Exposure Draft

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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/ THE SENATE

Presented and read a first time

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018

No. , 2018

(Treasury)

A Bill for an Act to amend the law relating to corporations and consumer credit protection, and for related purposes

Exposure Draft
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A Bill for an Act to amend the law relating to corporations and consumer credit protection, 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 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

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<th>Provisions</th>
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<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>
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<td>2. Schedule 1</td>
<td>The day after the end of the period of 2 years beginning on the day this Act receives the Royal Assent.</td>
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<td>The day after this Act receives the Royal Assent.</td>
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Note: This table relates only to the provisions of this Act as originally enacted.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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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 Section 761A (definition of personal advice)

Omit “subsection 766B(3)”, substitute “subsections 766B(3) and (3A)”.

4 After subsection 766B(3)

Insert:

(3A) However, the acts of asking for information solely to determine whether a person is in a target market (as defined in subsection 994A(1)) for a financial product, and of informing the person of the result of that determination, do not, of themselves, constitute personal advice.

5 After Part 7.8

Insert:
Part 7.8A—Design and distribution requirements relating to financial products for retail clients

Division 1—Preliminary

994A Definitions

(1) In this Part:

appropriate: a target market determination for a financial product is appropriate if it satisfies the requirements of subsection 994B(8).

complaint, in relation to a financial product, means a complaint about the product made to a regulated person, to which:

(a) the relevant person’s internal dispute resolution procedure (as referred to in paragraph 912A(2)(a)) applies; or
(b) an external dispute resolution procedure (as referred to in paragraph 912A(2)(b)) applies.

dealing in a financial product has the meaning given by section 766C, subject to the following:

(a) paragraphs 766C(1)(d) and (e) do not apply;
(b) despite subsection 766C(3), a person deals in a financial product if the dealing is a regulated sale of the product on the person’s own behalf;
(c) paragraph 766C(4)(c) does 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 994B(5)(c).

distribution information, in relation to a financial product, has the meaning given by subsection 994F(2).

excluded conduct means:
(a) an excluded dealing; and
(b) providing personal advice.

*excluded dealing* means a dealing in a financial product that consists of arranging for a retail client to apply for or acquire the product, where the arranging is undertaken:
(a) by a person, or by an associate of a person; and
(b) for the purpose of implementing personal advice that the person has given to the retail client.

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

*regulated person*, in relation to a financial product, means:
(a) a regulated person as defined in section 1011B (modified so that the references to financial products include references to securities); or
(b) the seller of the financial product, if a sale takes place in circumstances described in subsection 707(2), (3) or (5) (secondary sales that require a disclosure document) or subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); or
(c) an offeror (within the meaning of Chapter 8) of the financial product; or
(d) a person prescribed, in relation to the product, by regulations made for the purposes of this paragraph.

*regulated sale* means a sale:
(a) that, under subsection 707(2), (3) or (5), needs disclosure to investors under Part 6D.2; or
(b) in relation to which a Product Disclosure Statement must be given under subsection 1012C(5), (6) or (8).

*reporting period* means:
(a) for information about the number of complaints about a financial product—the period specified in the target market determination for the product as the reporting period for that kind of information; and
(b) for other kinds of information that must be reported under
subsection 994F(4)—the period specified in the target
market determination for the product as the reporting period
for those other kinds of information.

retail product distribution conduct, in relation to a financial
product, means any of the following:
(a) dealing in the product in relation to a retail client;
(b) under Part 6D.2, giving a disclosure document in relation to
an offer of the product to a retail client;
(c) under Part 7.9, giving a Product Disclosure Statement for the
product to a retail client;
(d) providing financial product advice in relation to the product
to a retail client;
(e) making a recognised offer, in relation to a recognised
jurisdiction, of the product.

review period, for a target market determination, means each of the
following:
(a) the period starting on the day the determination is made and
ending on the earlier of:
   (i) the day that a review of the determination under
   section 994C is started; and
   (ii) the end of the maximum period specified in the
determination as required by paragraph 994B(5)(e);
(b) a period starting on the day after a review of the
determination under section 994C is finished and ending on
the earlier of:
   (i) the day on which the next review of the determination
under section 994C is started; and
   (ii) the end of the maximum period specified in the
determination as required by paragraph 994B(5)(f).

review triggers, for a target market determination, has the meaning
given by paragraph 994B(5)(d).
target market, for a financial product, means the class of retail clients specified in the target market determination for the product under paragraph 994B(5)(b).

target market determination means a determination made as required by, and that meets all the requirements of, section 994B.

(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

994B Target market determinations for financial products

Requirement to make a target market determination

(1) Subject to subsection (3), a person must make a target market determination for a financial product if:

(a) under Part 6D.2, the person is required to prepare a disclosure document for the product; or

(b) under Part 7.9, the person is required to prepare a Product Disclosure Statement for the product; or

(c) the person makes a recognised offer, in relation to a recognised jurisdiction, of the product; or

(d) regulations made for the purpose of this paragraph require the person to make a target market determination for the product.

Note: Requirements for target market determinations are set out in subsections (2), (5), (6), (7), (8) and (9).

(2) A person required by subsection (1) to make a target market determination for a financial product must do so before:

(a) if paragraph (1)(a), (b) or (c) applies—any person engages in retail product distribution conduct in relation to the product; or

(b) if paragraph (1)(d) applies:
(i) the time or event specified in regulations made for the purposes of paragraph (1)(d); or
(ii) if there is no time or event so specified—any person engages in retail product distribution conduct 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 also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(3) Subsections (1) and (2) do not apply to:
   (a) a MySuper product; or
   (b) a margin lending facility; or
   (c) a security that has been or will be issued under an employee share scheme; or
   (d) a fully paid ordinary share in a company or a foreign company (except a fully paid ordinary share covered by subsection (4)); or
   (e) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.

