



ASIC
Australian Securities &
Investments Commission

Explanatory Statement

ASIC Corporations (Existing Providers) Instrument 2022/241

This is the Explanatory Statement for the *ASIC Corporations (Existing Providers) Instrument 2022/241* (the **Instrument**).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (**ASIC**).

Summary

1. The Instrument puts in place interim measures to address an unintended prohibition on Australian financial services (**AFS**) licensees authorising certain Existing Providers¹ to provide personal advice to retail clients in relation to relevant financial products (**Personal Advice**) (the **Unintended Prohibition**).
2. The Unintended Prohibition applies to Existing Providers (**Affected Existing Providers**) who:
 - (i) have not passed the financial adviser exam (the **Exam Requirement**) by 1 January 2022 (or 1 October 2022 in certain cases) (**Exam Cut-Off Day**);
 - (ii) were not authorised to provide Personal Advice on the relevant Exam Cut-Off Day (i.e. either 1 January 2022 or 1 October 2022); and
 - (iii) have not obtained an approved degree, qualification or approved course (the **Qualification Requirement**).
3. The Unintended Prohibition arose following the commencement of the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (**Better Advice Act**) on 1 January 2022.
4. The effect of the Instrument is that Affected Existing Providers need only pass the Exam Requirement to be eligible to be authorised by an AFS licensee to provide Personal Advice. Affected Existing Providers must also comply with the Qualification

1. An ‘existing provider’ is a person who was a relevant provider (i.e. someone who was authorised to provide Personal Advice) at any point in time between January 2016 and January 2019, and who was not banned, disqualified, or subject to an enforceable undertaking on 1 January 2019: section 1546A of the *Corporations Act 2001*

Requirement by 1 January 2026. This effect achieves the intended policy outcome of the Better Advice Act.

Purpose of the Instrument

5. Amendments made by the Better Advice Act modify the operation of subsections 921C(1)-(4) of the *Corporations Act 2001* (the **Corporations Act**) (references to legislation are to the Corporations Act unless otherwise stated). Section 921C prohibits individuals who have not met the professional standards set out in section 921B (**Professional Standards**) from being authorised to provide Personal Advice.
6. Transitional provisions inserted into the Corporations Act by the Better Advice Act allow Existing Providers to meet the Professional Standards in a staggered way (as did the transitional provisions inserted by the *Corporations Amendment (Professional Standards of Financial Advisers Act 2017* which introduced the Professional Standards). Individuals who are not Existing Providers (known as new entrants) do not have the benefit of the transitional provisions and are required to meet all the Professional Standards before they are eligible to be authorised to provide Personal Advice. That is, new entrants must:
 - complete an approved degree, qualification or approved courses under subsection 921B(2);
 - pass the financial adviser exam administered by ASIC under subsection 921B(3); and
 - complete, or be undertaking, work and training, in accordance with subsection 921B(4).
7. Prior to the commencement of the Better Advice Act, Existing Providers generally had until 1 January 2026 to meet the Qualification Requirement.
8. Section 1684D (inserted by the Better Advice Act) has the unintended effect that Affected Existing Providers are required to meet the Exam Requirement and the Qualification Requirement *before* they are eligible to be authorised to provide Personal Advice. That is, the Affected Existing Providers no longer have until 1 January 2026 to meet the Qualification Requirement.
9. An example of how the Unintended Prohibition applies to Affected Existing Providers follows:

Jane is an existing provider. In August 2020 she commenced a career break and ceased her authorisation to provide Personal Advice. Before commencing her career break, Jane's AFS licensee advised her that from 1 January 2022, she would be eligible to be re-authorised to provide Personal Advice as long as she had (a) passed the exam, and (b) obtained an approved degree prior to 1 January 2026 (i.e. before 1 January 2026 she could be re-authorised to provide Personal Advice without having a degree). She would not have to complete a professional year.

Jane intended to conclude her career break in March 2022. In February 2022 she sat and passed the financial adviser exam administered by ASIC. Despite not having a degree, Jane applied for authorisation to provide Personal Advice from

her former AFS licensee on the basis that she had until 1 January 2026 to complete a degree.

10. In the above scenario, sections 1684D and 921C have the effect that Jane, who was on a career break, is prohibited from being authorised to provide Personal Advice until she has also met the Qualification Requirement.
11. The Instrument provides exemptions from subsections 921C(2) to 921C(4) so that AFS licensees and authorised representatives of AFS licensees are permitted to authorise Affected Existing Providers to provide Personal Advice if the Affected Existing Provider has met the Exam Requirement, regardless of whether the Affected Existing Provider has also met the Qualification Requirement. This achieves the intended policy outcome under the Better Advice Act.²
12. Existing Providers who were (or are) Relevant Providers³ on the Exam Cut-Off Day do not get the benefit of the Instrument. This is consistent with the policy intent of the Better Advice Act.
13. Separately, subsection 921C(1) prohibits ASIC from issuing an AFS license to an individual that covers the provision of Personal Advice if the individual has not complied with the Qualification Requirement and the Exam Requirement. Using the example in paragraph 8 above, subsection 921C(1) would prohibit ASIC from issuing Jane an AFS licence. This Instrument does not affect the prohibition in subsection 921C(1) as ASIC does not consider it appropriate to use its exemption power to give itself relief from its licensing obligations.

Consultation

14. Following identification of the Unintended Prohibition, ASIC consulted with the Commonwealth Treasury. Treasury supports the instrument.
15. Given the nature of the relief, no other consultation has been undertaken by ASIC.

Operation of the Instrument

Commencement

16. Section 2 of the Instrument provides that the Instrument commences on the day after the Instrument is registered on the Federal Register of Legislation.

