

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

Corporations Act 2001

National Consumer Credit Protection Act 2009

Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022

Section 1364 of the *Corporations Act 2001* and section 329 of the *National Consumer Credit Protection Act 2009* provide that the Governor-General may make regulations prescribing matters required or permitted by those Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to those Acts.

These amendments form part of a program of legislative amendments intended to simplify and improve the navigability of Treasury legislation. The regulation amendments are made alongside amendments to the primary legislation being consulted on in the Treasury Laws Amendment (Measures for consultation) Bill 2022: Rationalisation of ending ASIC instruments. The amendments to the primary law and regulations incorporate longstanding and accepted matters currently contained in ASIC legislative instruments into the regulations.

This is part of an ongoing commitment to the care and maintenance of Treasury portfolio legislation and will provide industry and consumers with greater certainty and clarity when interacting with Treasury laws.

Amendments to the *Corporations Regulations 2001* incorporate:

- *ASIC Corporations (Commonwealth Financial Counselling—Financial Capability Services) Instrument 2022/221*;
- *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792*; and
- section 5 of *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378*.

Amendments to the *National Consumer Credit Protection Regulations 2010* incorporate *ASIC Corporations (Financial Counselling Agencies) Instrument 2017/793*.

Exemption from licensing requirements for financial counselling and financial capability services

The amendments in Schedule 1 apply in specified circumstances to exempt a person from:

- the requirement to hold an Australian financial services licence (AFSL) under section 911A of the *Corporations Act 2001*; and

- the requirement to hold a credit licence under section 29 of the *National Consumer Credit Protection Act 2009*.

The exemptions apply to a person who provides a financial service or credit assistance, as part of a financial counselling service or financial capability service, if no fees or charges are payable for the services, and independence, conflict of interest, training and competency conditions are met.

This decreases compliance costs associated with licencing requirements for certain rural and non-rural financial counselling agencies and financial capability service providers who assist individuals and small businesses in financial difficulty.

Underlying dealing of registrable superannuation entity

Section 5 of *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378* provides an exemption to section 911A(1) of the *Corporations Act 2001* for the trustee of a registrable superannuation entity (RSE) for dealing in a financial product (other than an interest in the entity) in the ordinary course of operation of the entity.

The amending regulations in Schedule 2 move the exemption from *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378* into the *Corporations Regulations 2001*. This provides ongoing relief to superannuation trustees and improves the navigability of the law, as the exemption will now be found near other licensing exemptions that relate to pooled superannuation trusts.

As trustees of RSEs are already required to maintain an AFSL licensing in relation to the provision of a superannuation trustee service, these amendments do not diminish the regulatory oversight of the superannuation industry provided by ASIC. Conversely, if the exemption contained in *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378* ceases, the process of applying for additional licensing authorisations would be adversely time-consuming for both superannuation trustees and ASIC as the regulator, with no clear regulatory benefit.

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 22-02606).

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

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

Schedule 1 to the regulations commenced on the day after they are registered on the Federal Register of Legislation. Schedule 2 to the regulations will commence on 1 January 2023.

Details of the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Treasury Laws Amendment (Rationalising ASIC Instruments) Regulations 2022* (the Regulations).

Section 2 – Commencement

Schedule 1 to the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*.

Section 4 – Schedule

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

Schedule 1 – Amendments relating to license exemptions for financial counselling and financial capability service providers

Items 1 – 2 – Amendments to the *Corporations Regulations 2001*

Items 1 and 2 have the effect of moving longstanding licensing exemptions contained in ASIC instruments into the *Corporations Regulations 2001*.

Section 911A of the *Corporations Act 2001* requires a person who carries on a financial services business to hold an Australian financial services license (AFSL).

ASIC Corporations (Commonwealth Financial Counselling—Financial Capability Services) Instrument 2022/221 exempted financial capability service providers from the requirement to hold an AFSL when providing advice about basic deposit products in certain circumstances.

A financial capability service helps people to build longer-term capability to budget and manage their money better and make informed financial decisions. Financial capability services include assisting clients to prepare a budget or set up a bank account. Financial capability services also screen clients and refer them to financial counsellors if detailed financial assistance is required.

ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792 exempted financial counselling services from the requirement to hold an AFSL when providing a client with financial product advice in certain circumstances.

A financial counselling service provides counselling and advocacy services predominantly for the purpose of assisting individuals and small businesses who are in financial difficulty to assist them to resolve their problems.

Obtaining an AFSL is likely to be unduly burdensome and may affect the ongoing viability of agencies who provide the above services. The ASIC instruments have addressed this concern by providing an exemption from the requirement to obtain an AFSL when an agency, who provides the above services, provides financial product advice.

The amendments mirror the effect of the exemptions as contained in the ASIC instruments.

