1546B(1) has the effect that Mike does not need to have completed the degree (or equivalent) by 1 January 2024. However, the new notional subsection 1546C(3B) has the effect that Mike cannot be authorised as a relevant provider on 1 May 2024 unless he has completed the degree requirement (or equivalent).

- 3.17. A further gap in the legislation is in relation to a person who was a relevant provider before 1 January 2016 but who was not a relevant provider between 1 January 2016 and 1 January 2019. A person within this class of persons, and who becomes a relevant provider after 1 January 2019 is not subject to the education and training standards at all. Section 1546B does not apply to a person within this class because they are not existing providers. Further, section 1546C also does not apply because the person was previously a relevant provider (albeit not a time that would make them an existing provider). This is an unintended result. Notional subsection 1546C(3C) corrects this anomaly by applying section 921C (the limitation on authorisations) on and after 1 January 2019 to persons within this class until the education and training standards are met.

Example 3

Mary was only authorised from 1 July 2014 to 1 July 2015 to provide personal advice to retail clients in relation to relevant financial products. Therefore, Mary is not an existing provider.

If Mary wishes to return to the industry after 1 January 2019, she can do so but only if she has met the exam requirement, the degree requirement and has met or is undertaking the year of work and training requirement. So, if Mary wishes to return on 1 May 2019, she can only be authorised to do so if she has passed the exam, completed the degree and is undertaking a year of work and training. Notional subsection 1546C(3C) is required so that when Mary is authorised on 1 May 2019, she must meet the exam requirement and degree requirement before she can be authorised and have met or be undertaking the year of work and training requirement.

3.18. Section 1546D of the Act has the effect that the requirements relating to provisional relevant providers do not apply to a person who was a relevant provider before 1 January 2019. The intended policy was for the requirements relating to provisional relevant providers to not apply to a person who is an existing provider. The requirements relating to provisional relevant providers are intended to apply to a person who is not an existing provider, even if the person was a relevant provider before 1 January 2016. Notional subsection 1546D(2) gives effect to the intended policy.

Example 4

Following on from Example 3 above, the requirements of a provisional relevant provider apply to Mary when she is authorised on 1 May 2019. Bill is Mary's supervisor, which means that he:

- must ensure that Mary is appropriately supervised;
- must approve, in writing, the statement of advice provided to the client;
- is taken to have provided the advice; and
- must ensure that the client is provided with certain disclosures about Mary's role and expertise.

Further, Mary must not obstruct or hinder Bill when he is supervising her.

Section 12

3.19. Section 12 of the instrument provides that if a person is authorised following an exclusion period that covered 1 January 2019, a notice must be lodged under section 1546Z of the Act if they become a provisional relevant provider following this exclusion period. The applicable exclusion periods are where a person was on 1 January 2019:

- Banned or disqualified under Division 8 of Part 7.6; or
- subject to an enforceable undertaking under section 93AA of the ASIC Act, under which the person undertook to not provide financial product advice or financial services generally; or
- prohibited under the law of a foreign country from providing personal advice in the foreign country to retail clients in relation to relevant financial products.

4. Consultation

4.1. A full regulatory impact statement (RIS) was completed when the measures in the Act were developed. The RIS is in the Explanatory Memorandum to the Corporations

Amendment (Professional Standards of Financial Advisers) Bill 2016 and reflects extensive consultation and Government reviews.

- 4.2. A public consultation process was not undertaken for this instrument due to the minor and machinery nature of the instrument. Apart from the revised schedule, the amendments in this instrument give effect to the policy intent of the Act. The revised schedule is intended to simplify licensees' disclosure obligations to facilitate a smooth transition for the new reforms.

Statement of Compatibility with Human Rights

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

ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894

ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894 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

The *ASIC Corporations (Professional Standards—Transitional) Instrument 2018/894* makes changes to the reporting dates in the *Corporations Act 2001* (Act) to simplify Australian financial services licensees' disclosure obligations in the transition to the new financial adviser professional standards reforms. It also makes minor technical amendments to address unintended consequences to ensure that the new education and training standards in the Act apply in a consistent way to individuals when they were intended to.

Human rights implications

The Regulatory Impact Statement and Human Rights Statement to the *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017* assessed the impacts of the measures on an individual's right to freely choose and accept work under Article 6(1) of the International Convention on Economic, Social and Cultural Rights.

The restrictions for an individual to work as a financial adviser unless they meet the new standards are justified as the reforms create a minimum standard for financial advice which will give consumers a better service standard and instil confidence in the industry. Further, the transitional arrangements provide existing providers with additional time to meet the requirements to minimise the impact while also ensuring that consumers benefit from a standard minimum level of service from the industry.

As such, the requirements for financial advisers are consistent with the International Convention on Economic, Social and Cultural Rights.

Conclusion

Consistent with the Act, this Legislative Instrument is compatible with human rights as the requirements to work as a financial planner ensure that consumers receive better service standards and instil confidence in the industry. The transitional arrangements ensure that the impact on existing financial advisers is minimised without compromising the new industry standard.

Australian Securities and Investments Commission