Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017

No. , 2017

(Treasury)

A Bill for an Act to amend the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 to improve consumer protection in relation to financial products, and for related purposes
Contents

1 Short title.................................................................1
2 Commencement..........................................................2
3 Schedules...................................................................2

Schedule 1—Amendments relating to design and distribution of financial products
  Corporations Act 2001 3

Schedule 2—Amendments relating to product intervention orders
  Corporations Act 2001 23
  National Consumer Credit Protection Act 2009 33
  Australian Securities and Investments Commission Act 2001 41
A Bill for an Act to amend the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 to improve consumer protection in relation to financial products, and for related purposes

The Parliament of Australia enacts:

1 Short title

This Act is the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2017.
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

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table</td>
<td>The day this Act receives the Royal Assent.</td>
<td></td>
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<tr>
<td>2. Schedule 1</td>
<td>The day after the end of the period of 12 months beginning on the day this Act receives the Royal Assent.</td>
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<td>3. Schedule 2</td>
<td>The day after this Act receives the Royal Assent.</td>
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</tr>
</tbody>
</table>

Note: This table relates only to the provisions of this Act as originally enacted.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 design and distribution of financial products

Corporations Act 2001

1 After paragraph 760A(a)

Insert:

(aa) the provision of suitable financial products to consumers of financial products; and

2 Section 760B (after table item 8)

Insert:

8A 7.8A design and distribution requirements relating to financial products

3 After Part 7.8

Insert:

Part 7.8A—Design and distribution requirements in relation to financial products, and related ASIC powers

Division 1—Preliminary

993DA Definitions

(1) In this Part:

appropriate: a target market determination for a financial product is appropriate if it satisfies the requirements of subsection 993DB(10).

dealing in a financial product has the meaning given by section 766C, subject to the following:
(a) subsection 766C(3) does not apply if the dealing is a sale that takes place in circumstances described in subsection 707(2), (3) or (5) or subsection 1012C(5), (6) or (8);
(b) paragraphs 766C(4)(c) and (d) do not apply if the dealing is an offer of securities that needs disclosure to investors under Part 6D.2.

*distribution condition* has the meaning given by paragraph 993DB(9)(b).

*distribution information* has the meaning given by subsection 993DF(2).

*MySuper product* has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

*regulated person* has the same meaning as in section 1011B, subject to the following:
(a) the references to financial product include references to securities;
(b) regulated person, in relation to a financial product, includes:
(i) a seller of the product if the sale takes place in circumstances described in subsection 707(2), (3) or (5) (secondary sales that require a disclosure document);
and
(ii) an offeror (within the meaning of Chapter 8) of the product.

*responsible person* has the same meaning as in subsection 1013A(3).

*review period* has the meaning given by paragraph 993DB(12)(b).

*review trigger* has the meaning given by paragraph 993DB(12)(a).

*target market*, in relation to a financial product, means a market specified in a target market determination for the product.

*target market determination* means a determination made as provided by section 993DB, or by section 993DC.

(2) Section 1010C applies for the purposes of this Part.
Note: Section 1010C makes special provision about the meaning of sale and offer.

Division 2—Target market determinations for financial products

993DB Target market determinations for financial products

Application

(1) This section applies to a financial product if:
   (a) an offer of the product would need disclosure to investors under Part 6D.2 (see subsection (4)); or
   (b) under Part 7.9, a Product Disclosure Statement must be prepared or given for the product (see subsection (5)); or
   (c) a recognised offer is proposed to be made in relation to the product (see subsection (6)); or
   (d) the product is of a kind prescribed by regulations made for the purposes of subsection (7) (see subsection (7)).

(2) This section does not apply to:
   (a) a MySuper product; or
   (b) a margin lending facility; or
   (c) a security to which an employee share scheme applies; or
   (d) an ordinary share in a company; or
   (e) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.

(3) Paragraph (2)(d) does not apply to an ordinary share in a company if:
   (a) the company’s constitution provides that ordinary shares may be converted into preference shares; or
   (b) the company:
      (i) carries on a business of investment in financial products, interests in land or other investments; and
      (ii) in the course of carrying on that business, invests funds subscribed, whether directly or indirectly, after an offer or invitation to the public (within the meaning of
Target market determinations

(4) If, under Part 6D.2, a person must prepare a disclosure document for an offer of a financial product, the person must make a target market determination for the product before a person deals in the product or provides financial product advice in relation to the product.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(5) If, under Part 7.9, a Product Disclosure Statement must be prepared or given for a financial product, the responsible person must make a target market determination for the product before a person deals in the product or provides financial product advice in relation to the product.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(6) A person must make a target market determination for a financial product before making a recognised offer and before a person provides financial product advice in relation to that product.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(7) If:

(a) a financial product is of a kind prescribed by regulations made for the purposes of this subsection; and
(b) the circumstances specified in those regulations in relation to
the product exist;

then:

(c) the person specified in those regulations; or

(d) if no person is so specified—the issuer of the product;

must make a target market determination for the product before the
time or event specified in those regulations.

Note 1: Failure to comply with this subsection is an offence (see
subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E). For
relief from liability to a civil penalty relating to this subsection, see
section 1317S.

(8) A target market determination must be in writing.