Exemptions applying to financial capability providers

A financial capability provider is an organisation funded by the Commonwealth to provide financial literacy and capacity building services to improve the financial knowledge and skills of consumers. Item 1 inserts paragraph 7.6.01(1)(za) to exempt financial capability providers from the requirement to hold an AFSL in the following circumstances:

- the advice relates to a basic deposit product (for example, a savings account);
- no fees or charges are payable by or on behalf of the client in relation to the service;
- no remuneration is payable, to the financial capability service provider, its representatives or associates in relation to any action by or on behalf of the client arising from the financial capability service (including the advice);
- the financial capability service provider does not carry on or participate in a financial service business involving the provision of other kinds of financial service;
- the financial capability service provider takes all reasonable steps to ensure none of its representatives provides or participates in the provision of other kinds of financial service; and
- the financial capability service provider takes all reasonable steps to ensure that each representative providing advice is adequately trained and is competent to provide the advice and any other aspect of the financial capability service.

These conditions ensure that the exemption is only available in relation to advice that is provided on an independent basis and in relation to relatively simple financial products and arrangements.

Exemptions applying to financial counselling agencies

A financial counselling agency is a not-for profit organisation providing free and independent services to people in financial difficulty. In addition to the exemption provided in these regulations, financial counsellors that are members of particular bodies are exempt from the requirement to hold an AFSL to provide a claims handling and settling service by operation of subregulation 7.1.04CAA(9) of the *Corporations Regulations 2001* and subparagraph 911A(2)(ek)(vi) of the *Corporations Act 2001*.

Item 1 also inserts paragraph 7.6.01(1)(zb) to exempt financial counselling agencies from the requirement to hold an AFSL in the following circumstances:

- the advice relates to a deposit product, a facility for making non-cash payments (within the meaning of subsection 763D(1) of the *Corporations Act 2001*, broadly a financial product that allows a person to make payments other than through the use of physical currency), an insurance product, an retirement savings account product, or a superannuation product; or
- the advice is to the effect that the client should or may dispose of a security, a financial product that is an interest in a registered scheme or managed investment scheme (as defined in paragraph 764A(1)(b) or (ba) of the *Corporations Act 2001*), or a debenture, stock or bond issued by a government;

and the following circumstances apply:

- no fees or charges are payable by or on behalf of the client in relation to the service;
- no remuneration is payable to the financial counselling agency, its representatives or associates in relation to any action by or on behalf of the client arising from the financial counselling agency (including the advice);
- the financial counselling agency does not carry on or participate in a financial service business involving the provision of other kinds of financial service, other than a service to which this exemption applies or a claims handling and settling service;
- the financial counselling agency takes all reasonable steps to ensure none of its representatives provides or participates in the provision of a financial service, other than a service to which this exemption applies or a claims handling and settling service; and
- the financial counselling agency takes all reasonable steps to ensure that each representative providing advice is adequately trained and is competent to provide the advice and any other aspect of the financial counselling service.

As in relation to the exemptions that apply to financial capability providers, the conditions ensure that the exemption is only available in relation to advice that is provided on an independent basis and in relation to relatively simple financial products and arrangements.

ASIC Corporations (Financial Counselling Agencies) Instrument 2017/792 referred to the requirement for representatives to have undertaken ‘appropriate training to ensure that they have adequate skills and knowledge...’. The regulations have updated the language to ‘adequately trained and is competent to provide...’. This is to align the language with the wording used in paragraph 912A(1)(f) of the *Corporations Act 2001* and ensure consistency with existing AFSL obligations.

Item 2 amends subregulation 7.6.01(7) to insert definitions of financial capability service, financial capability service provider, financial counselling agency, financial counselling association, financial counselling service, and small business. The definitions mirror the effect the definitions previously contained in the ASIC instruments.

Items 3 – 6 – Amendments to the *National Consumer Credit Protection Regulations 2010*

Items 3 to 6 have the effect of moving longstanding exemptions contained in an ASIC instrument into the *National Consumer Credit Protection Regulations 2010*.

Section 29 of the *National Consumer Credit Protection Act 2009* provides that a person must not engage in a credit activity if the person does not hold a licence. *ASIC Credit (Financial Counselling Agencies) Instrument 2017/793* exempted rural financial counselling service providers from the requirement to hold a credit licence in relation to the provision of credit assistance in certain circumstances.

This exemption has ensured that services can continue to be provided to primary producers and rural small businesses in financial difficulty. The credit assistance must be provided in particular circumstances that provide for free and independent rural financial counselling services to minimise the risk of consumer detriment.

Items 3 and 4 insert the following new definitions into subregulation 3(1) of the *National Consumer Credit Protection Regulations 2010*:

- financial counselling association has the same meaning as in regulation 7.6.01 of the *Corporations Regulations 2010*;
- rural financial counselling service means a counselling and advocacy service provided mainly for the purpose of assisting primary producers and rural small businesses who are in financial difficulty; and
- rural financial counselling service provider means a body that is funded wholly or partly by the Commonwealth or a State or Territory to provide a rural financial counselling service.

