

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Australian Securities and Investments Commission Act 2001

Competition and Consumer Act 2010

Corporations Act 2001

*Treasury Laws Amendment (Professional Standards Schemes No. 2)
Regulations 2022*

The *Australian Securities and Investments Commission Act 2001* (the ASIC Act) provides for the Australian Securities and Investments Commission to administer the *Corporations Act 2001* (the Corporations Act) and other prescribed laws of the Commonwealth.

The Corporations Act provides for the regulation of corporations and financial services.

The *Competition and Consumer Act 2010* (the CCA) promotes competition and fair trading and provides for consumer protection.

Section 251 of the ASIC Act, section 172 of the CCA and section 1364 of the Corporations Act provide that the Governor-General may make regulations prescribing matters required or permitted by the Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Acts.

The intergovernmental *Professional Standards Agreement 2011* provides for a national framework of professional standards legislation that provides professionals and members of occupational associations with capped civil liability. As part of this national framework, all states and territories have adopted legislation to establish a Professional Standards Council that can approve professional standards schemes in their respective jurisdictions. Members of professional groups that are part of these schemes are entitled to capped civil liability in return for raising industry service standards and having professional indemnity insurance up to the level of the prescribed liability cap.

As part of the national framework of professional standards legislation, the Commonwealth provides members of professional groups that are part of an approved professional standards scheme with capped civil liability in relation to misleading and deceptive conduct under the ASIC Act, the CCA and the Corporations Act to ensure that actions cannot be brought under these Acts to circumvent the cap on civil liability. This provides consistency across Commonwealth and state and territory laws.

All approved professional standards schemes are prescribed under the CCA. In addition, those schemes relating to financial services are also prescribed under the ASIC Act and Corporations Act.

Subsections 12GNA(2) of the ASIC Act, 137(2) of the CCA and 1044B(2) of the Corporations Act provide for capped civil liability for misleading and deceptive conduct for professional standards schemes that are prescribed in relevant regulations. Accordingly, regulation 3A of the *Australian Securities and Investments Commission Regulations 2001*, regulation 8A of the *Competition and Consumer Regulations 2010* and regulation 7.10.02 of the *Corporations Regulations 2001* prescribe a list of professional standards schemes that have capped civil liability for misleading and deceptive conduct under their respective principal Acts.

The *Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2022* (the Regulations) updates regulation 3A of the *Australian Securities and Investments Commission Regulations 2001*, regulation 8A of the *Competition and Consumer Regulations 2010* and regulation 7.10.02 of the *Corporations Regulations 2001* to give effect to decisions of the Professional Standards Councils to approve or amend professional standards schemes in their respective jurisdictions, as published in the relevant state Government gazette or on the relevant state Government legislation website. This includes prescribing replacement schemes (new schemes which replace currently-prescribed schemes).

Details of the currently approved schemes, as well as the expired schemes, are publicly available on the Professional Standards Councils website: www.psc.gov.au.

The Professional Standards Councils sought the opinion of independent actuarial consultants and called for public comment on professional standards schemes via public notification in major newspapers circulating throughout the relevant jurisdictions between 8 December 2021 and 5 January 2022, prior to approving schemes. Further consultation by the Commonwealth Government was not considered necessary.

As the Regulations prescribe or extend a number of schemes, the Regulations have incorporated by reference the relevant state Government gazette notices or legislative instruments. Gazette notice references include the state, gazette number and date the gazette was published; legislative instrument references include the title and date of making the instrument. Government gazette notices and legislative instruments can be accessed for free from the state government websites, by searching the relevant gazette date/number or legislative instrument title.

The Acts do not specify any conditions that need to be met before the power to make the Regulations are exercised.

The Office of Best Practice Regulation has advised that the amendments do not require a Regulatory Impact Statement (OBPR ID 25848).

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

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 1 July 2022.

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

Details of the *Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2022*

Section 1 – Name

This section provides that the title of the Regulations is the *Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2022* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on 1 July 2022.

Section 3 – Authority

This section provides that the Regulations are made under the *Australian Securities and Investments Commission Act 2001*, the *Competition and Consumer Act 2010* (CCA), and the *Corporations Act 2001*.

Section 4 – Schedules

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

Schedule 1 – Amendments

Items 3, 6 and 9 – Consequential amendments

These items make a minor and technical amendment to regulation 3A (table item 19, column 2) of the *Australian Securities and Investments Commission Regulations 2001* (ASIC Regulations), regulation 8A (table item 34, column 2) of the *Competition and Consumer Regulations 2010* (CC Regulations) and regulation 7.10.02 (table item 19, column 2) of the *Corporations Regulations 2001* (Corporations Regulations) to omit the words ‘the day Part 1 of Schedule 1 to the *Treasury Laws Amendment (Professional Standards Schemes) Regulations 2022* commences’ and substitute ‘22 March 2022’ which is the date that instrument commenced.

This will provide clarity about when the Institute of Public Accountants Professional Standards Scheme was prescribed.

Items 1, 4 and 7 – Replacement scheme: *Law Institute of Victoria Limited Professional Standards Scheme*

These items amend regulation 3A (table item 6) of the ASIC Regulations, regulation 8A (table item 14) of the CC Regulations, and regulation 7.10.02 (table item 6) of the Corporations Regulations to repeal and replace the existing *Law Institute of Victoria Limited Scheme* as a professional standards scheme that has capped civil liability for misleading or deceptive conduct under the CCA commencing on 1 July 2022.