(4) Paragraph (3)(d) does not apply to a fully paid ordinary share in a company or a foreign company if:
   (a) on the issue of the shares, the company intended that they be converted into preference shares within 12 months after the date of issue; 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 section 82) made on terms that the funds subscribed would be invested.
Requirements for target market determinations

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

(a) be in writing; and

(b) describe the class of retail clients that comprises the target market for the product; and

(c) specify any conditions and restrictions on retail product distribution conduct in relation to the product (distribution conditions), other than a condition or restriction imposed by or under another provision of this Act; and

(d) specify events and circumstances (review triggers) that would reasonably suggest that the determination is no longer appropriate; and

(e) specify the maximum period from the day the determination is made to the day the first review of the determination under section 994C is to start; and

(f) specify the maximum period between the completion of a review of the determination under section 994C and the start of the next review of the determination; and

(g) specify reporting periods for the purposes of subsection 994F(3); and

(h) specify the kinds of information needed to enable the person who made the target market determination to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred and, for each kind of information, specify:

(i) the regulated person or regulated persons that, under subsection 994F(4), are required to report the information to the person who made the determination; and

(ii) the reporting periods for reporting the information under subsection 994F(4).

Note 1: For paragraph (c): an example of a distribution condition for a financial product is a restriction limiting the distribution of the product to specified methods of distribution.
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Schedule 1  Amendments relating to design and distribution of financial products

Note 2: For paragraph (g): subsection 994F(3) requires regulated persons that receive complaints about the financial product to report the number of complaints in each reporting period to the person that made the target market determination for the product. Complaint is defined in subsection 994A(1).

Note 3: The requirements of subsection (5) also apply when a new target market determination is made as a result of a review under section 994C.

(6) Periods specified under paragraphs (5)(e) and (f), and reporting periods specified under paragraph (5)(g) and subparagraph (5)(h)(ii), must be reasonable.

(7) In determining what is reasonable for the purposes of subsection (6), regard must be had to:

(a) the need for reviews of a target market determination to be conducted sufficiently frequently that the person who made the determination can promptly identify whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred; and

(b) the likelihood, nature and extent of detriment to consumers that may result if:

   (i) a review trigger for the determination, or another event or circumstance that would reasonably suggest that the target market determination is no longer appropriate, has occurred; and

   (ii) the target market determination is not promptly reviewed.

(8) A target market determination for a financial product must be such that it would be reasonable to conclude that, if an issue, or a regulated sale, of the product were to occur:

(a) in accordance with the distribution conditions to a retail client—it would be likely that the retail client is in the target market; and

(b) to a retail client in the target market—it would likely be consistent with the likely objectives, financial situation and needs of the retail client.
Making target market determinations public

(9) A person who makes a target market determination must ensure that the determination is available to the public free of charge.

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.

994C Target market determinations to be reviewed

Review of target market determinations

(1) A person who made a target market determination may at any time:
   (a) review the determination; or
   (b) make a new target market determination in accordance with section 994B.

(2) A person contravenes this subsection if:
   (a) the person made a target market determination for a financial product; and
   (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at any time during a review period for the determination; and
   (c) the person does not review the determination at any time during the review period.

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—criminal offence—maker of target market determination

(3) If:
(a) a person made a target market determination for a financial product; and

(b) the person knows that:
   (i) a review trigger for the determination has occurred; or
   (ii) an event or circumstance has occurred that would reasonably suggest that the target market determination is no longer appropriate;

then, from as soon as practicable after, but no later than 10 business days after, the person first knew of the occurrence of the review trigger, event or circumstance, the person must not engage in retail product distribution conduct in relation to the product unless:

(c) the person has reviewed the determination and, if the determination is no longer appropriate, made a new target market determination in accordance with section 994B; or

(d) the distribution conduct is excluded conduct.

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

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in paragraphs (c) and (d) (see subsection 13.3(3) of the Criminal Code).

Where target market determinations may no longer be appropriate—civil penalty—maker of target market determination

If:

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

(b) the person knows, or ought reasonably to know, that:
   (i) a review trigger for the determination has occurred; or
   (ii) an event or circumstance has occurred that would reasonably suggest that the target market determination is no longer appropriate;

then, from as soon as practicable after, but no later than 10 business days after, the person first knew of the occurrence of the review trigger, event or circumstance, the person must not engage
in retail product distribution conduct in relation to the product
unless:

(c) the person has reviewed the determination and, if the
determination is no longer appropriate, made a new target
market determination in accordance with section 994B; or

(d) the distribution conduct is excluded conduct.

Note: 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.

Where target market determinations may no longer be
appropriate—further action—maker of target market
determination

(5) If:

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

(b) the person knows that:

(i) a review trigger for the determination has occurred; or

(ii) an event or circumstance has occurred that would
reasonably suggest that the target market determination
is no longer appropriate;

the person must, as soon as practicable but no later than 10
business days after the person first knew of the occurrence of the
review trigger, event or circumstance, take all reasonable steps to
ensure that regulated persons who engage in retail product
distribution conduct in relation to the product (or are expected to
do so) are informed that they must not engage in retail product
distribution conduct in relation to the product unless:

(c) the determination has been reviewed since the review trigger,
event or circumstance mentioned in paragraph (b) occurred
and, if a new target market determination is required by
subsection (4), it has been made; or

(d) the distribution conduct is excluded conduct.

