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2016-2017-2018

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**

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

4 The Parliament of Australia enacts:

5 **1 Short title**

6 This Act is the *Treasury Laws Amendment (Design and*
7 *Distribution Obligations and Product Intervention Powers) Act*
8 *2018.*

No. , 2018 *Treasury Laws Amendment (Design and Distribution Obligations and* 1
Product Intervention Powers) Bill 2018

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2 Commencement

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

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
2. Schedule 1	The day after the end of the period of 2 years beginning on the day this Act receives the Royal Assent.	
3. Schedule 2	The day after this Act receives the Royal Assent.	

Note: This table relates only to the provisions of this Act as originally enacted.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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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Amendments relating to design and distribution of financial products **Schedule 1**

1 **Schedule 1—Amendments relating to design**
2 **and distribution of financial products**
3

4 *Corporations Act 2001*

5 **1 After paragraph 760A(a)**

6 Insert:

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

9 **2 Section 760B (after table item 8)**

10 Insert:

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

11 **3 Section 761A (definition of *personal advice*)**

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

13 **4 After subsection 766B(3)**

14 Insert:

15 (3A) However, the acts of asking for information solely to determine
16 whether a person is in a target market (as defined in
17 subsection 994A(1)) for a financial product, and of informing the
18 person of the result of that determination, do not, of themselves,
19 constitute personal advice.

20 **5 After Part 7.8**

21 Insert:

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Schedule 1 Amendments relating to design and distribution of financial products

1 **Part 7.8A—Design and distribution requirements**
2 **relating to financial products for retail**
3 **clients**

4 **Division 1—Preliminary**

5 **994A Definitions**

6 (1) In this Part:

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

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

- 12 (a) the relevant person's internal dispute resolution procedure
13 (as referred to in paragraph 912A(2)(a)) applies; or
14 (b) an external dispute resolution procedure (as referred to in
15 paragraph 912A(2)(b)) applies.

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

- 18 (a) paragraphs 766C(1)(d) and (e) do not apply;
19 (b) despite subsection 766C(3), a person deals in a financial
20 product if the dealing is a regulated sale of the product on the
21 person's own behalf;
22 (c) paragraph 766C(4)(c) does not apply if the dealing is an offer
23 of securities that needs disclosure to investors under
24 Part 6D.2.

25 **distribution condition** has the meaning given by
26 paragraph 994B(5)(c).

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

29 **excluded conduct** means:

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Amendments relating to design and distribution of financial products **Schedule 1**

- 1 (a) an excluded dealing; and
2 (b) providing personal advice.

3 ***excluded dealing*** means a dealing in a financial product that
4 consists of arranging for a retail client to apply for or acquire the
5 product, where the arranging is undertaken:

- 6 (a) by a person, or by an associate of a person; and
7 (b) for the purpose of implementing personal advice that the
8 person has given to the retail client.

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

11 ***regulated person***, in relation to a financial product, means:

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

24 ***regulated sale*** means a sale:

- 25 (a) that, under subsection 707(2), (3) or (5), needs disclosure to
26 investors under Part 6D.2; or
27 (b) in relation to which a Product Disclosure Statement must be
28 given under subsection 1012C(5), (6) or (8).

29 ***reporting period*** means:

- 30 (a) for information about the number of complaints about a
31 financial product—the period specified in the target market
32 determination for the product as the reporting period for that
33 kind of information; and

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Schedule 1 Amendments relating to design and distribution of financial products

1 (b) for other kinds of information that must be reported under
2 subsection 994F(4)— the period specified in the target
3 market determination for the product as the reporting period
4 for those other kinds of information.

5 **retail product distribution conduct**, in relation to a financial
6 product, means any of the following:

- 7 (a) dealing in the product in relation to a retail client;
8 (b) under Part 6D.2, giving a disclosure document in relation to
9 an offer of the product to a retail client;
10 (c) under Part 7.9, giving a Product Disclosure Statement for the
11 product to a retail client;
12 (d) providing financial product advice in relation to the product
13 to a retail client;
14 (e) making a recognised offer, in relation to a recognised
15 jurisdiction, of the product.

16 **review period**, for a target market determination, means each of the
17 following:

- 18 (a) the period starting on the day the determination is made and
19 ending on the earlier of:
20 (i) the day that a review of the determination under
21 section 994C is started; and
22 (ii) the end of the maximum period specified in the
23 determination as required by paragraph 994B(5)(e);
24 (b) a period starting on the day after a review of the
25 determination under section 994C is finished and ending on
26 the earlier of:
27 (i) the day on which the next review of the determination
28 under section 994C is started; and
29 (ii) the end of the maximum period specified in the
30 determination as required by paragraph 994B(5)(f).