² See paragraph 1.265 of the Explanatory Memorandum to the *Financial Sector Reform (Hayne Royal Commission Response – Better Advice) Bill 2021*

³ A ‘relevant provider’ is a person who is:

- (a) *an individual; and*
- (b) *is:*
 - (i) *a financial services licensee; or*
 - (ii) *an authorised representative of a financial services licensee; or*
 - (iii) *an employee or director of a financial services licensee;*
 - (iv) *or an employee or director of a related body corporate of a financial services licensee; and*
 - (c) *is authorised to provide personal advice to retail clients, as the licensee or on behalf of the licensee, in relation to relevant financial products: section 910A.*

Authority

17. Section 3 of the Instrument provides that the Instrument is made under paragraph 926A(2)(a). This paragraph confers power on ASIC to exempt a person or class of persons from all or specified provisions to which it applies.
18. In particular, paragraph 926A(2)(a) enables ASIC to exempt a person or class of persons from being required to satisfy the requirements for authorisation in section 921C.

Operative provisions

19. Section 5 is the first operative provision of the Instrument. Subsection 5(1) of the Instrument provides that an AFS licensee is not required to comply with subsections 921C(2) (which applies to authorised representatives of AFS licensees) or 921C(4) (which applies to employees and directors of AFS licensees or of related body corporates) in relation to an Existing Provider who is not, or was not, a Relevant Provider on the Exam Cut-Off Day.
20. Subsection 5(2) provides that an authorised representative of an AFS licensee does not have to comply with subsection 921C(3) (which applies to the sub-authorisation of an individual by an authorised representative on behalf of an AFS licensee) in relation to an Existing Provider who is not, or was not, a Relevant Provider on the Exam Cut-Off Day.
21. The exemptions contained in section 5 of the Instrument relieve AFS licensees and certain authorised representatives from the prohibitions in subsections 921C(2) to (4) in certain circumstances.
22. Section 5 of the Instrument must be read in conjunction with section 6 of the Instrument.
23. The effect of section 6 of the Instrument is that (a) only Existing Providers who have met the Exam Requirement can be authorised to provide Personal Advice, and (b) if the Existing Provider is to provide a tax (financial) advice service, the Existing Provider must have met the requirements of any determination that is in force under subsection 921BB(1).

Incorporation by Reference

24. The Instrument does not incorporate any matter by reference for the purposes of section 14 of the *Legislation Act 2003*.

Legislative instrument and primary legislation

25. ASIC considers that the Unintended Prohibition is better addressed by a legislative instrument, at least in the short-term, rather than by primary legislation because:
 - (i) ASIC considers that the Unintended Prohibition needs to be addressed urgently; and
 - (ii) absent the making of the Instrument, Affected Existing Providers will be required to meet the Qualification Requirement *before* they are eligible to be authorised to provide Personal Advice. This outcome (which was not intended) will mean that

there are fewer financial advisers who are authorised to provide Personal Advice in the short-term. This outcome impinges on consumers, financial advisers and AFS licensees.

Legislative Authority and duration

26. This Instrument is made under paragraph 926A(2)(a) and is a disallowable instrument under the *Legislation Act 2003*. The Instrument continues in force for three years until 1 April 2025.
27. ASIC understands that Government will consider amending the Corporations Act so that the relief given by the Instrument will no longer be necessary. The three-year duration provides sufficient time for this process to be undertaken whilst giving Affected Existing Providers certainty about the requirements they must meet to be eligible to provide Personal Advice. If the Corporations Act is not amended during this three-year period, ASIC will review the operation of the Instrument prior to its expiry.

Statement of Compatibility with Human Rights

28. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is in the Attachment.

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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Overview

ASIC Corporations (Existing Providers) Instrument 2022/241 (the **Instrument**) puts in place interim measures to address an unintended prohibition on Australian financial services (AFS) licensees from authorising certain Existing Providers⁴ from providing personal advice to retail clients in relation to relevant financial products (**Personal Advice**) (the **Unintended Prohibition**).

The Unintended Prohibition applies to Existing Providers (**Affected Existing Providers**) who

- (i) have not passed the financial adviser exam (the **Exam Requirement**) by 1 January 2022 (or 1 October 2022 in certain cases) (**Exam Cut-Off Day**);
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- (iii) have not obtained an approved degree, qualification or approved course (the **Qualification Requirement**).

The Unintended Prohibition arose following the commencement of the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Act 2021* (**Better Advice Act**) on 1 January 2022.

The effect of the Instrument is that Affected Existing Providers need only pass the Exam Requirement in order to be eligible to be authorised to provide Personal Advice. Affected Existing Providers must also comply with the Qualification Requirement by 1 January 2026. This effect achieves the intended policy outcome of the Better Advice Act.

Assessment of human rights implications

The Instrument engages positively with the right to work contained in Article 6 of the *International Covenant on Economic, Social and Cultural Rights*. The Unintended

⁴ An ‘existing provider’ is a person who was a relevant provider (i.e. someone who was authorised to provide Personal Advice) at any point in time between January 2016 and January 2019, and who was not banned, disqualified, or subject to an enforceable undertaking on 1 January 2019: section 1546A of the *Corporations Act 2001*

Prohibition impinges on Affected Existing Providers' right to work by requiring them to meet the Qualification Requirement *before* they are eligible to be authorised to provide Personal Advice.

By removing the Unintended Prohibition, the Instrument lifts an unintended restriction on Affected Existing Providers and therefore promotes the right to work for Affected Existing Providers.

Conclusion

The 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*.