Note 1: Contravention of this subsection is an offence (see
subsection 1311(1)).
Where target market determinations may no longer be appropriate—criminal offence—regulated persons

(6) If a regulated person in relation to a financial product knows that
the person who made the target market determination for the
product has taken steps referred to in subsection (5), the regulated
person must not engage in retail product distribution conduct in
relation to the product unless:
(a) the determination has been reviewed since a review trigger,
event or circumstance mentioned is paragraph (5)(b) occurred
and, if a new target market determination is required by
subsection (4), it has been made; or
(b) the regulated person:
(i) made all inquiries (if any) that were reasonable in the
circumstances; and
(ii) after doing so, believed on reasonable grounds that the
determination had been reviewed since a review trigger,
event or circumstance mentioned in paragraph (5)(b)
occurred and, if a new target market determination was
required by subsection (4), it had been made; or
(c) the distribution conduct is excluded conduct.

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

Note 2: In a prosecution for an offence, the defendant bears an evidential
burden in relation to the matters in paragraphs (a), (b) and (c) (see
subsection 13.3(3) of the Criminal Code).

Where target market determinations may no longer be appropriate—civil penalty—regulated persons

(7) If a regulated person knows or ought reasonably to know that the
person who made the target market determination for a financial
product has taken steps referred to in subsection (5), the regulated
person must not engage in retail product distribution conduct in
relation to the product unless:
(a) the determination has been reviewed since a review trigger, 
event or circumstance mentioned is paragraph (5)(b) occurred 
and, if a new target market determination is required by 
subsection (4), it has been made; or 

(b) the regulated person: 
   (i) made all inquiries (if any) that were reasonable in the 
circumstances; and 
   (ii) after doing so, believed on reasonable grounds that the 
determination had been reviewed since a review trigger, 
event or circumstance mentioned in paragraph (5)(b) 
occurred and, if a new target market determination was 
required by subsection (4), it had been made; or 

(c) the distribution conduct is excluded conduct.

Note: 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.

994D Prohibition on engaging in retail product distribution conduct 
unless target market determination made

If:

(a) under section 994B, a person must make a target market 
determination for a financial product but the determination 
has not been made; and 

(b) the product is on offer for acquisition by issue, or for 
regulated sale, to retail clients; 

a regulated person must not engage in retail product distribution 
conduct in relation to the product unless:

(c) the regulated person made all inquiries (if any) that were 
reasonable in the circumstances and, after doing so, believed 
on reasonable grounds that: 
   (i) the determination had been made; or 
   (ii) this Part does not require a target market determination 
for the product; or 

(d) the distribution conduct is excluded conduct.
Division 3—Distribution of financial products

994E Reasonable steps to ensure consistency with target market determinations

Obligations—person who makes target market determination

(1) A person who makes a target market determination for a financial product must take reasonable steps that will, or are reasonably likely to, result in retail product distribution conduct in relation to the product (other than excluded conduct) being consistent with the determination.

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

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in paragraphs (c) and (d) (see subsection 13.3(3) of the Criminal Code).

Note 3: 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 person is not taken to have failed to take reasonable steps for the purpose of subsection (1) merely because:

(a) retail product distribution conduct of a regulated person (other than the person) in relation to the product is inconsistent with the target market determination; or

(b) a retail client who is not in the target market for the product acquires the product.

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

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to conduct being excluded conduct (see subsection 13.3(3) of the Criminal Code).

Note 3: 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.
Obligations—regulated persons

(3) If:
   (a) a target market determination for a financial product has been made; and
   (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and
   (c) a regulated person engages in retail product distribution conduct in relation to the product; and
   (d) the regulated person failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the retail product distribution conduct being consistent with the determination;

the regulated person contravenes this subsection unless the retail product distribution conduct is excluded conduct.

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

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to conduct being excluded conduct (see subsection 13.3(3) of the Criminal Code).

Note 3: 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.

(4) A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(c) merely because a retail client who is not in the target market for the product acquires the product.

What are reasonable steps

(5) Without limiting subsections (1) and (3), reasonable steps in relation to a person are steps that, in the circumstances, the person is reasonably able to take to ensure that retail product distribution conduct in relation to the financial product is consistent with the target market determination for the product, taking into account all relevant matters including:
(a) the likelihood of any such conduct being inconsistent with
the determination; and
(b) the nature and degree of harm that might result from an issue
or regulated sale of the financial product:
   (i) to retail clients who are not in the target market; or
   (ii) that is inconsistent with the 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.

994F Record keeping and notification obligations

Record keeping—persons who make, or are required to make,
target market determinations

(1) A person who makes, or who is required by this Part to make, a
target market determination for a financial product must collect
and keep complete and accurate records of:
   (a) the person’s decisions in relation to the following:
       (i) target market determinations for the product;
       (ii) review triggers for the target market determinations;
       (iii) review periods for the target market determinations;
       (iv) any other requirements referred in subsections 994B(5)
           and (7) for the target market determinations; 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.

Note 3: There are further requirements about records in sections 1101C,
1101E and 1101F.
Record keeping—other regulated persons—distribution information

(2) If:

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

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and

(c) a regulated person engages in retail product distribution conduct in relation to the product;

the regulated person must collect and keep complete and accurate records of the following information in relation to the product

(distribution information):

(d) the number of complaints in relation to the product that the regulated person receives;

(e) the steps the regulated person has taken in relation to the product as required by section 994E (reasonable steps to ensure consistency with the target market determination).

(f) if the regulated person is specified in the determination as required to report information of a specified kind to the person who made the determination (see subparagraph 994B(5)(h)(i))—information of that kind that the regulated person acquires;

(g) if the regulated person is not the person that made the determination—the dates on which the regulated person reported as required by subsection (3), (4) or (5) and the substance of the reports.