31 **review triggers**, for a target market determination, has the meaning
32 given by paragraph 994B(5)(d).

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Schedule 1 Amendments relating to design and distribution of financial products

- 1 (i) the time or event specified in regulations made for the
2 purposes of paragraph (1)(d); or
3 (ii) if there is no time or event so specified—any person
4 engages in retail product distribution conduct in relation
5 to the product.

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

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

- 11 (3) Subsections (1) and (2) do not apply to:
12 (a) a MySuper product; or
13 (b) a margin lending facility; or
14 (c) a security that has been or will be issued under an employee
15 share scheme; or
16 (d) a fully paid ordinary share in a company or a foreign
17 company (except a fully paid ordinary share covered by
18 subsection (4)); or
19 (e) a financial product of a kind prescribed by regulations made
20 for the purposes of this paragraph.
- 21 (4) Paragraph (3)(d) does not apply to a fully paid ordinary share in a
22 company or a foreign company if:
23 (a) on the issue of the shares, the company intended that they be
24 converted into preference shares within 12 months after the
25 date of issue; or
26 (b) the company:
27 (i) carries on a business of investment in financial
28 products, interests in land or other investments; and
29 (ii) in the course of carrying on that business, invests funds
30 subscribed, whether directly or indirectly, after an offer
31 or invitation to the public (within the meaning of
32 section 82) made on terms that the funds subscribed
33 would be invested.

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Amendments relating to design and distribution of financial products **Schedule 1**

1 *Requirements for target market determinations*

- 2 (5) A target market determination for a financial product must:
- 3 (a) be in writing; and
- 4 (b) describe the class of retail clients that comprises the target
- 5 market for the product; and
- 6 (c) specify any conditions and restrictions on retail product
- 7 distribution conduct in relation to the product (***distribution***
- 8 ***conditions***), other than a condition or restriction imposed by
- 9 or under another provision of this Act; and
- 10 (d) specify events and circumstances (***review triggers***) that
- 11 would reasonably suggest that the determination is no longer
- 12 appropriate; and
- 13 (e) specify the maximum period from the day the determination
- 14 is made to the day the first review of the determination under
- 15 section 994C is to start; and
- 16 (f) specify the maximum period between the completion of a
- 17 review of the determination under section 994C and the start
- 18 of the next review of the determination; and
- 19 (g) specify reporting periods for the purposes of
- 20 subsection 994F(3); and
- 21 (h) specify the kinds of information needed to enable the person
- 22 who made the target market determination to identify
- 23 promptly whether a review trigger for the determination, or
- 24 another event or circumstance that would reasonably suggest
- 25 that the determination is no longer appropriate, has occurred
- 26 and, for each kind of information, specify:
- 27 (i) the regulated person or regulated persons that, under
- 28 subsection 994F(4), are required to report the
- 29 information to the person who made the determination;
- 30 and
- 31 (ii) the reporting periods for reporting the information under
- 32 subsection 994F(4).

33 Note 1: For paragraph (c): an example of a distribution condition for a

34 financial product is a restriction limiting the distribution of the product

35 to specified methods of distribution.

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Schedule 1 Amendments relating to design and distribution of financial products

- 1 Note 2: For paragraph (g): subsection 994F(3) requires regulated persons that
2 receive complaints about the financial product to report the number of
3 complaints in each reporting period to the person that made the target
4 market determination for the product. **Complaint** is defined in
5 subsection 994A(1).
- 6 Note 3: The requirements of subsection (5) also apply when a new target
7 market determination is made as a result of a review under
8 section 994C.
- 9 (6) Periods specified under paragraphs (5)(e) and (f), and reporting
10 periods specified under paragraph (5)(g) and
11 subparagraph (5)(h)(ii), must be reasonable.
- 12 (7) In determining what is reasonable for the purposes of
13 subsection (6), regard must be had to:
- 14 (a) the need for reviews of a target market determination to be
15 conducted sufficiently frequently that the person who made
16 the determination can promptly identify whether a review
17 trigger for the determination, or another event or
18 circumstance that would reasonably suggest that the
19 determination is no longer appropriate, has occurred; and
- 20 (b) the likelihood, nature and extent of detriment to consumers
21 that may result if:
- 22 (i) a review trigger for the determination, or another event
23 or circumstance that would reasonably suggest that the
24 target market determination is no longer appropriate,
25 has occurred; and
- 26 (ii) the target market determination is not promptly
27 reviewed.
- 28 (8) A target market determination for a financial product must be such
29 that it would be reasonable to conclude that, if an issue, or a
30 regulated sale, of the product were to occur:
- 31 (a) in accordance with the distribution conditions to a retail
32 client—it would be likely that the retail client is in the target
33 market; and
- 34 (b) to a retail client in the target market—it would likely be
35 consistent with the likely objectives, financial situation and
36 needs of the retail client.
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Amendments relating to design and distribution of financial products **Schedule 1**