The new *Law Institute of Victoria Limited Professional Standards Scheme* will replace the existing scheme, which is due to expire. The new scheme is designed to provide continuity in coverage for scheme participants when the existing scheme expires. As with the previous scheme, the new scheme binds the Law Institute of Victoria Limited to monitor, enforce and improve the professional standards of their members, and protect consumers of their professional services. The scheme also continues to cap the civil liability or damages of members of the Law Institute of Victoria Limited who take part in an association's scheme that they may be required to pay if a court upholds a claim against them. The new scheme was published in the Victoria Government Gazette No. G 11, 17 March 2022.

Items 2, 5 and 8 – Replacement scheme: *South Australian Bar Association Professional Standards Scheme*

These items amend regulation 3A (table item 16) of the ASIC Regulations, regulation 8A (table item 27) of the CC Regulations, and regulation 7.10.02 (table item 16) of the Corporations Regulations to repeal and replace the existing *South Australian Bar Association Inc Professional Standards Scheme* as a professional standards scheme that has capped civil liability for misleading or deceptive conduct under the CCA commencing on 1 July 2022.

The new *South Australian Bar Association Professional Standards Scheme* will replace the existing scheme, which is due to expire. The new scheme is designed to provide continuity in coverage for scheme participants when the existing scheme expires. As with the previous scheme, the new scheme binds the South Australian Bar Association to monitor, enforce and improve the professional standards of their members, and protect consumers of their professional services. The scheme also caps the civil liability or damages of members of the South Australian Bar Association who take part in an association's scheme that they may be required to pay if a court upholds a claim against them. The new scheme was published in the South Australian Government Gazette No. 15, 10 March 2022.

Statement of Compatibility with Human Rights

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

Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2022

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* (Human Rights Act).

Overview of the Legislative Instrument

The Regulations update the list of prescribed professional schemes that have capped civil liability for misleading and deceptive conduct under the *Australian Securities and Investments Commission Act 2001* (the ASIC Act), the *Competition and Consumer Act 2010* (the CCA) and the *Corporations Act 2001* (the Corporations Act).

The intergovernmental *Professional Standards Agreement 2011* provides for a national framework of professional standards legislation that provides professionals and members of occupational associations with capped civil liability. As part of this national framework, all states and territories have adopted legislation to establish a Professional Standards Council that can approve professional standards schemes in their respective jurisdictions. Members of professional groups that are part of these schemes are entitled to capped civil liability in return for raising industry service standards and having professional indemnity insurance up to the level of the prescribed liability cap.

As part of the national framework of professional standards legislation, the Commonwealth provides members of professional groups that are part of an approved professional standards scheme with capped civil liability in relation to misleading and deceptive conduct under the ASIC Act, the CCA and the Corporations Act to ensure that actions cannot be brought under these Acts to circumvent the cap on civil liability. This provides consistency across Commonwealth and state and territory laws.

The Regulations are exempt from sunseting because of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. However, the professional standards schemes are not permanent: they are in place for a period of five years, with a one-year extension possible if approved by the Professional Standards Council and prescribed by further regulation.

As an amending instrument, the *Treasury Laws Amendment (Professional Standards Schemes No. 2) Regulations 2022* is subject to the automatic repeal provisions of section 48A of the *Legislation Act 2003*.

Human rights implications

This Legislative Instrument engages but does not limit any of the applicable rights or freedoms. Consideration has been given to the international conventions as set out in section 3 of the Human Rights Act.

This Legislative Instrument engages the right work under Articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to work provides that everyone must be able to freely accept or choose their work, and includes a right not to be unfairly deprived of work.

Any retrogressive step with respect to the realisation of the right to work must be directed towards a legitimate objective, be rationally connected to (that is, effective to achieve) that objective, and be proportionate. The Instrument meets these criteria.

The Instrument is relevant to the qualifications required to perform work and the right to not unfairly be deprived of work as the instrument prescribes certain standards that must be adhered to when performing the work with withdrawal of qualifications and ability to work the consequence if they are not met.

The objective of the Instrument is to ensure better consumer outcomes by incentivising certain professions to adhere to quality standards. The objective is necessary to ensure that certain professions adequately self-regulate, and that consumers are protected against malpractice. The objective addresses malpractice and deceptive conduct in certain professions. This issue is pressing and substantial enough to warrant limiting these rights, because consumers generally lack the specific knowledge in these professions to protect their own rights and ensure they are receiving quality services.

The Instrument is rationally connected to the goal of protecting consumers and ensuring high professional standards, as it is an effective way to achieve that objective. By requiring certain professions to adhere to standards their representative organisations submit, consumers can be assured of high-quality work. Finally, the Instrument *is* a proportionate response to dealing with malpractice in certain professions.

The Instrument also engages the right to fair hearing/ access to justice under article 13 of the International Covenant on Civil and Political Rights (ICCPR). The instrument engages this right by capping the potential damages that may be awarded in certain cases of professional misconduct or malpractice where a professional is covered by a professional standards scheme. However, while this right is engaged it is not limited as the capped damages are proportional to the higher standards of professional conduct imposed by the professional standards scheme. Therefore, while the right to fair hearing/ access to justice is engaged it is not limited.

This Legislative Instrument does not impose or amend penalty provisions, nor does it apply retrospectively or concern privacy rights of individuals or groups of people.

Conclusion

This Legislative Instrument is compatible with human rights as where it engages human rights it does so proportionally and appropriately.