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 1101F.
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Schedule 1  Amendments relating to design and distribution of financial products

Reporting complaint information to persons who make target market determinations

(3) If:

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

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and

(c) a regulated person engages in retail product distribution conduct in relation to the product during a reporting period specified in the determination under paragraph 994B(5)(g) (which relates to complaints);

the regulated person must, as soon as practicable after, but in any case within 10 business days after, the end of the reporting period, report in writing to the person who made the determination the number of complaints in relation to the product that the regulated person received during the reporting 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.

Reporting other information to persons who make target market determinations

(4) If:

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

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and

(c) a regulated person is specified in the determination as required to report information of a specified kind to the person that made the determination (see subparagraph 994B(5)(h)(i)); and

(d) the regulated person engages in retail product distribution conduct in relation to the product during a reporting period for that kind of information;
the regulated person must as soon as practicable after, but in any case within 10 business days after, the end of the reporting period for information of that kind, report in writing to the person that made the determination:

(e) all the information of that kind that the regulated person acquired during the reporting period; or

(f) if the regulated person did not acquire information of that kind during the reporting period—that fact.

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) If:

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

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and

(c) a regulated person engages in retail product distribution conduct in relation to the product; and

(d) the regulated person becomes aware of a significant dealing in the product; and

(e) the regulated person becomes aware that the dealing is not consistent with the determination;

the regulated person must, as soon as practicable, and in any case within 10 business days, report the dealing, in writing, 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.

Regulations

(6) The regulations may impose requirements in relation to records relating to compliance with this Part.
(7) A person contravenes this subsection if the person refuses or fails to comply with the requirements of regulations made for the purposes of subsection (6).

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.

994G Notice to ASIC

If:

(a) a person makes a target market determination for a financial product; and

(b) the person becomes aware of a significant dealing in the product in relation to a retail client (except an excluded dealing); and

(c) the person becomes aware that the dealing is not consistent with the determination;

the person must give written notice to ASIC as soon as practicable and in any case within 10 business days.

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

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

Division 4—ASIC powers

994H Information to be provided to ASIC

(1) ASIC may, in writing, require:

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

(b) a regulated person who engages in retail product distribution conduct in relation to a financial product;
to provide ASIC with distribution information, relating to the
financial product, that is in the person’s possession or to which the
person has access.

(2) ASIC may, in writing, require a person who makes, or is required
by this Part to make, a target market determination for a financial
product to provide records referred to in subsection 994F(1)
relating to the product.

(3) A person who is required by ASIC to provide it with distribution
information or records under subsection (1) or (2) must comply
with the requirement:
   (a) by the date specified by ASIC in the requirement; or
   (b) if no date is so specified, within 10 business days after the
day the person is notified by ASIC of the requirement in
subsection (1) or (2).

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.

994J Stop orders

(1) This section applies if ASIC is satisfied that a provision of
Division 2, or section 994E, has been contravened in relation to a
financial product.

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

(3) 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.
(4) 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.

(5) 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.

(6) If ASIC makes an order under subsection (2) in relation to a financial product, ASIC must serve a copy of the order on the person who made or was required to make the target market determination.

(7) The person on whom the order is served must take all 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.

(8) 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.
Division 5—Exemptions and modifications

994K Definitions

In this Division, the provisions of this Part include definitions in this Act as they apply to references in this Part.

994L Exemptions and modifications by ASIC

Exemptions and modifications—individuals

(1) ASIC may, by notifiable instrument:
   (a) exempt a specified person from all or specified provisions of this Part; or
   (b) exempt a specified financial product from all or specified provisions of this Part; or
   (c) declare that this Part applies in relation to:
      (i) a specified person; or
      (ii) a specified financial product;
      as if specified provisions were omitted, modified or varied as specified in the declaration.

Exemptions and modifications—classes

(2) ASIC may, by legislative instrument:
   (a) exempt a specified class of persons from all or specified provisions of this Part; or
   (b) exempt a specified class of financial products from all or specified provisions of this Part; or
   (c) declare that this Part applies in relation to:
      (i) a specified class of persons; or
      (ii) a specified class of financial products;
      as if specified provisions were omitted, modified or varied as specified in the declaration.

(3) Subsection (2) applies whether or not the legislative instrument is also expressed to apply in relation to one or more persons or
products identified otherwise than by reference to membership of a class.

Conditions on exemptions

(4) An exemption may apply unconditionally or subject to specified conditions.

(5) A person to whom a condition specified in an exemption applies must comply with the condition.

(6) The Court may, on application by ASIC, order the person to comply with the condition in a specified way.

Protections

(7) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) or (2)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred:

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

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

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.

Division 6—Miscellaneous

994M Civil liability

(1) If:

(a) a person (the first person) contravenes subsection 994C, 994D or 994E(1) or (3); and

(b) another person (the client) suffers loss or damage because of the contravention;
the client may recover the amount of the loss or damage by action against the first person, whether or not:

(c) the first person (or anyone else) has been convicted of an offence in relation to the contravention; or

(d) a Court has made a declaration of contravention under subsection 1317E(1) in relation to the contravention; or

(e) a Court has ordered the first person (or anyone else) to pay the Commonwealth a pecuniary penalty under section 1317G in relation to the contravention.

(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.