1 *Making target market determinations public*

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

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

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

9 **994C Target market determinations to be reviewed**

10 *Review of target market determinations*

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

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

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

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

28 *Where target market determinations may no longer be*
29 *appropriate—criminal offence—maker of target market*
30 *determination*

- 31 (3) If:
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Schedule 1 Amendments relating to design and distribution of financial products

- 1 (a) a person made a target market determination for a financial
2 product; and
3 (b) the person knows that:
4 (i) a review trigger for the determination has occurred; or
5 (ii) an event or circumstance has occurred that would
6 reasonably suggest that the target market determination
7 is no longer appropriate;

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

- 13 (c) the person has reviewed the determination and, if the
14 determination is no longer appropriate, made a new target
15 market determination in accordance with section 994B; or
16 (d) the distribution conduct is excluded conduct.

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

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

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

- 24 (4) If:
25 (a) a person made a target market determination for a financial
26 product; and
27 (b) the person knows, or ought reasonably to know, that:
28 (i) a review trigger for the determination has occurred; or
29 (ii) an event or circumstance has occurred that would
30 reasonably suggest that the target market determination
31 is no longer appropriate;
32 then, from as soon as practicable after, but no later than 10
33 business days after, the person first knew of the occurrence of the
34 review trigger, event or circumstance, the person must not engage

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Amendments relating to design and distribution of financial products **Schedule 1**

1 in retail product distribution conduct in relation to the product
2 unless:

- 3 (c) the person has reviewed the determination and, if the
4 determination is no longer appropriate, made a new target
5 market determination in accordance with section 994B; or
6 (d) the distribution conduct is excluded conduct.

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

10 *Where target market determinations may no longer be*
11 *appropriate—further action—maker of target market*
12 *determination*

13 (5) If:

- 14 (a) a person made a target market determination for a financial
15 product; and
16 (b) the person knows that:
17 (i) a review trigger for the determination has occurred; or
18 (ii) an event or circumstance has occurred that would
19 reasonably suggest that the target market determination
20 is no longer appropriate;

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

- 28 (c) the determination has been reviewed since the review trigger,
29 event or circumstance mentioned in paragraph (b) occurred
30 and, if a new target market determination is required by
31 subsection (4), it has been made; or
32 (d) the distribution conduct is excluded conduct.

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

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Schedule 1 Amendments relating to design and distribution of financial products

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

4 *Where target market determinations may no longer be*
5 *appropriate—criminal offence—regulated persons*

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

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

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

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

- 31 (7) If a regulated person knows or ought reasonably to know that the
32 person who made the target market determination for a financial
33 product has taken steps referred to in subsection (5), the regulated
34 person must not engage in retail product distribution conduct in
35 relation to the product unless:
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Amendments relating to design and distribution of financial products **Schedule 1**

- 1 (a) the determination has been reviewed since a review trigger,
2 event or circumstance mentioned is paragraph (5)(b) occurred
3 and, if a new target market determination is required by
4 subsection (4), it has been made; or
5 (b) the regulated person:
6 (i) made all inquiries (if any) that were reasonable in the
7 circumstances; and
8 (ii) after doing so, believed on reasonable grounds that the
9 determination had been reviewed since a review trigger,
10 event or circumstance mentioned in paragraph (5)(b)
11 occurred and, if a new target market determination was
12 required by subsection (4), it had been made; or
13 (c) the distribution conduct is excluded conduct.