(9) A target market determination for a financial product must:

(a) describe the class of persons who comprise the target market
for the product; and

(b) set out any conditions and restrictions on dealings in, or

providing financial product advice in relation to, the product,
other than a condition or restriction imposed by or under this
Act (distribution conditions).

Note: Examples of distribution conditions for a financial product are:

(a) a condition that the financial product not be issued to a person
unless the person has received personal advice; and

(b) restrictions limiting the distribution of the product to specified
distribution channels.

Target market determinations to be appropriate

(10) A target market determination for a financial product must be such
that it would be reasonable to conclude that, if the product were
issued or sold to persons in the target market in accordance with
the distribution conditions, the product would generally meet the
likely objectives, financial situations and needs of the persons in
the target market.

(11) In subsection (10), sold means sold in circumstances described in
subsection 707(2), (3) or (5) or subsection 1012C(5), (6) or (8).
Review triggers and review periods

(12) A person who makes a target market determination must at the same time:

(a) identify events and circumstances (review triggers) that would reasonably suggest that the target market determination is no longer appropriate; and

(b) determine the maximum period between reviews of the target market determination (review period).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: This requirement also applies when a new target market determination is made under section 993DC.

(13) A maximum period determined under paragraph (12)(b) must be a period that is reasonable in the circumstances.

993DC Target market determinations to be reviewed

Review of target market determinations

(1) A person who makes a target market determination may review the determination, and may make a new target market determination in accordance with section 993DB, at any time.

(2) A person contravenes this subsection if:

(a) the person makes a target market determination; and

(b) the determination is not reviewed during a review period for the determination.

Note 1: Contravention of this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.
Where target market determinations may no longer be appropriate

(3) Subsections (4) and (5) apply if:
   (a) a person makes a target market determination for a financial product; and
   (b) the person knows, or reasonably ought to know, that:
      (i) an event or circumstance has occurred that would reasonably suggest that the target market determination is no longer appropriate; or
      (ii) a review trigger has occurred.

(4) The person must not deal in, or provide financial product advice in relation to, the product until the person has reviewed the determination and, if the determination is not appropriate, made a new determination in accordance with section 993DB.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(5) The person must, as soon as practicable but no later than 10 business days after this subsection starts to apply, take reasonable steps to ensure that a regulated person who deals in or provides financial product advice in relation to the financial product (or is expected to do either of those things) is given a direction:
   (a) not to distribute a disclosure document, a Product Disclosure Statement for the product or an offer document for the recognised offer; and
   (b) not to deal in, or provide financial product advice in relation to, the product;

unless the person has notified the regulated person that the determination has been reviewed and, if a new determination has been made, of the new determination.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.
(6) A regulated person contravenes this subsection if:
   (a) the person is given a direction referred to in subsection (5); and
   (b) the person does not comply with the direction.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

993DD  Prohibition on dealing and providing financial product advice unless target market determination made

(1) If section 993DB or 993DC requires a person to make a target market determination in relation to a financial product, a regulated person must not deal in, or provide financial product advice in relation to, the product unless a target market determination for the financial product has been made.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(2) In any proceedings against a person (not being a person required to make the target market determination) for an offence based on subsection (1), it is a defence if:
   (a) the person who is required to make the target market determination notified the regulated person with that it had made a target market determination; and
   (b) the regulated person’s failure to comply with subsection (1) occurred because the regulated person was acting on reliance on that notice; and
   (c) the regulated person’s reliance on that notice was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the Criminal Code.

Sensitive: Legal
(3) A regulated person must give written notice to ASIC, as soon as practicable, and in any case within 10 business days, if the person becomes aware that the person has contravened subsection (1).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Division 3—Distribution of financial products

993DE Reasonable steps to ensure target market determinations given effect to

Obligations

(1) A person who makes a target market determination for a financial product must take reasonable steps to ensure that dealings in, and financial product advice provided in relation to, the product are consistent with the most recent determination.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(2) A regulated person who deals in, or provides financial product advice in relation to, a financial product for which a target market determination has been made must take reasonable steps to ensure that the dealing or advice is consistent with the most recent determination.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.
What are reasonable steps

(3) In subsections (1) and (2), reasonable steps means steps that are, in the circumstances, reasonably able to be taken in relation to ensuring that any dealing in, and financial product advice in relation to, the financial product is in accordance with the target market determination, taking into account all relevant matters including:

(a) the likelihood of dealings in the financial product, or of financial product advice being given that recommends that a person acquire the financial product, otherwise than in accordance with the target market determination; and

(b) the nature and degree of harm that might result from the financial product being issued or sold:
   (i) to persons who are not in the target market; or
   (ii) otherwise than in accordance with the target market determination; and

(c) what the person knows, or ought reasonably to know, about:
   (i) the matters referred to in paragraphs (a) and (b); and
   (ii) ways of eliminating or minimising the likelihood and the harm; and

(d) the availability and suitability of ways to eliminate or minimise the likelihood and the harm.

(4) In subsection (3), sold means sold in circumstances described in subsection 707(2), (3) or (5) or subsection 1012C(5), (6) or (8).