994N Additional powers of court to make orders

(1) The court dealing with an action under subsection 994M(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 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), an order under that paragraph may include either or both of the following:

(a) an order for the return of money paid by a person;

(b) an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

6 After paragraph 1018A(1)(c)

Insert:

(ca) in a case where Part 7.8A requires a target market determination be made for the product—describes the target
Schedule 1 Amendments relating to design and distribution of financial products

7 After paragraph 1018A(2)(c)

Insert:

(ca) in a case where 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

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

Insert:

<p>| | | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>40A</td>
<td>subsections 994B(2) and (9)</td>
<td>failure to make and make available target market determinations for financial products</td>
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<tr>
<td>40B</td>
<td>subsections 994C(2)</td>
<td>failure to review target market determinations</td>
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<td>40C</td>
<td>subsection 994C(4)</td>
<td>engaging in retail product distribution conduct in relation to financial products before review of target market determinations</td>
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<tr>
<td>40D</td>
<td>subsection 994C(5)</td>
<td>failure to inform regulated persons of obligations not to engage in retail product distribution conduct in relation to financial products before review of target market determinations</td>
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<td>40E</td>
<td>subsection 994C(7)</td>
<td>engaging in retail product distribution conduct in relation to financial products before review of target market determinations</td>
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<td>40F</td>
<td>section 994D</td>
<td>engaging in retail product distribution conduct where no target market determination</td>
</tr>
<tr>
<td>40G</td>
<td>subsections 994E(1) and (3)</td>
<td>ensuring that retail product distribution conduct is consistent with target market determinations</td>
</tr>
<tr>
<td>40H</td>
<td>subsections 994F(1) and (2)</td>
<td>failure to keep records</td>
</tr>
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Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018
### 9 Schedule 3 (after table item 290C)

Insert:

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<td>290CAA</td>
<td>Subsections 994B(2) and (9)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
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<td>290CAB</td>
<td>Subsection 994C(2)</td>
<td>50 penalty units or imprisonment for 12 months, or both.</td>
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<td>290CAC</td>
<td>Subsection 994C(3), (5) and (6)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
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<td>290CAD</td>
<td>Section 994D</td>
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<td>290CAE</td>
<td>Subsections 994E(1) and (3)</td>
<td>200 penalty units or imprisonment for 5 years, or both.</td>
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<td>Subsections 994F(1), (2), (3), (4), (5) and (7)</td>
<td>50 penalty units or imprisonment for 12 months, or both.</td>
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<td>290CAG</td>
<td>Section 994G</td>
<td>100 penalty units or imprisonment for 2 years, or both.</td>
</tr>
<tr>
<td>290CAH</td>
<td>Subsection 994H(3)</td>
<td>100 penalty units or imprisonment for 2 years, or both.</td>
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<tr>
<td>2290CAI</td>
<td>Subsections 994J(7) and (8)</td>
<td>100 penalty units or imprisonment for 2 years, or both.</td>
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Schedule 2—Amendments relating to product intervention orders

Part 1—Main amendments

Corporations Act 2001

1 Section 760B (after table item 9)

Insert:

9A 7.9A intervention powers in relation to financial products

2 Paragraph 764A(1)(m)

Omit “section”, substitute “Chapter”.

3 Before subsection 764A(1A)

Insert:

Contracts of insurance

4 At the end of section 764A

Add:

Regulations

(3) Subject to Subdivision D, the regulations may declare that anything is a financial product for the purposes of all or specified provisions of this Chapter.

5 Before subsection 765A(2)

Insert:

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018
ASIC declarations

6 At the end of section 765A

Add:

Regulations

(3) Despite anything in Subdivision B or Subdivision C, the regulations may declare that a specified facility, interest or other thing is not a financial product for the purposes of all or specified provisions of this Chapter.

(4) A declaration under subsection (2) that is inconsistent with the regulations made for the purposes of subsection (3) has no effect to the extent of the inconsistency, but a declaration is taken to be consistent with the regulations to the extent that the declaration is capable of operating concurrently with the regulations.

7 After Part 7.9

Insert:

Part 7.9A—Product intervention orders

1023A Object

The object of this Part is to provide ASIC with powers that it can use proactively to reduce the risk of significant detriment to retail clients resulting from financial products.

1023B Definitions

In this Part:

financial product does not include a financial product specified in regulations made for the purposes of this definition.

product intervention order means an order made under subsection 1023D(1) or (3).
regulated sale has the meaning given by subsection 994A(1).

1023C Application of product intervention orders

(1) A product intervention order does not apply to a financial product held by a person if the person acquired, or entered into a contract for the acquisition of, the product before the order comes into force.

(2) A product intervention order does not apply to a person:
(a) in the person’s capacity as a retail client; or
(b) who is in a class of persons specified in regulations made for the purposes of this paragraph.

(3) The regulations may provide that this Part does not apply to a financial product specified in the regulations.

Note: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3) of the Criminal Code).

1023D 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 issue, or regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); 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 a specified person must not engage in specified conduct in relation to the product, either entirely or except in accordance with conditions specified in the order.

Note 1: An example of conditions 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.
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Amendments relating to product intervention orders Schedule 2
Main amendments Part 1

Note 2: Section 1023E specifies matters to be taken into account in considering whether detriment to retail clients resulting from a financial product is significant.

Note 3: Section 1023N also provides that product intervention orders may include requirements for notifying retail clients.

(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 issue, or regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); 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 a person must not engage in specified conduct in relation to the class of products, either entirely or except in accordance with conditions specified in the order.

Note 1: An example of conditions 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.

Note 2: Section 1023E specifies matters to be taken into account in considering whether detriment to retail clients resulting from a financial product is significant.

Note 3: Section 1023N also provides that product intervention orders may include requirements for notifying retail clients.

Restrictions on product intervention orders

(4) A product intervention order may not specify any of the following for subsection (1) or (3):
   (a) a condition that a person satisfy a standard of training, or meet a professional standard, other than a standard otherwise prescribed for the person by or under this Act;
   (b) a condition that a person who is not required to hold an Australian financial services licence become a member of an external dispute resolution scheme;
(c) a condition related to a person’s remuneration, other than a
condition related to so much of the person’s remuneration as
is conditional on the achievement of objectives directly
related to the financial product.