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

17 **994D Prohibition on engaging in retail product distribution conduct** 18 **unless target market determination made**

19 If:

- 20 (a) under section 994B, a person must make a target market
21 determination for a financial product but the determination
22 has not been made; and
23 (b) the product is on offer for acquisition by issue, or for
24 regulated sale, to retail clients;
25 a regulated person must not engage in retail product distribution
26 conduct in relation to the product unless:
27 (c) the regulated person made all inquiries (if any) that were
28 reasonable in the circumstances and, after doing so, believed
29 on reasonable grounds that:
30 (i) the determination had been made; or
31 (ii) this Part does not require a target market determination
32 for the product; or
33 (d) the distribution conduct is excluded conduct.

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Schedule 1 Amendments relating to design and distribution of financial products

- 1 Note 1: Failure to comply with this subsection is an offence (see
2 subsection 1311(1)).
- 3 Note 2: In a prosecution for an offence, the defendant bears an evidential
4 burden in relation to the matters in paragraphs (c) and (d) (see
5 subsection 13.3(3) of the *Criminal Code*).
- 6 Note 3: This subsection is also a civil penalty provision (see section 1317E).
7 For relief from liability to a civil penalty relating to this subsection,
8 see section 1317S.

9 **Division 3—Distribution of financial products**

10 **994E Reasonable steps to ensure consistency with target market** 11 **determinations**

12 *Obligations—person who makes target market determination*

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

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

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

23 Note 3: This subsection is also a civil penalty provision (see section 1317E).
24 For relief from liability to a civil penalty relating to this subsection,
25 see section 1317S.

- 26 (2) A person is not taken to have failed to take reasonable steps for the
27 purpose of subsection (1) merely because:
- 28 (a) retail product distribution conduct of a regulated person
29 (other than the person) in relation to the product is
30 inconsistent with the target market determination; or
 - 31 (b) a retail client who is not in the target market for the product
32 acquires the product.

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Amendments relating to design and distribution of financial products **Schedule 1**

1 *Obligations—regulated persons*

2 (3) If:

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

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

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

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

20 Note 3: This subsection is also a civil penalty provision (see section 1317E).
21 For relief from liability to a civil penalty relating to this subsection,
22 see section 1317S.

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

27 *What are reasonable steps*

28 (5) Without limiting subsections (1) and (3), **reasonable steps** in
29 relation to a person are steps that, in the circumstances, the person
30 is reasonably able to take to ensure that retail product distribution
31 conduct in relation to the financial product is consistent with the
32 target market determination for the product, taking into account all
33 relevant matters including:

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Schedule 1 Amendments relating to design and distribution of financial products

- 1 (a) the likelihood of any such conduct being inconsistent with
2 the determination; and
3 (b) the nature and degree of harm that might result from an issue
4 or regulated sale of the financial product:
5 (i) to retail clients who are not in the target market; or
6 (ii) that is inconsistent with the determination; and
7 (c) what the person knows, or ought reasonably to know, about:
8 (i) the matters referred to in paragraphs (a) and (b); and
9 (ii) ways of eliminating or minimising the likelihood and
10 the harm; and
11 (d) the availability and suitability of ways to eliminate or
12 minimise the likelihood and the harm.

13 **994F Record keeping and notification obligations**

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

- 16 (1) A person who makes, or who is required by this Part to make, a
17 target market determination for a financial product must collect
18 and keep complete and accurate records of:
19 (a) the person's decisions in relation to the following:
20 (i) target market determinations for the product;
21 (ii) review triggers for the target market determinations;
22 (iii) review periods for the target market determinations;
23 (iv) any other requirements referred in subsections 994B(5)
24 and (7) for the target market determinations; and
25 (b) the reasons for those decisions.

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

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

31 Note 3: There are further requirements about records in sections 1101C,
32 1101E and 1101F.

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Amendments relating to design and distribution of financial products **Schedule 1**

1 *Record keeping—other regulated persons—distribution*
2 *information*

3 (2) If:

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

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

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

10 the regulated person must collect and keep complete and accurate
11 records of the following information in relation to the product
12 (***distribution information***):

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

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

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

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

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

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

32 Note 3: There are further requirements about records in sections 1101C,
33 1101E and 1101F.

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Schedule 1 Amendments relating to design and distribution of financial products

1 *Reporting complaint information to persons who make target*
2 *market determinations*

- 3 (3) If:
4 (a) a target market determination has been made for a financial
5 product; and
6 (b) the product is on offer for acquisition by issue, or for
7 regulated sale, to retail clients; and
8 (c) a regulated person engages in retail product distribution
9 conduct in relation to the product during a reporting period
10 specified in the determination under paragraph 994B(5)(g)
11 (which relates to complaints);

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

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

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

22 *Reporting other information to persons who make target market*
23 *determinations*