993DF Record keeping and notification obligations

Record keeping

(1) A person who makes, or who is required by this Part to make, a target market determination for a financial product must keep records of:

(a) the person’s decisions in relation to:
   (i) the determination; and
   (ii) the review triggers; and
   (iii) the review period; and
(b) the reasons for those decisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Distribution information

(2) If:

(a) a person makes, or is required by this Part to make, a target market determination for a financial product; or

(b) a regulated person deals in, or provides financial advice in relation to, a financial product for which a target market determination has been made;

the person or the regulated person must collect, and keep records of the following information (distribution information):

(c) the number of issues and sales of the product that the person makes; and

(d) the dollar value of the issues and sales of the product that the person makes; and

(e) the proportion of the number of issues and sales of the product that the person makes that were consistent with the determination; and

(f) the ways in which the person’s dealings in, or the person’s providing financial advice in relation to, the financial product occurred; and

(g) the steps taken as required by section 933DE.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: There are further requirements about records in sections 1101C, 1101E and 1101E.

(3) In subsection (2), sale means a sale that takes place in circumstances described in subsection 707(2), (3) or (5) or subsection 1012C(5), (6) or (8).
1 Regulations

(4) The regulations may impose requirements in relation to records relating to compliance with this Part.

Notifications to persons who make target market determinations

(5) If:

(a) a target market determination for a financial product has been made; and

(b) a regulated person deals in, or provides financial advice in relation to, the product; and

(c) the regulated person becomes aware of a significant dealing in the financial product that is not consistent with the determination;

the regulated person must, as soon as practicable, and in any case within 10 business days, give written notice to the person who made the determination.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

993DG Notifications to ASIC

A person who makes a target market determination for a financial product must give written notice to ASIC, as soon as practicable, and in any case within 10 business days, if the person becomes aware of a significant dealing in the financial product that is not consistent with the determination.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.
Division 4—ASIC powers

993DH Information to be provided to ASIC on request

(1) ASIC may, in writing, request:
   (a) the person who makes, or is required by this Part to make, a target market determination; or
   (b) a regulated person who deals in, or provides financial advice in relation to, a financial product for which a target market determination is, has been or is required to be made; to provide ASIC with distribution information in relation to a financial product, being information in the person’s possession or to which the person has access.

(2) ASIC may, in writing, request a person who makes, or is required by this Part to make, a target market determination to provide records referred to in subsection 993DF(1).

(3) The person must give the information to ASIC in writing by the date specified in the request or, if no date is specified, within 10 business days after the day the person receives the request.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

993DI Stop orders

(1) This section applies if ASIC is satisfied that a provision of Division 2, or section 993DD or 993DE, has been contravened in relation to a financial product.

(2) ASIC may order that specified conduct in respect of the financial product must not be engaged in while the order is in force. The order is not a legislative instrument.

(3) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Part.
(4) Before making an order under subsection (2), ASIC must:
   (a) hold a hearing; and
   (b) give a reasonable opportunity to any interested person to
       make oral or written submissions to ASIC on whether an
       order should be made.

(5) If ASIC considers that any delay in making an order under
subsection (2) pending the holding of a hearing would be
prejudicial to the public interest, ASIC may make an interim order
under that subsection. The interim order may be made without
holding a hearing and lasts for 21 days after the day on which it is
made unless revoked before then.

(6) At any time during the hearing, ASIC may make an interim order
under subsection (2). The interim order lasts until:
   (a) ASIC makes an order under subsection (2) after the
       conclusion of the hearing; or
   (b) the interim order is revoked;
   whichever happens first.

(7) The order under subsection (2) must be in writing and must be
served on the person who made or was required to make the target
market determination.

(8) The person on whom the order is served must take reasonable steps
to ensure that other people who engage in conduct to which the
order applies are aware of the order.

Note 1: Failure to comply with this subsection is an offence (see
subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E).
For relief from liability to a civil penalty relating to this subsection,
see section 1317S.

(9) The person on whom the order is served, or a person who is aware
of the order, must not engage in conduct contrary to the order.

Note 1: Failure to comply with this subsection is an offence (see
subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E).
For relief from liability to a civil penalty relating to this subsection,
see section 1317S.
(10) If the person on whom the order is served, or a person who is aware of the order, engages in conduct contrary to the order, any relevant statement included in the order under subsection (3) has effect accordingly. This applies in addition to any other consequence that is provided for by this Act.

Division 5—Exemptions and modifications

993DJ  Definitions

In this Division, the provisions of this Part include:
(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

993DK  Exemptions and modifications by ASIC

(1) ASIC may:
(a) exempt a person or class of persons from all or specified provisions of this Part; or
(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
(c) declare that this Part applies in relation to:
   (i) a person or a financial product; or
   (ii) a class of persons or financial products;
   in respect of which a person is required to make a target market determination as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) An exemption or declaration is not a legislative instrument.

(3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may
order the person to comply with the condition in a specified way.

Only ASIC may apply to the Court for the order.

(4) An exemption or declaration must be in writing and ASIC must publish notice of it in the Gazette.

(5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

993DL  Exemptions and modifications by regulations

The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions of this Part were omitted, modified or varied as specified in the regulations.

Division 6—Miscellaneous

993DM  Civil liability

(1) If:

(a) a person (the first person) is required by subsection 993DD(1) to not deal in, or to not provide, financial product advice in relation to, a product; and
(b) the first person deals in, or provides financial product advice in relation to, the product; and
(c) another person (the *client*) suffers loss or damage because of the dealing or provision of financial product advice; the client may recover the amount of the loss or damage by action against the first person, whether or not the first person (or anyone else) has been convicted of an offence in respect of the failure.