(5) Conduct covered by a product intervention order must be limited to
conduct in relation to a retail client.

1023E Significant detriment to retail clients

(1) In considering whether a financial product has resulted in, or will
or is likely to result in, significant detriment to retail clients for the
purposes of this Part, 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 for the
purposes of this Part.

(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.

1023F 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.

(4) Section 17 of the Legislation Act 2003 (rule-makers should consult before making legislative instruments) does not apply to the making of a product intervention order.

1023G Commencement and duration of product intervention orders

Commencement of product intervention orders

(1) A product intervention order comes into force:
   (a) for an order that is a legislative instrument—on the day after the instrument is registered under the Legislation Act 2003;
   or
   (b) otherwise—on the day after the notice under subsection 1023L(3) in relation to the order is published;
   or a later day specified in the order.

Duration of product intervention orders

(2) Subject to this Part, a product intervention order remains in force for:
   (a) 18 months, or any shorter period specified by the regulations;
   or
   (b) any shorter period specified in the order.

However, if the Court makes an order staying or otherwise affecting the operation or enforcement of a product intervention
order, then, in determining when the period referred to in paragraph (a) or (b) ends, disregard the period during which the Court’s order has that effect.

(3) Subsection (2) does not apply to a product intervention order if a declaration under section 1023H (which refers to extensions of product intervention orders) is in force in relation to the order.

(4) Subsection (2) does not prevent the revocation of a product intervention order.

Repeal of product intervention orders

(5) A product intervention order that is a legislative instrument that ceases to be in force is repealed by force of this subsection.

1023H Extension of product intervention orders

(1) ASIC may, in accordance with an approval under subsection (3), by legislative instrument, declare that a product intervention order that is in force:
   (a) remains in force until it is revoked; or
   (b) remains in force for a specified period, unless it is revoked earlier.

(2) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the declaration should be made.

(3) After considering the report, the Minister may give an approval in writing for the purposes of subsection (1).

1023J Amendment of product intervention orders

(1) Subject to this section, ASIC may, in writing, amend a product intervention order that is in force.

Requirements before amending product intervention orders

(2) If a declaration under section 1023H is in force in relation to a product intervention order, ASIC must not amend the order without
Amendments relating to product intervention orders

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the Minister’s approval, given after considering a report from ASIC on whether the amendment should be made.

(3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the amendment should be made.

Amendments of product intervention orders

(4) An amendment of a product intervention order must not be such that the order remains in force for a period longer than the maximum period determined for the order in accordance with subsection 1023G(2). This subsection does not apply to an order if a declaration under subsection 1023H(1) is in force in relation to the order.

(5) An amendment of a product intervention order comes into force:
   (a) for an amendment of an order that is a legislative instrument—on the day after the amendment is registered under the Legislation Act 2003; or
   (b) otherwise—on the day after the day on which the notice under subsection 1023L(6) in relation to the amendment is published;

or a later day specified in the amendment.

Amendments of orders that are legislative instruments

(6) An amendment of a product intervention order that is a legislative instrument must be by legislative instrument.

1023K Revocation of product intervention orders

(1) Subject to this section, ASIC may, in writing, revoke a product intervention order.

Requirements for revocation of product intervention orders

(2) If a declaration under section 1023H is in force in relation to a product intervention order, ASIC must not revoke the order.
Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

without the Minister’s approval, given after considering a report from ASIC on whether the order should be revoked.

(3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the order should be revoked.

Revocation of orders that are legislative instruments

(4) A revocation of a product intervention order that is a legislative instrument must be by legislative instrument.

1023L ASIC to issue public notice of product intervention orders

Product intervention orders

(1) ASIC must serve a copy of a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

(2) ASIC must publish each product intervention order, as in force for the time being, on its website.

Note: The Legislation Act 2003 requires legislative instruments to be registered on the Federal Register of Legislation and provides for compilations of legislative instruments.

(3) ASIC must also publish on its website, with the product intervention order, a notice that:

(a) describes the significant detriment to retail clients that has resulted from, or will or is likely to result from, the financial product or class of financial products to which the order relates, and sets out why the order is an appropriate way of reducing the detriment; and

(b) describes the consultation that ASIC undertook in relation to the order; and

(c) if the day the order comes into force is later than the day after the day of publication of the order—specifies the day the order comes into force.
Amendments of product intervention orders

(4) ASIC must serve a copy of the instrument amending a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

(5) ASIC must publish on its website each amendment of a product intervention order.

(6) ASIC must also publish on its website, with the amendment, a notice that:
   (a) sets out why the amendment is appropriate; and
   (b) describes the consultation that ASIC undertook in relation to the amendment; and
   (c) if the day the amendment is to take effect is later than the day after the day of publication of the amendment—specifies the day the amendment is to take effect.

Revocation of product intervention orders

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

1023M Re-making product intervention orders

If a product intervention order ceases to be in force or is revoked, ASIC may not remake the order, or make an order in substantially the same terms, unless:
   (a) ASIC is satisfied the circumstances have materially changed since the order was made; or
   (b) the Minister approves, in writing, the remaking of the order.

1023N Product intervention orders may require notification

(1) A product intervention order in relation to a financial product may require:
   (a) that a specified person who has:
(i) dealt in, or dealt in a specified way in, a financial product in relation to a retail client; or
(ii) provided financial product advice, or a specified kind of financial product advice, to a retail client in relation to, a financial product;

take reasonable steps to notify the retail client:

(iii) of the terms of the order; and
(iv) of any other matter specified in regulations made for the purposes of this subparagraph; and

(b) as to ways in which, and the periods within which, those notifications are to be given.

