



Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018

No. 122, 2018

An Act to amend the *Australian Securities and Investments Commission Act 2001* in relation to competition in the financial system, to provide that ASIC is not a Statutory Agency, and to remove the requirement for ASIC to engage staff under the *Public Service Act 1999*, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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[Assented to 3 October 2018]

The Parliament of Australia enacts:

No. 122, 2018 Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018

1

1 Short title

This Act is the *Treasury Laws Amendment (Enhancing ASIC's Capabilities) Act 2018*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	3 October 2018
2. Schedule 1	The day after this Act receives the Royal Assent.	4 October 2018
3. Schedule 2	1 July 2019.	1 July 2019

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments relating to competition in the financial system

Australian Securities and Investments Commission Act 2001

1 After subsection 1(2)

Insert:

- (2A) Without limiting subsection (2), ASIC must consider the effects that the performance of its functions and the exercise of its powers will have on competition in the financial system.

Schedule 2—Amendments relating to engagement of ASIC staff

Part 1—Main amendments

Australian Securities and Investments Commission Act 2001

1 Subsection 5(1)

Insert:

senior staff member means a staff member identified as a senior staff member in a determination made under section 122A.

2 Subsection 5(1) (definition of *staff member*)

Repeal the definition, substitute:

staff member means:

- (a) a person employed under section 120; or
- (b) a person engaged under subsection 121(1); or
- (c) any of the officers, employees and persons who under section 122 are to assist ASIC.

3 Section 10A

Repeal the section, substitute:

10A Chairperson not subject to direction by ASIC on certain matters

The Chairperson of ASIC is not subject to direction by ASIC in relation to the Chairperson's performance of functions, or exercise of powers, under:

- (a) the *Public Governance, Performance and Accountability Act 2013*; or
- (b) Part 6 or 7 of this Act.

4 Paragraph 102(2C)(b)

Repeal the paragraph, substitute:

- (b) a senior staff member.

5 At the end of subsection 102(2C)

Add:

Note: Senior staff members are identified in determinations under section 122A.

6 At the end of subsection 119A(2)

Add:

; or (c) if the member is the Chairperson or a Deputy Chairperson and the function or power is a function or power of the member as Chairperson or Deputy Chairperson—another member or a senior staff member.

7 Section 120

Repeal the section, substitute:

120 Staff

- (1) The Chairperson may, on behalf of ASIC, employ under written agreements such permanent, temporary or casual staff as the Chairperson considers necessary for the performance or exercise of any of ASIC's functions or powers.
- (2) The terms and conditions of employment (including as to remuneration) are to be determined by the Chairperson.

8 Subsection 121(1)

Omit "on the Commonwealth's behalf", substitute "on behalf of ASIC".

9 At the end of Part 6

Add:

122A Senior staff member determination

- (1) The Chairperson may, by written instrument, make a determination identifying which staff members are senior staff members.
- (2) A determination under subsection (1) may identify a staff member who holds or acts in a specified position as a senior staff member.
- (3) A determination under subsection (1) is a legislative instrument.

10 Paragraph 125(1)(a)

Repeal the paragraph, substitute:

- (a) performing functions or services as a staff member, otherwise than because the person is:
 - (i) a person employed under section 120; or
 - (ii) an officer or employee of an Agency, within the meaning of the *Public Service Act 1999*, whose services are made available under section 122; or

11 At the end of Division 1 of Part 7

Add:

126A Chairperson to ensure adequate disclosure of interest requirements for ASIC staff members

The Chairperson must take reasonable steps to ensure that there are, where appropriate, adequate disclosure of interest requirements applying to staff members.

126B ASIC Code of Conduct

- (1) The Chairperson must determine, in writing, the ASIC Code of Conduct.

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* provides for the repeal, variation etc. of instruments.

- (2) The ASIC Code of Conduct applies to ASIC members and staff members employed under section 120.
- (3) To avoid doubt, a determination under subsection (1) is not a legislative instrument.

126C ASIC Values

- (1) The Chairperson must determine, in writing, the ASIC Values.

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* provides for the repeal, variation etc. of instruments.

- (2) The Chairperson must uphold and promote the ASIC Values.

- (3) ASIC members (other than the Chairperson) and staff members employed under section 120 must uphold the ASIC Values.
- (4) To avoid doubt, a determination under subsection (1) is not a legislative instrument.

12 In the appropriate position

Insert:

Part 25—Transitional provisions relating to the Treasury Laws Amendment (Enhancing ASIC’s Capabilities) Act 2018

309 Definitions

In this Part:

APS employee has the meaning given in section 7 of the *Public Service Act 1999*.

commencement day means the day on which Schedule 2 to the *Treasury Laws Amendment (Enhancing ASIC’s Capabilities) Act 2018* commences.

staff member has the meaning given in subsection 5(1) as in force on and from the commencement day.

310 Staff members engaged under former subsection 120(3)

Each person who, immediately before the commencement day, was a staff member employed under a written agreement under subsection 120(3) continues to be employed under that agreement. That agreement is taken to be an agreement under section 120 as in force on and from that day.

311 APS employees in ASIC

- (1) This section applies to a person who, immediately before the commencement day, was a staff member (as defined in subsection 5(1) as in force immediately before the commencement day) engaged under the *Public Service Act 1999*.

