

DRAFT EXPLANATORY MATERIAL

Corporations Act 2001

Corporations (Relevant Providers—Education and Training Standards) Determination 2021

Subsections 921B(6) and 921BB(1) of the *Corporations Act 2001* (the Act) provide that the Minister may, by legislative instrument, determine education and experience requirements for:

- a person who is, or is to be a relevant provider; and
- a person who is, or is to provide, a tax (financial) advice service.

The purpose of the *Corporations (Relevant Providers—Education and Training Standards) Determination 2021* (the Instrument) is to support the amendments in the *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021* (the Better Advice Bill).

It does this by putting in place principles to guide the administration of the financial adviser exam by the Australian Securities and Investments Commission (ASIC) and setting education and training standards for the provision of tax (financial) advice services by relevant providers.

Please note that for the purposes of this instrument the term ‘financial adviser’ is used instead of ‘relevant provider’.

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

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Instrument commences on the later of the day after the Instrument is registered on the Federal Register of Legislation and 1 January 2022.

Details of the Corporations (Relevant Providers—Education and Training Standards) Determination 2021

Section 1-1 – Name of the Instrument

This section provides that the name of the Instrument is the *Corporations (Relevant Providers—Education and Training Standards) Determination 2021* (the Instrument).

Section 1-2 – Commencement

The Instrument commences on the later of:

- the day after the Instrument is registered on the Federal Register of Legislation; and
- 1 January 2022.

Section 1-3 – Authority

The Instrument is made under the *Corporations Act 2001* (the Act).

Section 1-4 – Definitions

In accordance with paragraph 13(1)(b) of the *Legislation Act 2003*, the following terms in the Instrument have the same meaning as in the Act, as in force from time to time:

- *retail client* has the meaning given by sections 761G and 761GA of the Act; and
- *financial product advice* has the meaning given by section 766B of the Act;
- *Code of Ethics*, *CPD year*, *provision relevant provider*, *relevant provider* and *tax (financial) adviser* have the meanings given by section 910A of the Act;
- *existing provider* has the meaning given by section 1546A of the Act;
- *taxation law* has the meaning given by the *Income Tax Assessment Act 1997*;
- *the Act* means the *Corporations Act 2001*.

Part 2 – Education and training standards for relevant providers

The *Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021* (the Better Advice Bill) transfers the functions of the Financial Adviser Standards and Ethics Authority (FASEA) to the Minister responsible for administering the Act, with ASIC responsible for administering the financial adviser exam.

Divisions 1, 3 and 4 of Part 2 of the Instrument provide that the current instruments made by FASEA about approved degrees, work and training and continuing professional development (CPD) continue in force until they are repealed and remade by the Minister under subsection 921B(6) of the Act.

However, the Instrument made by FASEA (the *Corporations (Relevant Providers Exams Standard) Determination 2019* (FASEA Determination)), which sets out the standard for the financial adviser exam cannot rely on this ‘savings’ provision. The FASEA Determination was made under a power that required FASEA to approve an exam. The Better Advice Bill clarifies that the Minister’s power is intended to be used to approve the principles underpinning the exam, rather than to approve each exam and all of the exam questions.

As a result of the change to the description of the Minister’s power, Division 2 of Part 2 of the Instrument replaces the FASEA Determination. The Instrument has the same effect as the FASEA Determination to ensure continuity in the delivery and standard of the exam for financial advisers. The only differences are that the Instrument provides greater flexibility for financial advisers by removing the three-month waiting period to register to take the exam again and allowing alternate methods for taking the exam, including in person, virtually or through alternate arrangements. It is not the Government’s policy intent to change the knowledge which the exam tests.

Feedback is not being sought on the policy underpinning the principles setting out the financial adviser exam standard.

Principle	Current FASEA Instrument	Revised Instrument
Principle 1 - Relevant knowledge and skills	The exam must cover the following: <ul style="list-style-type: none"> • regulatory and legal obligations; • ethical and professional reasoning and communication; and • financial advice construction. 	No change
Principle 2 - Exam questions	The exam must include a minimum of 70 questions, made up of at least 64 multiple choice questions and at least six written response questions.	No change
Principle 3 - Duration of exams	A person must have three and a half hours (210 minutes) to complete the exam, which includes at least 15 minutes reading time.	No change
Principle 4 - Marking or scoring of exams	Persons with appropriate expertise are responsible for approving the exam questions and the maximum number of marks that may be awarded for each question, for inclusion in the exam.	No change
Principle 5 - Eligibility to take the exam	A person can sit the exam if they are an existing provider or a provisional relevant provider (subject to meeting certain conditions), are registered to take the exam, and have paid the exam fee. A person must wait three months before attempting the exam again after failing.	Removes the three-month waiting period before being able to register to take the exam again after failing.
Principle 5 - Method of taking the exam	Candidates may apply to seek alternative arrangements to sit the	Provides more flexibility by allowing exams to be