(2) In this section, dealing in a financial product has the meaning given by subsection 994A(1).

1023P Enforcement of product intervention orders

(1) A person must not engage in conduct contrary to a product intervention order that is in force in relation to the person.

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 person who is required by a product intervention order to take reasonable steps to notify a retail client must comply with the requirement.

Note 1: For this requirement, see subsection 1023N(1).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 3: 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.

(3) Subsections (1) and (2) do not apply if:

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

(4) If a product intervention order has been served on a person, the person must take all reasonable steps as soon as practicable 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.

1023Q Civil liability

(1) If:

(a) a person (the first person) contravenes a product intervention order; and

(b) a retail client suffers loss or damage because of the contravention;

the retail client may recover the amount of the loss or damage by action against the first person, whether or not:

(c) the first person (or anyone else) has been convicted of an offence in relation to the contravention; or

(d) a Court has made a declaration of contravention under subsection 1317E(1) in relation to the contravention; or

(e) a Court has ordered the first person (or anyone else) to pay the Commonwealth a pecuniary penalty under section 1317G in relation to the contravention.

(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.
1023R Additional powers of court to make orders

(1) The Court dealing with an action under subsection 1023Q(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 retail 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), an order under that paragraph may include either or both of the following:
   (a) an order for the return of money paid by a person;
   (b) an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

8 Section 1101J

Before “The”, insert “(1)”.

9 At the end of section 1101J

Add:

(2) However, the Minister must not delegate the Minister’s powers under section 1023H, 1023J, 1023K or 1023M (which deal with product intervention orders) to a person other than ASIC.

10 After paragraph 1317C(gdl)

Insert:

(gdm) a decision by ASIC to make a product intervention order under subsection 1023D(3); or

11 Subsection 1317E(1) (before table item 41)

Insert:

40P subsection 1023P(1) engaging in conduct contrary to a product intervention order
40Q subsection 1023P(2) failure to notify retail clients
40R subsection 1023P(4) failure to take reasonable steps to make others aware of product intervention order

12 Schedule 3 (after table item 309AF)
Insert:
309AG subsections 1023P(1), (2) and (4) 200 penalty units or imprisonment for 5 years, or both.

National Consumer Credit Protection Act 2009

13 After Part 6-7
Insert:

Part 6-7A—Product intervention orders

Division 1—Introduction

301A Guide to this Part
This Part aims to reduce the risk that credit contracts, mortgages, guarantees or consumer leases (credit products) or proposed credit products result in significant detriment for consumers.

Division 2 provides ASIC with powers that it can use proactively 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 given by paragraph 301D(1)(a).

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

301C Application of product intervention orders

(1) A product intervention order does not apply to a credit product entered into by a person if the person entered into the product before the order comes into force.

(2) A product intervention order does not apply to a person:
   (a) in the person’s capacity as a consumer; or
   (b) who is in a class of persons specified in regulations made for the purposes of this paragraph.

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

Note: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3) of the Criminal Code).

301D 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 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 a specified person must not engage in specified conduct in relation to the product, either entirely or except in accordance with conditions specified in the order.

Note 1: Section 301E specifies matters to be taken into account in considering whether detriment resulting from a credit product is significant.
Note 2: Section 301N also provides that product intervention orders may include requirements for notifying consumers.

(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 a person must not engage in specified conduct in relation to the class of products, either entirely or except in accordance with conditions specified in the order.

Note 1: Section 301E specifies matters to be taken into account in considering whether detriment to consumers resulting from a credit product is significant.

Note 2: Section 301N also provides that product intervention orders may include requirements for notifying consumers.

Restrictions on product intervention orders

(4) A product intervention order may not specify any of the following for subsection (1) or (3):
   (a) a condition 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;
   (b) a condition that a person who is not required to hold an Australian credit licence become a member of an external dispute resolution scheme;
   (c) a condition related to a person’s remuneration, other than a condition related to so much of the person’s remuneration as is conditional on the achievement of objectives directly related to the credit product.

(5) Conduct covered by a product intervention order must be limited to conduct in relation to a consumer.
301E Significant detriment to consumers

(1) In considering whether a credit product has resulted in, or will or is likely to result in, significant detriment to consumers for the purposes of this Part, 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 for the purposes of this Part.

(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 in relation to the product.

301F 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.

(4) Section 17 of the Legislation Act 2003 (rule-makers should consult before making legislative instruments) does not apply to the making of a product intervention order.

301G Commencement and duration of product intervention orders

Commencement of product intervention orders

(1) A product intervention order comes into force:

(a) for an order that is a legislative instrument—on the day after the instrument is registered under the Legislation Act 2003; or

(b) otherwise—on the day after the notice under subsection 301L(3) in relation to the order is published; or a later day specified in the order.

Duration of product intervention orders

(2) Subject to this Part, a product intervention order remains in force for:

(a) 18 months, or any shorter period specified by the regulations; or

(b) any shorter period specified in the order.

However, if a court makes an order staying or otherwise affecting the operation or enforcement of a product intervention order, then, in determining when the period referred to in paragraph (a) or (b) ends, disregard the period during which the court’s order has that effect.

(3) Subsection (2) does not apply to a product intervention order if a declaration under section 301H (which refers to extensions of product intervention orders) is in force in relation to the order.

(4) Subsection (2) does not prevent the revocation of a product intervention order.
Exposure Draft

Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

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Repeal of product intervention orders

(5) A product intervention order that is a legislative instrument that
ceases to be in force is repealed by force of this subsection.

301H Extension of product intervention orders

(1) ASIC may, in accordance with an approval under subsection (3),
by legislative instrument, declare that a product intervention order
that is in force:
   (a) remains in force until it is revoked; or
   (b) remains in force for a specified period, unless it is revoked
      earlier.