- 24 (4) If:
25 (a) a target market determination has been made for a financial
26 product; and
27 (b) the product is on offer for acquisition by issue, or for
28 regulated sale, to retail clients; and
29 (c) a regulated person is specified in the determination as
30 required to report information of a specified kind to the
31 person that made the determination (see
32 subparagraph 994B(5)(h)(i)); and
33 (d) the regulated person engages in retail product distribution
34 conduct in relation to the product during a reporting period
35 for that kind of information;
-

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Amendments relating to design and distribution of financial products **Schedule 1**

1 the regulated person must as soon as practicable after, but in any
2 case within 10 business days after, the end of the reporting period
3 for information of that kind, report in writing to the person that
4 made the determination:

- 5 (e) all the information of that kind that the regulated person
6 acquired during the reporting period; or
7 (f) if the regulated person did not acquire information of that
8 kind during the reporting period—that fact.

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

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

14 (5) If:

- 15 (a) a target market determination for a financial product has been
16 made; and
17 (b) the product is on offer for acquisition by issue, or for
18 regulated sale, to retail clients; and
19 (c) a regulated person engages in retail product distribution
20 conduct in relation to the product; and
21 (d) the regulated person becomes aware of a significant dealing
22 in the product; and
23 (e) the regulated person becomes aware that the dealing is not
24 consistent with the determination;

25 the regulated person must, as soon as practicable, and in any case
26 within 10 business days, report the dealing, in writing, to the
27 person who made the determination.

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

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

33 *Regulations*

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

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Schedule 1 Amendments relating to design and distribution of financial products

1 (7) A person contravenes this subsection if the person refuses or fails
2 to comply with the requirements of regulations made for the
3 purposes of subsection (6).

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

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

9 **994G Notice to ASIC**

10 If:

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

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

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

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

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

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

25 **Division 4—ASIC powers**

26 **994H Information to be provided to ASIC**

27 (1) ASIC may, in writing, require:

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

30 (b) a regulated person who engages in retail product distribution
31 conduct in relation to a financial product;

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1 to provide ASIC with distribution information, relating to the
2 financial product, that is in the person's possession or to which the
3 person has access.

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

8 (3) A person who is required by ASIC to provide it with distribution
9 information or records under subsection (1) or (2) must comply
10 with the requirement:

- 11 (a) by the date specified by ASIC in the requirement; or
12 (b) if no date is so specified, within 10 business days after the
13 day the person is notified by ASIC of the requirement in
14 subsection (1) or (2).

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

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

20 **994J Stop orders**

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

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

28 (3) Before making an order under subsection (2), ASIC must:

- 29 (a) hold a hearing; and
30 (b) give a reasonable opportunity to any interested person to
31 make oral or written submissions to ASIC on whether an
32 order should be made.

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- 1 (4) If ASIC considers that any delay in making an order under
2 subsection (2) pending the holding of a hearing would be
3 prejudicial to the public interest, ASIC may make an interim order
4 under that subsection. The interim order may be made without
5 holding a hearing and lasts for 21 days after the day on which it is
6 made unless revoked before then.
- 7 (5) At any time during the hearing, ASIC may make an interim order
8 under subsection (2). The interim order lasts until:
9 (a) ASIC makes an order under subsection (2) after the
10 conclusion of the hearing; or
11 (b) the interim order is revoked;
12 whichever happens first.
- 13 (6) If ASIC makes an order under subsection (2) in relation to a
14 financial product, ASIC must serve a copy of the order on the
15 person who made or was required to make the target market
16 determination.
- 17 (7) The person on whom the order is served must take all reasonable
18 steps to ensure that other people who engage in conduct to which
19 the order applies are aware of the order.
- 20 Note 1: Failure to comply with this subsection is an offence (see
21 subsection 1311(1)).
- 22 Note 2: This subsection is also a civil penalty provision (see section 1317E).
23 For relief from liability to a civil penalty relating to this subsection,
24 see section 1317S.
- 25 (8) The person on whom the order is served, or a person who is aware
26 of the order, must not engage in conduct contrary to the order.
- 27 Note 1: Failure to comply with this subsection is an offence (see
28 subsection 1311(1)).
- 29 Note 2: This subsection is also a civil penalty provision (see section 1317E).
30 For relief from liability to a civil penalty relating to this subsection,
31 see section 1317S.