Principle	Current FASEA Instrument	Revised Instrument
	exam if they are unable to travel to an exam location or live in a remote area.	taken in person, virtually or through alternative arrangements.
Principle 5 - Consequences of misconduct	A person may be excluded from or fail an exam if they use non-permitted equipment or materials, engage in plagiarism or cheating, or not comply with a direction.	No change
Principle 5 - Exam results	A person will only be notified whether they have passed or failed the exam. Exams will be marked to an overall credit grade. A person may apply and pay a fee to have their written responses reviewed.	No change
Principle 5 - Deferral of exams	Once registered for an exam, a person may apply to defer taking the exam in exceptional circumstances such as for medical reasons, recent loss or bereavement, hardship or trauma etc. If a deferral application is granted, the person may take the exam at another date and time without having to pay another fee.	No change

Part 3 – Additional requirements for financial advisers who provide tax (financial) advice services

Part 3 of the Instrument supports the Better Advice Bill to implement recommendation 7.1 of the Independent Review of the TPB by setting education and training requirements for the provision of tax (financial) advice services by financial advisers.

These requirements provide that financial advisers who provide tax (financial) advice services must complete commercial law and tax law courses. However, these requirements will not apply to:

- from 1 January 2022 - financial advisers who were registered as tax (financial) advisers immediately before 1 January 2022 will never be required to comply with this requirement; or
- from the date the person's registration as a tax (financial) adviser comes into force - financial advisers who applied to be registered as tax (financial) advisers before 1 January 2022 (and whose application is subsequently approved by the TPB on or after 1 January 2022) will never be required to comply with this requirement;
- between 1 January 2022 and 31 December 2025 - existing providers who are also financial advisers and who are not captured by the other exemptions will be granted a temporary exemption from this requirement.

More details on these operation of these transitional provisions and exemptions is provided in the description of sections 3-170, 3-171 and 3-172 of the Instrument below.

From 1 January 2022, the Better Advice Bill removes the requirement for financial advisers who provide tax (financial) advice services to be registered under the TAS Act, and instead a person can only provide tax (financial) advice services (as defined in section 90-15 of the TAS Act) for a fee or reward, in the following circumstances:

- the person providing the advice is either a registered tax agent or a qualified tax relevant provider;
- where a tax (financial) advice service is being provided on a person or entity's behalf by another person – the person providing the advice is a registered tax agent or a qualified tax relevant provider; or
- where a tax (financial) advice service is provided as a legal service – the person is not prohibited from providing that tax (financial) advice service.

Section 910A of the Act provides that a 'qualified tax relevant provider' is 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 Act (if any).

Subsection 921BB(1) of the Act provides that the Minister may, by legislative instrument, determine any or all of the following requirements for a person who provides, or is to provide, a tax (financial) advice service:

- to complete one or more specified bachelor or higher degrees, qualifications, or courses;
- to undertake specified work and training; and

- to complete CPD during the CPD year of a financial services licensee.

Division 3 of Part 3 of the Instrument, which is made under paragraph 921BB(1)(c) of the Act, sets out the requirements to complete specified courses.

Division 5 of Part 3 of the Instrument, which is made under paragraph 921BB(1)(e) of the Act, sets out the CPD requirements for persons who provide, or are to provide, tax (financial) advice services.

Division 6 of Part 3 of the Instrument specifies transitional provisions for the application of the education and training requirements for the provision of tax (financial) advisers in Divisions 3 and 5 of Part 3 of the Instrument.

Section 3-60 - Requirement to complete specified courses

Paragraph 921BB(1)(c) of the Act provides that the Minister may, by legislative instrument, determine the requirement to complete one or more specified courses for a person who provides, or is to provide, a tax (financial) advice service.

This section requires that, a person who provides, or is to provide, tax (financial) advice services must complete each of the courses specified in Division 3 of Part 3 of the Instrument.

Section 3-65 - Specified course: commercial law

This section requires a person who provides, or is to provide, tax (financial) advice services to complete a commercial law course.

The requirements for the commercial law course in this section are consistent with the requirements in the 2014 TPB guidelines for a course in commercial law approved by the TPB for tax (financial) advisers.