(2) ASIC may, at any time before the order ceases to be in force, give
the Minister a report on whether the declaration should be made.

(3) After considering the report, the Minister may give an approval in
writing for the purposes of subsection (1).

301J Amendment of product intervention orders

(1) Subject to this section, ASIC may, in writing, amend a product
intervention order that is in force.

Requirements before amending product intervention orders

(2) If a declaration under section 301H is in force in relation to a
product intervention order, ASIC must not amend the order without
the Minister’s approval, given after considering a report from
ASIC on whether the amendment should be made.

(3) ASIC may, at any time before the order ceases to be in force, give
the Minister a report on whether the amendment should be made.

Amendments of product intervention orders

(4) An amendment of a product intervention order must not be such
that the order remains in force for a period longer than the
maximum period determined for the order in accordance with
subsection 301G(2). This subsection does not apply to an order if a declaration under subsection 301H(1) is in force in relation to the order.

(5) An amendment of a product intervention order comes into force:
   (a) for an amendment of an order that is a legislative instrument—on the day after the amendment is registered under the Legislation Act 2003; or
   (b) otherwise—on the day after the day on which the notice under subsection 301L(6) in relation to the amendment is published;
   or a later day specified in the amendment.

Amendments of orders that are legislative instruments

(6) An amendment of a product intervention order that is a legislative instrument must be by legislative instrument.

301K Revocation of product intervention orders

(1) Subject to this section, ASIC may, in writing, revoke a product intervention order.

Requirements for revocation of product intervention orders

(2) If a declaration under section 301H is in force in relation to a product intervention order, ASIC must not revoke the order without the Minister’s approval, given after considering a report from ASIC on whether the order should be revoked.

(3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the order should be revoked.

Revocation of orders that are legislative instruments

(4) A revocation of a product intervention order that is a legislative instrument must be by legislative instrument.
301L ASIC to issue public notice of product intervention orders

Product intervention orders

(1) ASIC must serve a copy of a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

(2) ASIC must publish each product intervention order, as in force for the time being, on its website.

Note: The Legislation Act 2003 requires legislative instruments to be registered on the Federal Register of Legislation and provides for compilations of legislative instruments.

(3) ASIC must also publish on its website, with the product intervention order, a notice that:

(a) describes the significant detriment to consumers that has resulted from, or will or is likely to result from, the credit product or class of credit products to which the order relates, and sets out why the order is an appropriate way of reducing the detriment; and

(b) describes the consultation that ASIC undertook in relation to the order; and

(c) if the day the order comes into force is later than the day after the day of publication of the order—specifies the day the order comes into force.

Amendments of product intervention orders

(4) ASIC must serve a copy of the instrument amending a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

(5) ASIC must publish on its website each amendment of a product intervention order.

(6) ASIC must also publish on its website, with the amendment, a notice that:
(a) sets out why the amendment is appropriate; and
(b) describes the consultation that ASIC undertook in relation to
the amendment; and
(c) if the day the amendment is to take effect is later than the day
after the day of publication of the amendment—specifies the
day the amendment is to take effect.

Revocation of product intervention orders

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

301M Re-making product intervention orders

If a product intervention order ceases to be in force or is revoked,
ASIC may not remake the order, or make an order in substantially
the same terms, unless:
(a) ASIC is satisfied the circumstances have materially changed
since the order was made; or
(b) the Minister approves, in writing, the remaking of the order.

301N Product intervention orders may require notification

A product intervention order in relation to a credit product may
require:
(a) that a specified person who has engaged in a credit activity in
relation to the product in respect of a consumer take
reasonable steps to notify the consumer:
(i) of the terms of the order; and
(ii) of any other matter specified in regulations made for the
purposes of this paragraph; and
(b) as to ways in which, and the periods within which, those
notifications are to be given.

301P Enforcement of product intervention orders

(1) A person must not engage in conduct contrary to a product
intervention order that is in force in relation to the person.

No. , 2018  Treasury Laws Amendment (Design and Distribution Obligations and
Product Intervention Powers) Bill 2018

Exposure Draft
Schedule 2  Amendments relating to product intervention orders
Part 1  Main amendments

1 Civil penalty: 200 penalty units.

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

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

(3) A person who is required by a product intervention order to take reasonable steps to notify a consumer must comply with the requirement.

Civil penalty: 200 penalty units.

Note: For this requirement, see subsection 301N.

(4) A person who is required by a product intervention order to take reasonable steps to notify a consumer must comply with the requirement.

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

Note: For this requirement see subsection 301N.

(5) Subsections (1), (2), (3) and (4) do not apply if:

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

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

(6) If a product intervention order has been served on a person, the person must take all 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.

(7) If a product intervention order has been served on a person, the person must take all reasonable steps as soon as practicable to ensure that other persons who engage in conduct to which the order applies are aware of the order.
Criminal penalty: 200 penalty units, or imprisonment for 5 years, or both.

14 After subsection 337(1)

Insert:

(1A) However, the Minister must not delegate the Minister’s powers under section 301H, 301J, 301K or 301M (which deal with product intervention orders) to a person other than ASIC.
Part 2—Consequential amendments

Australian Securities and Investments Commission Act 2001

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

16 After subsection 102(2C)
Insert:

(2D) ASIC must not delegate a function or power under:

(a) Part 7.9A of the Corporations Act 2001; or

(b) Part 6-7A of the National Consumer Credit Protection Act 2009;

that has been delegated to it under that Act by the Minister.

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

(cb) information about any instances during the period where ASIC failed to consult as required by section 1023F of the Corporations Act 2001 or section 301F of the National Consumer Credit Protection Act 2009;