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Amendments relating to design and distribution of financial products **Schedule 1**

1 **Division 5—Exemptions and modifications**

2 **994K Definitions**

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

5 **994L Exemptions and modifications by ASIC**

6 *Exemptions and modifications—individuals*

- 7 (1) ASIC may, by notifiable instrument:
- 8 (a) exempt a specified person from all or specified provisions of
9 this Part; or
 - 10 (b) exempt a specified financial product from all or specified
11 provisions of this Part; or
 - 12 (c) declare that this Part applies in relation to:
 - 13 (i) a specified person; or
 - 14 (ii) a specified financial product;as if specified provisions were omitted, modified or varied as
15 specified in the declaration.
16

17 *Exemptions and modifications—classes*

- 18 (2) ASIC may, by legislative instrument:
- 19 (a) exempt a specified class of persons from all or specified
20 provisions of this Part; or
 - 21 (b) exempt a specified class of financial products from all or
22 specified provisions of this Part; or
 - 23 (c) declare that this Part applies in relation to:
 - 24 (i) a specified class of persons; or
 - 25 (ii) a specified class of financial products;as if specified provisions were omitted, modified or varied as
26 specified in the declaration.
27
- 28 (3) Subsection (2) applies whether or not the legislative instrument is
29 also expressed to apply in relation to one or more persons or

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Schedule 1 Amendments relating to design and distribution of financial products

1 products identified otherwise than by reference to membership of a
2 class.

3 *Conditions on exemptions*

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

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

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

10 *Protections*

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

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

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

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

22 **Division 6—Miscellaneous**

23 **994M Civil liability**

24 (1) If:

25 (a) a person (the *first person*) contravenes subsection 994C,
26 994D or 994E(1) or (3); and

27 (b) another person (the *client*) suffers loss or damage because of
28 the contravention;

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- 1 the client may recover the amount of the loss or damage by action
2 against the first person, whether or not:
- 3 (c) the first person (or anyone else) has been convicted of an
4 offence in relation to the contravention; or
 - 5 (d) a Court has made a declaration of contravention under
6 subsection 1317E(1) in relation to the contravention; or
 - 7 (e) a Court has ordered the first person (or anyone else) to pay
8 the Commonwealth a pecuniary penalty under section 1317G
9 in relation to the contravention.
- 10 (2) An action under subsection (1) may be begun at any time within 6
11 years after the day on which the cause of action arose.
- 12 (3) This section does not affect any liability that a person has under
13 any other law.

14 **994N Additional powers of court to make orders**

- 15 (1) The court dealing with an action under subsection 994M(1) may, in
16 addition to awarding loss or damage under that subsection and if it
17 thinks it necessary in order to do justice between the parties:
- 18 (a) make an order declaring void a contract entered into by the
19 client who suffered loss or damage relating to a financial
20 product; and
 - 21 (b) if it makes an order under paragraph (a)—make such other
22 order or orders as it thinks are necessary or desirable because
23 of that order.
- 24 (2) Without limiting paragraph (1)(b), an order under that paragraph
25 may include either or both of the following:
- 26 (a) an order for the return of money paid by a person;
 - 27 (b) an order for payment of an amount of interest specified in, or
28 calculated in accordance with, the order.

29 **6 After paragraph 1018A(1)(c)**

30 Insert:

- 31 (ca) in a case where Part 7.8A requires a target market
32 determination be made for the product—describes the target
-

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Schedule 1 Amendments relating to design and distribution of financial products

1 market for the product or specifies where the determination is
2 available; and

3 **7 After paragraph 1018A(2)(c)**

4 Insert:

5 (ca) in a case where Part 7.8A requires a target market
6 determination be made in relation to the product—describes
7 the target market or specifies where the description is
8 available; and

9 **8 Subsection 1317E(1) (after table item 40)**

10 Insert:

40A	subsections 994B(2) and (9)	failure to make and make available target market determinations for financial products
40B	subsections 994C(2)	failure to review target market determinations
40C	subsection 994C(4)	engaging in retail product distribution conduct in relation to financial products before review of target market determinations
40D	subsection 994C(5)	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
40E	subsection 994C(7)	engaging in retail product distribution conduct in relation to financial products before review of target market determinations
40F	section 994D	engaging in retail product distribution conduct where no target market determination
40G	subsections 994E(1) and (3)	ensuring that retail product distribution conduct is consistent with target market determinations
40H	subsections 994F(1) and (2)	failure to keep records

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

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Amendments relating to design and distribution of financial products **Schedule 1**