(2) Subsection (1) does not apply to a proceeding against a regulated person who is not required to make the target market determination if:
(a) the person who is required to make the determination notified the regulated person with that it had made a target market determination; and
(b) the regulated person’s failure to comply with subsection (1) occurred because the regulated person was acting on reliance on that notice; and
(c) the regulated person’s reliance on that notice was reasonable.

(3) If:
(a) a person (the *first person*) is required by subsection 993DE(1) or (2) to take reasonable steps; and
(b) the first person fails to take all those reasonable steps; and
(c) another person (the *client*) suffers loss or damage because of the failure;
the client may recover the amount of the loss or damage by action against the first person, whether or not the first person (or anyone else) has been convicted of an offence in respect of the failure.

(4) An action under subsections (1) or (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(5) This section does not affect any liability that a person has under any other law.

**993DN Additional powers of court to make orders**

(1) The court dealing with an action under subsection 993DM(1) or (2) may, in addition to awarding loss or damage under that subsection...
and if it thinks it necessary in order to do justice between the parties:

(a) make an order declaring void a contract entered into by the client who suffered loss or damage relating to a financial product; and

(b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

(2) Without limiting paragraph (1)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

4 After subparagraph 1018A(1)(c)(ii)

Insert:

(c) if Part 7.8A requires a target market determination be made in relation to the product—describes the target market or specifies where the description is available; and

5 After subparagraph 1018A(2)(c)

Insert:

(c) if Part 7.8A requires a target market determination be made in relation to the product—describes the target market or specifies where the description is available; and

6 Subsection 1317E(1) (after table item 40)

Insert:

40AA subsections 993DB(4), (5), (6) determining target market for financial products

40AB section 993DB(12) determining review triggers and review period for target market determination

40AC subsections 993DC(2), (4), (5) and (6) reviewing target market determination

40AD subsection 993DD(1) and (3) dealing in or providing financial product advice unless target market determination made

20 Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017
### Amendments relating to design and distribution of financial products

**Schedule 1**

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<td>reasonable steps to ensure target market determinations given effect to</td>
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<td>40AF</td>
<td>subsections 993DF(1), (2) and (5)</td>
<td>record keeping and notification</td>
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<td>40AG</td>
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<td>40AH</td>
<td>subsection 993DH(3)</td>
<td>failure to provide information to ASIC on request</td>
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<td>40AI</td>
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<td>stop orders</td>
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#### 7 Schedule 3 (after table item 290C)

Insert:

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<td>290CAA</td>
<td>Subsections 993DB(4), (5), (6), (7) and (12)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
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<td>290CAB</td>
<td>Subsection 993DC(2)</td>
<td>50 penalty units or imprisonment for 12 months, or both.</td>
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<tr>
<td>290CAC</td>
<td>Subsections 993DC(4) and (5)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
</tr>
<tr>
<td>290CAD</td>
<td>Subsection 993DC(6)</td>
<td>100 penalty units or imprisonment for 2 years, or both.</td>
</tr>
<tr>
<td>290CAE</td>
<td>Subsections 993DD(1) and (3)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
</tr>
<tr>
<td>290CAF</td>
<td>Subsections 993DE(1) and (2)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
</tr>
<tr>
<td>290CAG</td>
<td>Subsections 993DF(1) and (2)</td>
<td>50 penalty units or imprisonment for 12 months, or both.</td>
</tr>
<tr>
<td>290CAH</td>
<td>Subsection 993DF(5)</td>
<td>50 penalty units.</td>
</tr>
<tr>
<td>290CAI</td>
<td>Section 993DG</td>
<td>50 penalty units.</td>
</tr>
<tr>
<td>290CAJ</td>
<td>Section 993DH(3)</td>
<td>10 penalty units or imprisonment for 3 months, or both.</td>
</tr>
<tr>
<td>290CAK</td>
<td>Subsections 993DI(8) and (9)</td>
<td>100 penalty units or imprisonment for 2 years, or both.</td>
</tr>
</tbody>
</table>

#### 14 In the appropriate position in Chapter 10

Insert:

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No. 2017  Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017
Part 10.—Transitional provisions relating to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018

Application of Schedule 1 of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018

(1) In this section:

commencement day means the day on which Schedule 1 to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018 commences.

(2) The amendments made by Schedule 1 to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018 apply in relation to a financial product:

(a) if the first issue of the financial product occurs after the commencement day, on the commencement day; or

(b) if:

(i) the first issue of the financial product occurs before the commencement day; and

(ii) a further issue occurs on or after the end of 12 months after the commencement day;

on the day that is 12 months after the commencement day.
Schedule 2—Amendments relating to product intervention orders

Corporations Act 2001

1 Section 760B (after table item 9)
   Insert:
   9A 7.9A intervention powers in relation to financial products

2 After Part 7.9
   Insert:

Part 7.9A—Product intervention orders

1022CA Object
   The object of this Part is to provide ASIC with proactive powers to reduce the risk of significant detriment to retail clients resulting from financial products.