The amendments mirror the effect of the exemptions as contained in the ASIC instruments.

Item 5 inserts new subregulation 20(5A) into the *National Consumer Credit Protection Regulations 2010* to exempt a person from section 29 of the *National Consumer Credit Protection Act 2009* in the following circumstances:

- the person is a rural financial counselling service provider who provides credit assistance as part of the provision of a rural financial counselling service to a customer;
- no benefit (including any indirect remuneration) is payable to, or for the benefit of the service provider, its representatives or its associates;

- no fees or charges are payable by or on behalf of the customer in relation to the service other than any fees or charges payable on behalf of the client by the Commonwealth, a State or a Territory;
- the rural financial counselling service provider does not provide any other kind of credit assistance and takes all reasonable steps to ensure that none of its representatives provide any other kind of credit assistance; and
- the rural financial counselling service provider takes all reasonable steps to ensure that the person who provides credit assistance on its behalf is a member of a financial counselling association and is adequately trained and competent to provide the credit assistance and any other aspect of the service.

ASIC Corporations (Financial Counselling Agencies) Instrument 2017/793 referred to the requirement for representatives to have undertaken ‘appropriate training to ensure that they have adequate skills and knowledge...’. The regulations have updated the language to ‘adequately trained and is competent to provide...’. This is to align the language with the wording used in paragraph 47(1)(g) of the *National Consumer Credit Protection Act 2009* and ensure consistency with existing credit licence obligations.

Subregulation 20(5) of the *National Consumer Credit Protection Regulations 2010* exempts a person from having a credit licence if the person engages in credit activity as a part of a financial counselling service. Item 5 repeals and replaces subregulation 20(5) to align the drafting with the exemption in subregulation 20(5A).

Item 6 amends paragraph 20(12)(c) to substitute “the only benefit” for “the only remuneration” to ensure consistency with other exemptions in regulation 20.

Schedule 2 – Amendments relating to underlying dealing of a registrable superannuation entity

The *Corporations Act 2001* requires an entity that carries on a financial services business to hold an AFSL. Paragraph 911A(2)(k) of the Act exempts a person from the requirement to hold an AFSL for a financial service they provide if the provision of the service is covered by an exemption prescribed in regulations. Such exemptions are contained in subregulation 7.6.01.

The *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* introduced the financial service of providing a superannuation trustee service, which captures all the activities involved in operating a superannuation fund (paragraph 766(1)(ec)).

Providing a financial service also includes dealing in a financial product (paragraph 766A(1)(b)). Dealing is defined in subsection 766C(1) to include applying for, acquiring or disposing of a financial product. As a result, a superannuation trustee deals in financial products when it:

- a) issues, varies or disposes of the superannuation interests in the fund;

- b) acquires or disposes of financial products which form part of the investment portfolio of the fund; or
- c) acquires or disposes of financial products to cover its obligations to members.

As such, the trustee of a registrable superannuation entity (RSE) would be required to meet the licensing requirements for both providing a superannuation trustee service and the underlying dealing of the fund. However, since 2002 ASIC has provided relief for superannuation trustees from having to meet licensing requirements for the underlying dealing of their funds. This relief is currently found in section 5 of *ASIC Corporations (Superannuation and Schemes: Underlying Investments) Instrument 2016/378*.

Item 1 of Schedule 2 of the regulations amends the *Corporations Regulations 2001* by inserting a new paragraph 7.6.01(1)(db) into subregulation 7.6.01(1), which relates to the underlying dealing of RSEs.

This item provides an exemption for the trustee of RSE from the requirement to hold an AFSL for dealing in a financial product in the ordinary course of operation of the RSE (other than a financial product that is an interest in the RSE).

Some conduct related to the operation of an RSE falls within the definition of both ‘dealing’ and ‘providing a superannuation trustee service.’ However, section 911A(4A) of the Act provides that a person is not exempt for a superannuation trustee service unless the exemption expressly covers a superannuation trustee service. As such, the new paragraph 7.6.01(1)(db) exemption will not affect or “carve out” any of the dealing behaviour as far as it pertains to the licensing requirements for providing a superannuation trustee service. This means that trustees must continue to ensure that their underlying dealing activities are carried out in accordance with the general obligations, including the obligation to do all things necessary to ensure that financial services are carried out efficiently, honestly, and fairly.

An RSE is defined in section 10 of the *Superannuation Industry (Supervision) Act 1993*, and includes regulated superannuation funds, approved deposit funds and pooled superannuation trusts. RSEs do not include self-managed superannuation funds. Certain trustees of pooled superannuation trusts are already exempt from some AFS licensing requirements that relate to dealing under existing paragraphs 7.6.01(1)(b) to (d). The broad exemption provided by this instrument may in some circumstances overlap with these existing pooled superannuation trust exemptions.