40J	Subsection 994F(3), (4) and (5)	failure to report complaints and other information
40K	subsection 994F(7)	failure to comply with requirements of regulations
40L	section 994G	failure to notify ASIC
40M	subsection 994H(3)	failure to provide information to ASIC on request
40N	subsections 994J(7) and (8)	failure to comply with stop order obligations

1 **9 Schedule 3 (after table item 290C)**

2 Insert:

290CAA	Subsections 994B(2) and (9)	200 penalty units or imprisonment for 5 years, or both.
290CAB	Subsection 994C(2)	50 penalty units or imprisonment for 12 months, or both.
290CAC	Subsection 994C(3), (5) and (6)	200 penalty units or imprisonment for 5 years, or both.
290CAD	Section 994D	200 penalty units or imprisonment for 5 years, or both.
290CAE	Subsections 994E(1) and (3)	200 penalty units or imprisonment for 5 years, or both.
290CAF	Subsections 994F(1), (2), (3), (4), (5) and (7)	50 penalty units or imprisonment for 12 months, or both.
290CAG	Section 994G	100 penalty units or imprisonment for 2 years, or both.
290CAH	Subsection 994H(3)	100 penalty units or imprisonment for 2 years, or both.
2290CAI	Subsections 994J(7) and (8)	100 penalty units or imprisonment for 2 years, or both.

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

1 **Schedule 2—Amendments relating to product**
2 **intervention orders**

3 **Part 1—Main amendments**

4 *Corporations Act 2001*

5 **1 Section 760B (after table item 9)**

6 Insert:

9A 7.9A intervention powers in relation to financial
products

7 **2 Paragraph 764A(1)(m)**

8 Omit “section”, substitute “Chapter”.

9 **3 Before subsection 764A(1A)**

10 Insert:

11 *Contracts of insurance*

12 **4 At the end of section 764A**

13 Add:

14 *Regulations*

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

18 **5 Before subsection 765A(2)**

19 Insert:

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

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

1 *ASIC declarations*

2 **6 At the end of section 765A**

3 Add:

4 *Regulations*

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

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

14 **7 After Part 7.9**

15 Insert:

16 **Part 7.9A—Product intervention orders**

17 **1023A Object**

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

21 **1023B Definitions**

22 In this Part:

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

25 *product intervention order* means an order made under
26 subsection 1023D(1) or (3).

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

1 *regulated sale* has the meaning given by subsection 994A(1).

2 **1023C Application of product intervention orders**

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

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

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

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

16 **1023D ASIC may make product intervention orders**

17 *Making product intervention orders*

18 (1) If ASIC is satisfied that a financial product:
19 (a) is, or is likely to be, available for acquisition by issue, or
20 regulated sale, to persons as retail clients (whether or not it
21 also is, or is likely to be, available for acquisition by persons
22 as wholesale clients); and
23 (b) has resulted in, or will or is likely to result in, significant
24 detriment to retail clients;

25 ASIC may, in accordance with this Part, order that a specified
26 person must not engage in specified conduct in relation to the
27 product, either entirely or except in accordance with conditions
28 specified in the order.

29 Note 1: An example of conditions that may be specified in a product
30 intervention order include that the product not be issued to a retail
31 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**

- 1 Note 2: Section 1023E specifies matters to be taken into account in
2 considering whether detriment to retail clients resulting from a
3 financial product is significant.
- 4 Note 3: Section 1023N also provides that product intervention orders may
5 include requirements for notifying retail clients.
- 6 (2) An order under subsection (1) is not a legislative instrument.
- 7 (3) If ASIC is satisfied that a class of financial products:
8 (a) is, or is likely to be, available for acquisition by issue, or
9 regulated sale, to persons as retail clients (whether or not it
10 also is, or is likely to be, available for acquisition by persons
11 as wholesale clients); and
12 (b) has resulted in, or will or is likely to result in, significant
13 detriment to retail clients;
14 ASIC may, in accordance with this Part and by legislative
15 instrument, order that a person must not engage in specified
16 conduct in relation to the class of products, either entirely or except
17 in accordance with conditions specified in the order.
- 18 Note 1: An example of conditions that may be specified in a product
19 intervention order include that a product in a class of products not be
20 issued to a retail client unless the retail client has received personal
21 advice.
- 22 Note 2: Section 1023E specifies matters to be taken into account in
23 considering whether detriment to retail clients resulting from a
24 financial product is significant.
- 25 Note 3: Section 1023N also provides that product intervention orders may
26 include requirements for notifying retail clients.
- 27 *Restrictions on product intervention orders*
- 28 (4) A product intervention order may not specify any of the following
29 for subsection (1) or (3):
30 (a) a condition that a person satisfy a standard of training, or
31 meet a professional standard, other than a standard otherwise
32 prescribed for the person by or under this Act;
33 (b) a condition that a person who is not required to hold an
34 Australian financial services licence become a member of an
35 external dispute resolution scheme;
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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

1 (c) a condition related to a person's remuneration, other than a
2 condition related to so much of the person's remuneration as
3 is conditional on the achievement of objectives directly
4 related to the financial product.