1022CB Definitions
   In this Part:
   financial product does not include a financial product specified in regulations made for the purposes of this definition.
   prescribed period has the meaning given by subsection 1022CF(2).
   product intervention order means an order made under subsection 1022CC(1) or (3).

1022CC ASIC may make product intervention orders
   Making product intervention orders
   (1) If ASIC is satisfied that a financial product:
(a) is, or is likely to be, available for acquisition by persons as retail clients (whether or not it is also available or likely to be available for acquisition by persons as wholesale clients) by way of issue or pursuant to an offer to which section 707 or 1012C applies or will apply; and  
(b) has resulted in or will, or is likely to, result in significant detriment to retail clients;  
ASIC may, in accordance with this Part, order that:  
(c) a person must not engage in specified conduct in relation to the product; or  
(d) a person must not engage in specified conduct in relation to the product except in circumstances specified in the order; or  
(e) a person must not engage in specified conduct in relation to the product unless steps specified in the order have been taken.  
Note: An example of circumstances that may be specified in a product intervention order include that the product not be issued to a retail client unless the retail client has received personal advice.  
(2) An order under subsection (1) is not a legislative instrument.  
(3) If ASIC is satisfied that a class of financial products:  
(a) is, or is likely to be, available for acquisition by persons as retail clients (whether or not it is also available or likely to be available for acquisition by persons as wholesale clients) by way of issue or pursuant to an offer to which section 707 or 1012C applies or will apply; and  
(b) has resulted in or will, or is likely to, result in significant detriment to retail clients,  
ASIC may, in accordance with this Part and by legislative instrument, order that:  
(c) a person must not engage in specified conduct in relation to the class of products; or  
(d) a person must not engage in specified conduct in relation to the class of products except in circumstances specified in the order; or
(e) a person must not engage in specified conduct in relation to the class of products unless steps specified in the order have been taken.

Note: An example of circumstances that may be specified in a product intervention order include that a product in a class of products not be issued to a retail client unless the retail client has received personal advice.

(4) A product intervention order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with a specified provision of Chapter 6D or this Chapter.

Restrictions on product intervention orders

(5) A product intervention order may not impose an obligation on a person:

(a) in the person’s capacity as a retail client; or

(b) who is specified in regulations made for the purposes of this paragraph.

(6) A product intervention order cannot:

(a) require that a person satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person by or under this Act; or

(b) require that a person who is not required to hold a Australian financial services licence join an external dispute resolution scheme; or

(c) impose requirements in relation to a person’s remuneration, other than so much of the remuneration as is conditional on the achievement of objectives directly related to the financial product.

Commencement of product intervention orders

(7) A product intervention order comes into force:

(a) in the case of an order that is a legislative instrument—on the day after the instrument is registered; or

(b) in other cases—on the day on which the notice under subsection 1022CJ(1) in relation to the order is published;
or a later date specified in the order.

1022CD Significant detriment to retail clients

(1) In considering whether detriment resulting from a financial product is significant for the purposes of paragraph 1022CC(1)(b) or (3)(b), the following must be taken into account:
   (a) the nature and extent of the detriment;
   (b) without limiting paragraph (a)—the actual or potential financial loss to retail clients resulting from the product;
   (c) the impact that the detriment has had, or will or is likely to have, on retail clients;
   (d) any other matter prescribed by regulations made for the purposes of this paragraph.

(2) Subsection (1) does not limit the matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

(3) A financial product may result in significant detriment to retail clients even if a person has complied with the disclosure requirements in Chapter 6D or this Chapter, and with the person’s obligations under Part 7.8A, in relation to the product.

1022CE ASIC to consult before making product intervention orders

(1) ASIC must not make a product intervention order unless ASIC has:
   (a) consulted persons who are reasonably likely to be affected by the proposed order; and
   (b) if the proposed order will apply to a body that is regulated by APRA—consulted APRA; and
   (c) complied with any other requirements as to consultation prescribed by regulations made for the purposes of this paragraph.

(2) Without limiting paragraph (1)(a), ASIC is taken to comply with paragraph (1)(a) if ASIC, on its website:
   (a) makes the proposed order, or a description of the content of the proposed order, available; and
Amendments relating to product intervention orders

Schedule 2

1022CF Duration of product intervention orders

(1) A product intervention order expires at the end of the prescribed period after it comes into force unless:

(a) a declaration under section 1022CG is in force in relation to the order; or

(b) the order is revoked.

(2) The prescribed period is:

(a) 18 months, or a shorter period specified in regulations made for the purposes of this paragraph; or

(b) if the order specifies a shorter period than that determined under paragraph (a)—that period.

However, if the Court makes an order staying or otherwise affecting the operation or enforcement of a product intervention order, the period of the Court’s order is to be disregarded in determining the prescribed period.

1022CG Making product intervention orders permanent

The Minister may, after considering a report from ASIC, by legislative instrument, declare that a product intervention order that is in force:

(a) remains in force until revoked; or

(b) remains in force, unless revoked, for a specified period.

1022CH Amendment of product intervention orders

(1) The Minister may, after considering a report from ASIC, in writing, amend a product intervention order in respect of which a declaration under section 1022CG is in force.

(2) ASIC may, in writing, amend any other product intervention order. The amendment may not extend the term of the order if, as a result
of the amendment, the term of the order would be more than the prescribed period for the product intervention order.