To satisfy this requirement, the commercial law course must be provided by a registered higher education provider or a registered training organisation and be designed to provide the person with knowledge and skills at not less than an AQF level 5, as described in the *Australian Qualifications Framework*, 2nd edition (January 2013). The AQF level 5 requires a person to:

- have a technical and theoretical knowledge in a specific area or a broad field of work and learning;
- have a broad range of cognitive, technical and communication skills to select and apply methods and technologies to analyse information to complete a range of activities, provide and transmit solutions to sometimes complex problems and transmit information and skills to others; and
- be able to apply knowledge and skills to demonstrate autonomy, judgement and defined responsibility in known or changing contexts and within broad but established parameters.

To achieve this level of knowledge and skills, the commercial law course must cover each of the following knowledge and skills areas, contract law, the law relating to organisational structures in which businesses are operated, tort law (particularly the torts of negligence and negligence misstatement) and the requirements of the *Competition and Consumer Act 2010*.

To satisfy the requirements, the course must also be designed to provide assurance that the person has attained the necessary level of knowledge and skills. This could be

achieved through the inclusion of one or more assessment practices, including (but not limited to):

- tests and examinations (oral and written);
- problem based assignments;
- essays and reports; and
- computer-based assessment tasks.

The requirement to complete a commercial law course apply subject to the transitional provisions in Division 6 of Part 3 of the Instrument. The transitional provisions provide that in certain cases a person may be exempt from complying with this requirement, for example, where a person was registered as a tax (financial) adviser immediately before 1 January 2022. Also, a person who has previously completed a TPB-approved commercial law course is taken to have already complied with this requirement. For more information on the transitional provisions and exemptions, see the description of sections 3-170, 3-171 and 3-172 of the Instrument below.

Section 3-70 - Specified course: taxation law

This section requires a person who provides, or is to provide, tax (financial) advice services to complete a course in Australian taxation law (tax law course).

The requirements for the tax law course in this section are consistent with the requirements in the 2014 TPB Guidelines for a course in taxation law approved by the TPB for tax (financial) advisers.

The tax law course must be provided by a registered higher education provider or a registered training organisation and be designed to provide the person with knowledge and skills at not less than an AQF level 5.

To satisfy this requirement, the tax law course must cover each of the knowledge and skill areas specified in subsection 3-70(2) of the Instrument, which includes (but is not limited to) knowledge of income and deductions; how income tax law applies to different types of entities; capital gains and losses; superannuation; investments; taxation offences; the goods and services tax (GST); and the Commissioner of Taxation's administration of tax laws.

As for the commercial law course, the tax law course must also be designed to provide assurance that the person has attained the necessary level of knowledge and skills, which could be achieved through the inclusion of one or more assessment practices, such as tests, exams or essays.

The requirement to complete a tax law course apply subject to the transitional provisions in Division 6 of Part 3 of the Instrument. The transitional provisions provide that in certain cases a person may be exempt from complying with this requirement. Also, a person who has previously completed a TPB-approved tax law course is taken to have already complied with this requirement. For more information on the transitional provisions and exemptions, see the description of sections 3-170, 3-171 and 3-172 of the Instrument below.

Section 3-120 - Requirement for CPD

Paragraph 921BB(1)(e) of the Act provides that the Minister may, by legislative instrument, determine the requirement to undertake CPD during the CPD year of a

financial services licensee, or any other period determined by the Minister, for a person who provides tax (financial) advice services.

The CPD requirements in the Instrument are separate to, and in addition to, the CPD requirements that all financial advisers are currently required to undertake. The existing CPD requirements for financial advisers set out in the *Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018*, which was made by FASEA and is to continue in force until it is repealed and remade by the Minister (see Division 4 of Part 2 of the Instrument).

The CPD requirements for the provision of tax (financial) advice services in this Instrument replace the CPD requirements set by the TPB under the TAS Act.

Section 910A of Act provides that a financial services licensee's CPD year is the 12-month period beginning on the day of the year included in the most recent notice given by the licensee to ASIC under section 922HA of the Act. In accordance with this definition, a licensee's CPD year can start at any time during the calendar year.

This requirement to undertake CPD does not apply to provisional financial advisers in accordance with the exemption in subsection 921BC(2) of the Act.

Section 3-125 - Additional requirements for tax-specific CPD

This section provides that a financial adviser who provides, or is to provide, a tax (financial) advice service, must complete CPD activities in order to maintain and extend their knowledge and skills relating to Australian commercial and taxation law, as relevant to providing a tax (financial) advice service.