- (2) On and from the commencement day, the person is taken:
- (a) to cease to be engaged under the *Public Service Act 1999*; and
 - (b) to be employed by ASIC under a written agreement under section 120 as in force on and from the commencement day; and
 - (c) except as provided by this Act:
 - (i) to be employed on the same terms and conditions as those that applied to the person immediately before the commencement day; and
 - (ii) to have accrued an entitlement to benefits, in connection with that employment by ASIC, that is equivalent to the entitlement that the person had accrued, in connection with his or her employment, immediately before the commencement day.
- (3) The person's service as an employee of ASIC is taken, for all purposes, to be continuous with his or her service as an APS employee.
- (4) This Part does not affect any promotion, performance management or disciplinary actions (however described) in relation to the person that had been started before the commencement day.
- (5) A staff member who ceases to be an APS employee because of subsection (2) is not entitled to receive any payment or other benefit merely because he or she ceased to be an APS employee.

312 ASIC Enterprise Agreement

- (1) In this section:

Enterprise Agreement means the *Australian Securities & Investments Commission Enterprise Agreement 2016-2019* approved under the *Fair Work Act 2009* on 20 May 2016, as in force immediately before the commencement day.

- (2) The Enterprise Agreement:
- (a) continues, on and from the commencement day, to cover and apply to employees whom it covered and applied to immediately before the commencement day; and

- (b) covers and applies to employees at the classification levels covered by the Enterprise Agreement whose employment with ASIC commences on or after the commencement day.
- (3) On and after the commencement day, the Enterprise Agreement covers and applies to the Chairperson as the employing authority but on behalf of ASIC under section 120.
- (4) This section does not prevent the variation or termination of the Enterprise Agreement in accordance with law.
- (5) This section does not affect the operation of section 58 of the *Fair Work Act 2009*.

313 Variation of terms and conditions of employment

- (1) This Part does not prevent the terms and conditions of a staff member's employment after the commencement day from being varied:
 - (a) in accordance with those terms and conditions; or
 - (b) by or under a law, award, determination or agreement.
- (2) In this section:
vary, in relation to terms and conditions, includes:
 - (a) omitting any of those terms and conditions; and
 - (b) adding to those terms and conditions; and
 - (c) substituting new terms or conditions for any of those terms and conditions.

314 Transitional rules

- (1) In this section:
transitional rule means an instrument made under subsection (2) or (4).
- (2) The Minister may make a written instrument prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to sections 310 to 313 in relation to a particular person.

- (3) An instrument made under subsection (2) is not a legislative instrument.

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* provides for the repeal, variation etc. of instruments.

- (4) The Minister may, by legislative instrument, prescribe matters of a transitional nature (including prescribing any saving or application provisions) relating to sections 310 to 313 in relation to a class of persons.

- (5) Without limiting subsection (2) or (4):

- (a) a transitional rule made under subsection (2) may declare that a specified provision of sections 310 to 313 is to have effect, in relation to a particular person, as if it were modified as specified in the transitional rule; and
- (b) a transitional rule made under subsection (4) may declare that a specified provision of sections 310 to 313 is to have effect, in relation to a class of persons, as if it were modified as specified in the transitional rule.

The provision has effect accordingly.

- (6) A transitional rule:

- (a) must not be made after 12 months after the commencement day; and
- (b) if it is a legislative instrument—takes effect from the later of:
 - (i) the day after the day it is registered; or
 - (ii) a later day specified in the rule; and
- (c) if it is not a legislative instrument—takes effect from the later of:
 - (i) the day after the day it is made; or
 - (ii) a later day specified in the rule; and
- (d) unless revoked earlier, remains in effect for 12 months from the day the rule takes effect, or a shorter period specified in the rule.

- (7) To avoid doubt, a transitional rule may not do any of the following:

- (a) create an offence or civil penalty;
- (b) provide powers of:
 - (i) arrest or detention; or
 - (ii) entry, search or seizure;

- (c) impose a tax;
- (d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- (e) directly amend the text of this Act.

Part 2—Consequential amendments

Australian Securities and Investments Commission Act 2001

13 Section 96

Omit “subsection 120(3)”, substitute “section 120”.

Business Names Registration Act 2011

14 Subsection 79(1)

Omit “or a staff member who is an SES employee or an acting SES employee”, substitute “or a staff member who is a senior staff member (within the meaning given by subsection 5(1) of the *Australian Securities and Investments Commission Act 2001*)”.

15 Paragraph 80(1)(b)

Repeal the paragraph, substitute:

- (b) a staff member who is a senior staff member (within the meaning given by subsection 5(1) of the *Australian Securities and Investments Commission Act 2001*);

Corporations Act 2001

16 Paragraph 1101J(c)

Repeal the paragraph, substitute:

- (c) a staff member of ASIC who is a senior staff member (within the meaning given by subsection 5(1) of that Act).

17 Paragraph 50-10(4)(c) of Schedule 2

Repeal the paragraph, substitute:

- (c) a staff member of ASIC who is a senior staff member (within the meaning given by subsection 5(1) of that Act).

Mutual Assistance in Business Regulation Act 1992

18 After paragraph 22(2)(a)

Insert:

- (aa) if the Commonwealth regulator is the Australian Securities and Investments Commission—a senior staff member (within the meaning given by subsection 5(1) of the *Australian Securities and Investments Commission Act 2001*); or

19 Paragraph 22(2)(b)

Omit “a Commonwealth regulator”, substitute “a Commonwealth regulator (other than the Australian Securities and Investments Commission)”.

[*Minister’s second reading speech made in—
House of Representatives on 28 March 2018
Senate on 27 June 2018*]

(63/18)