(3) If the product intervention order is a legislative instrument, the amendment must be by legislative instrument.

(4) An amendment to a product intervention order comes into force:
(a) in the case of an order that is a legislative instrument—on the day after the instrument is registered; or
(b) in other cases—on the day on which the notice under subsection 1022CJ(2) in relation to the order is published; or on a later date specified in the amendment.

1022CI Revocation of product intervention orders

(1) The Minister may, after considering a report from ASIC, in writing, revoke a product intervention order in respect of which a declaration under section 1022CG is in force.

(2) ASIC may, in writing, revoke any other product intervention order.

(3) If the product intervention order is a legislative instrument, the revocation must be by legislative instrument.

1022CJ ASIC to issue public notice of product intervention orders

(1) For each product intervention order, ASIC must publish on its website a notice that:
(a) describes the financial product or class of financial products; and
(b) describes the significant detriment to retail clients; and
(c) sets out or summarises the terms of the order; and
(d) specifies the date the order is to take effect; and
(e) describes the consultation ASIC has undertaken on the order; and
(f) sets out why the order is an appropriate way of reducing the significant detriment.

Note: The order cannot come into effect before the notice is published: see subsection 1022CC(7).
Amendments relating to product intervention orders

Schedule 2

(2) If a product intervention order is amended, ASIC must publish on its website a notice that:
   (a) sets out or summarises the effect of the amendment; and
   (b) specifies the date the amendment is to take effect; and
   (d) describes the consultation ASIC has undertaken on the amendment.; and
   (e) sets out why the amendment is appropriate.

Note: The amendment cannot come into effect before the notice is published: see subsection 1022CH(4).

(3) If a product intervention order is revoked, ASIC must publish notice of the revocation on its website.

1022CK  Re-making product intervention orders

If a product intervention order expires or is revoked, ASIC may not remake the order, or make an order in substantially the same terms, unless:
   (a) the circumstances have materially changed from those when the order was made; or
   (b) the Minister approves.

1022CL  Enforcement of product intervention orders

(1) A person must not engage in conduct contrary to a product intervention order.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(2) In any proceedings against a person for an offence based on subsection (1), it is a defence if:
   (a) the product intervention order is not a legislative instrument; and
   (b) the defendant was not aware, and could not reasonably have been aware, of the order.
(3) If a product intervention order has been served on a person, the person on whom the order is served must take reasonable steps to ensure that other persons who engage in conduct to which the order applies are aware of the order.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E).
For relief from liability to a civil penalty relating to this subsection, see section 1317S.

1022CM Additional notification may be required

(1) If ASIC makes a product intervention order in relation to a financial product, it may also by notice require a person (first person) who has dealt in, or provided financial advice in relation to, the product in respect of a retail client to notify the retail client:
(a) of the terms of the order; and
(b) of any other matter specified in regulations made for the purposes of this paragraph.

(2) The notice may specify the way in which notifications under subsection (1) are to be made.

(3) If the order is a legislative instrument, the notice must also be a legislative instrument.

(4) A person contravenes this subsection if the person fails to comply with a requirement under subsection (1).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is also a civil penalty provision (see section 1317E).
For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(5) In any proceedings against a person for an offence based on subsection (4), it is a defence if:
(a) the notice is not a legislative instrument; and
(b) the defendant was not aware, and could not reasonably have
been aware, of the notice.

Note: A defendant bears an evidential burden in relation to the matters in
this subsection. See subsection 13.3(3) of the Criminal Code.

(6) In this section, dealing in a financial product has the meaning
given by section 766C, subject to the following:
(a) subsection 766C(3) does not apply if the dealing is a sale that
takes place in circumstances described in subsection 707(2),
(3) or (5) or subsection 1012C(5), (6) or (8);
(b) paragraphs 766C(4)(c) and (d) do not apply if the dealing is
an offer of securities that needs disclosure to investors under
Part 6D.2.

1022CN  Civil liability

(1) If:
(a) a person (the first person) is required to comply with a
product intervention order; and
(b) the first person has contravened the product intervention
order; and
(c) a retail client suffers loss or damage because of the breach;
the retail client may recover the amount of the loss or damage by
action against the first person, whether or not the first person (or
anyone else) has been convicted of an offence in respect of the
breach.

(2) An action under subsection (1) may be begun at any time within
6 years after the day on which the cause of action arose.

(3) This section does not affect any liability that a person has under
any other law.

1022CO  Additional powers of court to make orders

(1) The court dealing with an action under subsection 1022CN(1) may,
in addition to awarding loss or damage under that subsection and if
it thinks it necessary in order to do justice between the parties:
(a) make an order declaring void a contract relating to the financial product that was entered into by the client who suffered the loss or damage; and
(b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

(2) Without limiting paragraph (1)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

3 Section 1101J
Renumber the section as subsection (1).

4 At the end of section 1101J
Add:

(2) However, the Minister must not delegate the Minister’s powers under section 1022CG, 1022CH, 1022CI or 1022CK to a person other than ASIC.