The CPD requirements in the Instrument are to apply as if the table in section 7 of the *Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018* were repealed and replaced with the following table:

Item	Column 2	Column 3
	Content of CPD activity	CPD area
1	The activity is designed to enhance participants' technical proficiency (other than in relation to Australian commercial and taxation laws) and ability to develop and provide advice strategies that are appropriate to the objectives, financial situations and needs of different classes of retail clients.	Technical competence (general)
1A	The activity is designed to enhance participants' technical proficiency relating to Australia's commercial and taxation laws and ability to develop and provide advice strategies that are appropriate to the objectives, financial situations and needs of different classes of retail clients.	Technical competence (tax-specific)
2	The activity is designed to enhance participants' ability to act as a client-centric practitioner in advising retail clients.	Client care and practice
3	The activity is designed to enhance participants' understanding of applicable legal obligations and how to comply with them.	Regulatory compliance and consumer protection
4	The activity is designed to enhance participants' capacity to act as an ethical professional.	Professionalism and ethics
5	The activity is designed to maintain and extend participants' professional capabilities, knowledge and skills, including keeping up to date with regulatory, technical and other relevant developments, but is not in an area referred to in another item of this table.	General

This section amends item 1, and inserts a new item 1A, into the table in section 7 of the *Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018*.

The CPD requirements in the Instrument also apply as if the qualifying CPD activities in subsection 9(2) of the *Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018* were repealed and replaced with:

- a) a minimum of 5 hours in the CPD area of technical competence (general); and
- aa) a minimum of 5 hours in the CPD area of technical competence (tax-specific); and
- b) a minimum of 5 hours in the CPD area of client care and practice; and
- c) a minimum of 5 hours in the CPD area of regulatory compliance and consumer protection; and
- d) a minimum of 9 hours in the CPD area of professionalism and ethics.

A financial adviser who provides tax (financial) advice services must complete a total of at least 40 hours of CPD during his financial services licensee's CPD year, which must include at least:

- five hours of general technical competence;
- five hours of tax-specific technical competence - this is the additional requirement for the provision of tax (financial) advice services);
- five hours of client care and practice;
- five hours of regulatory compliance and consumer protection; and

- nine hours of professionalism and ethics.

The remaining hours of CPD (within the minimum of 40 hours) may be satisfied by completing any qualifying CPD activities.

Example 1

Pat, a financial adviser, completes 40 hours of CPD during his licensee’s CPD year (which is between July 2022 and 30 June 2023), including the minimum number of hours of each of the specified CPD areas (general technical competence; client care and practice; regulatory compliance and consumer protection; and professionalism and ethics).

In addition to this, Pat has completed 16 hours of tax-specific CPD this year. While Pat is only required to complete a minimum of five hours of CPD in the area of tax-specific technical competence, Pat undertakes more tax-specific CPD this year because he has only recently started providing tax (financial) advice services and wants to build up his technical knowledge in this area.

Pat has complied with his CPD obligations under this Instrument and the *Corporations (Relevant Providers Continuing Professional Development Standard) Determination 2018*.

Section 3-170 – Transitional provision for registered tax (financial) advisers who are financial advisers on 31 December 2021

This section provides that a financial adviser who was also a registered tax (financial) adviser immediately before 1 January 2022 is permanently exempt from the requirement to complete commercial law and tax law courses, as required by Division 3 of Part 3 of the Instrument.

This is because a person who is registered as a tax (financial) adviser before 1 January 2022 is taken to have satisfied the requirements for the provision of tax (financial) advice services.

Example 2

John is a financial adviser and was registered as a tax (financial) adviser immediately before 1 January 2022. From 1 January 2022, John will be taken to have met the requirements to be a qualified tax relevant provider and may continue to provide tax (financial) advice services.

Section 3-171 – Transitional provision for financial advisers awaiting registration as tax (financial) advisers on 31 December 2021

This section provides that a person who meets all of the following requirements may provide tax (financial) advice services:

- immediately before 1 January 2022:
 - is a financial adviser; and
 - has applied to be registered as a tax (financial) adviser under subsection 20-20(1) of the TAS Act; and
 - the application had not been decided; and
- after 1 January 2022 - that application for registration as a tax (financial) adviser is granted and that registration comes into force.