5 Subsection 1317E(1) (after table item 40)
Insert:

40A subsection 1022CL(1) engaging in conduct contrary to a product intervention order
40B subsection 1022CL(3) failure to take reasonable steps to make others aware of product intervention order
40C subsection 1022CM(4) failure to notify retail clients

7 Schedule 3 (after table item 309AF)
Insert:

309AG Subsections 1022CL(1) and (3) 200 penalty units or imprisonment for 5 years, or both.
309AH Subsection 1022CM(4) 200 penalty units or imprisonment for 5 years, or both.

32 Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017

Sensitive: Legal
National Consumer Credit Protection Act 2009

8 After Part 6-7

Insert:

Part 6-7A—Product intervention orders

Division 1—Introduction

301A Guide to this Part

This Part is about reducing the risk that credit products result in significant detriment for consumers.

Division 2 provides ASIC with proactive powers to reduce the risk of significant detriment to consumers resulting from credit products.

Division 2—Product intervention orders

301B Definitions

In this Part:

credit product has the meaning give to in paragraph 301C(1)(a).

prescribed period has the meaning given by subsection 301F(2).

product intervention order means an order made under subsection 301C(1) or (3).

301C ASIC may make product intervention orders

Making product intervention orders

(1) If ASIC is satisfied that:

(a) a person is engaging, or is likely to engage, in credit activity in relation to a credit contract, mortgage, guarantee or
Schedule 2  Amendments relating to product intervention orders

34  consumer lease (credit product) or a proposed credit product;  
and  
(b) the credit product has resulted in or will, or is likely to, result  
in significant detriment to consumers;  
ASIC may, in accordance with this Part, order that:  
(c) a person must not engage in specified conduct in relation to  
the product; or  
(d) a person must not engage in specified conduct in relation to  
the product except in circumstances specified in the order; or  
(e) a person must not engage in specified conduct in relation to  
the product unless steps specified in the order have been  
taken.  
Note: Specified conduct that could be the subject of a product intervention  
order includes the provision of credit services.  

(2) An order under subsection (1) is not a legislative instrument.  

(3) If ASIC is satisfied that:  
(a) a person is engaging, or is likely to engage, in credit activity  
in relation to a class of credit products or proposed credit  
products; and  
(b) the class of products has resulted in or will, or is likely to,  
result in significant detriment to consumers,  
ASIC may, in accordance with this Part and by legislative  
instrument, order that:  
(c) a person must not engage in specified conduct in relation to  
the class of products; or  
(d) a person must not engage in specified conduct in relation to  
the class of products except in circumstances specified in the  
order; or  
(e) a person must not engage in specified conduct in relation to  
the class of products unless steps specified in the order have  
been taken.  
Note: Specified conduct that could be the subject of a product intervention  
order includes the provision of credit services.  

(4) A product intervention order may not impose an obligation on a  
person:
Amendments relating to product intervention orders

Schedule 2

No.      , 2017

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2017

(a) in the person’s capacity as a consumer; or
(b) who is specified in regulations made for the purposes of this paragraph.

(5) A product intervention order cannot:
(a) require that a person satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person by or under this Act; or
(b) require that a person who is not required to hold a Australian financial services licence join an external dispute resolution scheme; or
(c) impose requirements in relation to a person’s remuneration, other than so much of the remuneration as is conditional on the achievement of objectives directly related to the credit product.

Commencement of product intervention orders

(6) A product intervention order comes into force:
(a) in the case of an order that is a legislative instrument—on the day after the instrument is registered; or
(b) in other cases—on the day on which the notice under subsection 301K(1) in relation to the order is published; or a later date specified in the order.

Exclusion of credit products

(7) The regulations may provide that this Part does not apply to a credit product specified in regulations.

301D Significant detriment to consumers

(1) In considering whether detriment resulting from a credit product is significant for the purposes of paragraph 301C(1)(b) or (3)(b), the following must be taken into account:
(a) the nature and extent of the detriment;
(b) without limiting paragraph (a)—the actual or potential financial loss to consumers resulting from the product;
(c) the impact that the detriment has had, or will or is likely to have, on consumers;
(d) any other matter prescribed by regulations made for the purposes of this paragraph.

(2) Subsection (1) does not limit the matters to be taken into account in considering whether a credit product has resulted in, or will or is likely to result in, significant detriment to consumers.

(3) A credit product may result in significant detriment to consumers even if a person has complied with the disclosure requirements in the National Credit Code.

301E ASIC to consult before making product intervention orders

(1) ASIC must not make a product intervention order unless ASIC has:
(a) consulted persons who are reasonably likely to be affected by the proposed order; and
(b) if the proposed order will apply to a body that is regulated by APRA—consulted APRA; and
(c) complied with any other requirements as to consultation prescribed by regulations made for the purposes of this paragraph.

(2) Without limiting paragraph (1)(a), ASIC is taken to comply with paragraph (1)(a) if ASIC, on its website:
(a) makes the proposed order, or a description of the content of the proposed order, available; and
(b) invites the public to comment on the proposed order.

(3) A failure to comply with subsection (1) does not invalidate a product intervention order.

301F Duration of product intervention orders

(1) A product intervention order expires at the end of the prescribed period after it comes into force unless:
(a) a declaration under section 301G is in force in relation to the order; or
(b) the order is revoked.
(2) The **prescribed period** is:

(a) 18 months, or a shorter period specified in regulations made for the purposes of this paragraph; or

(b) if the order specifies a shorter period than that determined under paragraph (a)—that period.

However, if the Court makes an order staying or otherwise affecting the operation or enforcement of a product intervention order, the period of the Court’s order is to be disregarded in determining the prescribed period.

301G Making product intervention orders permanent

The Minister may, after considering a report from ASIC, by legislative instrument, declare that a product intervention order that is in force:

(a) remains in force until revoked; or

(b) remains in force, unless revoked, for a specified period.

301H Amendment of product intervention orders

(1) The Minister may, after considering a report from ASIC, in writing, amend a product intervention order in respect of which a declaration under section 301G is in force.

(2) ASIC may, in writing, amend any other product intervention order. The amendment may not extend the term of the order if, as a result of the amendment, the term of the order would be more than the prescribed period for the product intervention order.

(3) If the product intervention order is a legislative instrument, the amendment must be by legislative instrument.

(4) An amendment to a product intervention order comes into force:

(a) in the case of an order that is a legislative instrument—on the day after the instrument is registered; or

(b) in other cases—on the day on which the notice under subsection 301K(2) in relation to the order is published; or on a later date specified in the amendment.
301J Revocation of product intervention orders

(1) The Minister may, after considering a report from ASIC, in writing, revoke a product intervention order in respect of which a declaration under section 301G is in force.

(2) ASIC may, in writing, revoke any other product intervention order.

(3) If the product intervention order is a legislative instrument, the revocation must be by legislative instrument.

301K ASIC to issue public notice of product intervention orders

(1) For each product intervention order, ASIC must publish on its website a notice that:
   (a) describes the credit product or class of credit products; and
   (b) describes the significant detriment to consumers; and
   (c) sets out or summarises the terms of the order; and
   (d) specifies the date the order is to take effect; and
   (e) describes the consultation ASIC has undertaken on the order; and
   (f) sets out why the order is an appropriate way of reducing the significant detriment.

Note: The order cannot come into effect before the notice is published: see subsection 301C(6).

(2) If a product intervention order is amended, ASIC must publish on its website a notice that:
   (a) sets out or summarises the effect of the amendment; and
   (b) specifies the date the amendment is to take effect; and
   (c) describes the consultation ASIC has undertaken on the amendment; and
   (d) sets out why the amendment is appropriate.

Note: The amendment cannot come into effect before the notice is published: see subsection 301H(4).

(3) If a product intervention order is revoked, ASIC must publish notice of the revocation on its website.
Amendments relating to product intervention orders

Schedule 2

301L Re-making product intervention orders

If a product intervention order expires or is revoked, ASIC may not remake the order, or make an order in substantially the same terms, unless:

(a) the circumstances have materially changed from those when the order was made; or

(b) the Minister approves.

301M Enforcement of product intervention orders

(1) A person must not engage in conduct contrary to a product intervention order.

Civil penalty: 200 penalty units.

Criminal penalty: 200 penalty units, or imprisonment for 5 years, or both.

(2) In any proceedings against a person for an offence based on subsection (1), it is a defence if:

(a) the product intervention order is not a legislative instrument; and

(b) the defendant was not aware, and could not reasonably have been aware, of the order.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the Criminal Code.

(3) If a product intervention order has been served on a person, the person on whom the order is served must take reasonable steps to ensure that other persons who engage in conduct to which the order applies are aware of the order.

Civil penalty: 200 penalty units.

Criminal penalty: 200 penalty units, or imprisonment for 5 years, or both.
301N Additional notification may be required

(1) If ASIC makes a product intervention order in relation to a credit product, it may also by notice require a person (first person) who has engaged in a credit activity in relation to the product in respect of a consumer to notify the consumer:
(a) of the terms of the order; and
(b) of any other matter specified in regulations made for the purposes of this paragraph.

(2) The notice may specify the way in which notifications under subsection (1) are to be made.

(3) If the order is a legislative instrument, the notice must also be a legislative instrument.

(4) A person contravenes this subsection if the person fails to comply with a requirement under subsection (1).

Civil penalty: 200 penalty units.

Criminal penalty: 200 penalty units, or imprisonment for 5 years, or both.

(5) In any proceedings against a person for an offence based on subsection (4), it is a defence if:
(a) the notice is not a legislative instrument; and
(b) the defendant was not aware, and could not reasonably have been aware, of the notice.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the Criminal Code.

9 At the end of subsection 337(1)

Insert:

(1A) However, the Minister must not delegate the Minister’s powers under section 301G, 301H, 301J or 301L to a person other than ASIC.
Amendments relating to product intervention orders  Schedule 2

1 Australian Securities and Investments Commission Act 2001

10 Subsection 102(2C)
Omit “Part 2,”, insert “Part 2 or under Part 7.9A of the Corporations Act 2001 or Part 6-7A of the National Consumer Credit Protection Act 2009,”.

11 After subsection 102(2C)
Insert:

(2D) ASIC must not delegate a function or power under Part 7.9A of the Corporations Act 2001 or Part 6-7A of the National Consumer Credit Protection Act 2009 that has been delegated to it by the Minister.

12 After paragraph 136(1)(ca)
Insert:

(cb) information about any instances during the period where ASIC failed to consult as required by section 1022CE of the Corporations Act 2001 or section 301E of the National Consumer Credit Protection Act 2009;