A person who satisfies all of these requirements is permitted to provide tax (financial) advice services without being required to complete the specified courses in Division 3 of Part 3 of the Instrument from the day their registration under the TAS Act comes into force. Section 20-35 of the TAS Act provides that a person’s registration comes into force on the day specified in the notice given to the person under subsection 20-30(1) of the Act.

This means that between 1 January 2022 and the day the person's registration as a tax (financial) adviser comes into force, the person may not provide tax (financial) advice services unless the person has completed the specified courses in Division 3 of Part 3 of the Instrument.

This is because a person who is registered as a tax (financial) adviser on or after 1 January 2022 is taken to have satisfied the requirements for the provision of tax (financial) advice services.

Example 3

Paula is a financial adviser who applied to be registered as a tax (financial) adviser on 11 December 2021:

- Between 1 January 2022 and the date her tax (financial) adviser registration comes into force (if it comes into force) - Paula must not provide tax (financial) services unless she has completed commercial law and tax law courses.
- From the day tax (financial) adviser registration comes into force (if it comes into force) - Paula may provide tax (financial) advice services as a qualified tax relevant provider without being required to complete commercial law and tax law courses.
- If Paula's application to be registered as a tax (financial) adviser is refused (i.e. her registration as a tax (financial) adviser never comes into force) - from 1 January 2022 Paula must have completed commercial law and tax law courses before she is able to provide tax (financial) advice services.

Section 3-172 – Transitional provision for other financial advisers on 31 December 2021

This section provides that a person may provide tax (financial) advice services until 31 December 2025 without completing the specified courses in Division 3 of Part 3 of the Instrument – if the person is:

- a financial adviser immediately before 1 January 2022;
- an existing provider, in accordance with the definition of 'existing provider' in section 1546A of the Act; and
- not already subject to the transitional provisions in sections 3-170 or 3-171 in Division 6 of Part 3 of the Instrument.

A person who satisfies these requirements may provide tax (financial) advice services between 1 January 2022 and 31 December 2025 without being required to complete the commercial law and tax law courses required by Division 3 of Part 3 of the Instrument.

To continue providing tax (financial) advice services on and after 1 January 2026, a person in this class must have met the requirements in Division 3 of Part 3 of the Instrument by completing commercial law and tax law courses. From 1 January 2026, the provision of tax (financial) advice services for a fee or reward without having completed both of the specified courses (or alternatively being registered as a tax agent) is a contravention of the civil penalty provision in section 50-17 of the TAS Act.

However, this transitional provision will end early if (before 31 December 2025) if:

- the person is an existing provider; and
- the person is authorised as a financial adviser on the exam cut-off day; and
- the person does not pass the financial adviser exam by the relevant exam cut-off day for that person.

Section 1684 of the Act provides that the exam cut-off day for an existing provider is either 1 January 2022, or the day prescribed in regulations (if any). The regulations prescribe that the exam cut-off day is 1 October 2022 for a person who has sat the exam at least twice before 1 January 2022.

Example 4

Steven is an existing provider and has unsuccessfully sat the exam twice before 1 January 2022. Steven's exam cut-off day is 30 September 2022.

- Scenario 1 - Steven passes the financial adviser exam before 30 September 2022 – Steven can continue to provide tax (financial) advice services until 31 December 2025 without completing commercial law and tax law courses.
- Scenario 2 - Steven does not pass the exam by 30 September 2022 - Steven must not provide tax (financial) advice services until he has met one of the following requirements (or contravene a civil penalty provision):
 - o be registered as a tax agent under the TAS Act; or
 - o meet the requirements to be a qualified tax relevant provider – which involves:
 - o being authorised again as a financial adviser by meeting all of the applicable education and training standards in section 921B of the Corporations Act (including passing the exam); and
 - o completing commercial law and tax law courses that meet the requirements.

On the other hand, an existing provider who is not authorised as a financial adviser on their exam cut-off day has until 31 December 2025 to complete the commercial law and tax law courses. However, the existing provider may not provide tax (financial) advice services until he or she has passed the exam and been authorised again to provide financial advice.

Section 3-200 - Application—Additional requirements for tax-specific CPD

This section provides that the CPD requirements for the provision of tax (financial) advice services in Division 5 of Part 3 of the Instrument commence for the financial services licensee's CPD year that begins on or after 1 January 2022.

For example, if a financial adviser's financial services licensee's CPD year begins on 1 July 2022, the adviser must complete the new CPD requirements in Division 5 of Part 5 of the Instrument by 30 June 2023. This ensures that all financial advisers have the full 12-months to complete the new CPD requirements, regardless of when their licensee's CPD year begins.