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

7 **1023E Significant detriment to retail clients**

8 (1) In considering whether a financial product has resulted in, or will
9 or is likely to result in, significant detriment to retail clients for the
10 purposes of this Part, the following must be taken into account:

11 (a) the nature and extent of the detriment;

12 (b) without limiting paragraph (a), the actual or potential
13 financial loss to retail clients resulting from the product;

14 (c) the impact that the detriment has had, or will or is likely to
15 have, on retail clients;

16 (d) any other matter prescribed by regulations made for the
17 purposes of this paragraph.

18 (2) Subsection (1) does not limit the matters to be taken into account in
19 considering whether a financial product has resulted in, or will or is
20 likely to result in, significant detriment to retail clients for the
21 purposes of this Part.

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

26 **1023F ASIC to consult before making product intervention orders**

27 (1) ASIC must not make a product intervention order unless ASIC has:

28 (a) consulted persons who are reasonably likely to be affected by
29 the proposed order; and

30 (b) if the proposed order will apply to a body that is regulated by
31 APRA—consulted APRA; and

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

- 1 (c) complied with any other requirements as to consultation
2 prescribed by regulations made for the purposes of this
3 paragraph.
- 4 (2) Without limiting paragraph (1)(a), ASIC is taken to comply with
5 paragraph (1)(a) if ASIC, on its website:
6 (a) makes the proposed order, or a description of the content of
7 the proposed order, available; and
8 (b) invites the public to comment on the proposed order.
- 9 (3) A failure to comply with subsection (1) does not invalidate a
10 product intervention order.
- 11 (4) Section 17 of the *Legislation Act 2003* (rule-makers should consult
12 before making legislative instruments) does not apply to the
13 making of a product intervention order.

14 **1023G Commencement and duration of product intervention orders**

15 *Commencement of product intervention orders*

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

23 *Duration of product intervention orders*

- 24 (2) Subject to this Part, a product intervention order remains in force
25 for:
26 (a) 18 months, or any shorter period specified by the regulations;
27 or
28 (b) any shorter period specified in the order.
29 However, if the Court makes an order staying or otherwise
30 affecting the operation or enforcement of a product intervention

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

1 order, then, in determining when the period referred to in
2 paragraph (a) or (b) ends, disregard the period during which the
3 Court's order has that effect.

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

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

9 *Repeal of product intervention orders*

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

12 **1023H Extension of product intervention orders**

13 (1) ASIC may, in accordance with an approval under subsection (3),
14 by legislative instrument, declare that a product intervention order
15 that is in force:

16 (a) remains in force until it is revoked; or

17 (b) remains in force for a specified period, unless it is revoked
18 earlier.

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

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

23 **1023J Amendment of product intervention orders**

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

26 *Requirements before amending product intervention orders*

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

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

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

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

5 *Amendments of product intervention orders*

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

12 (5) An amendment of a product intervention order comes into force:
13 (a) for an amendment of an order that is a legislative
14 instrument—on the day after the amendment is registered
15 under the *Legislation Act 2003*; or
16 (b) otherwise—on the day after the day on which the notice
17 under subsection 1023L(6) in relation to the amendment is
18 published;
19 or a later day specified in the amendment.

20 *Amendments of orders that are legislative instruments*

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

23 **1023K Revocation of product intervention orders**

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

26 *Requirements for revocation of product intervention orders*

27 (2) If a declaration under section 1023H is in force in relation to a
28 product intervention order, ASIC must not revoke the order

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Schedule 2 Amendments relating to product intervention orders

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

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

5 *Revocation of orders that are legislative instruments*

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

8 **1023L ASIC to issue public notice of product intervention orders**

9 *Product intervention orders*

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

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

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

19 (3) ASIC must also publish on its website, with the product
20 intervention order, a notice that:
21 (a) describes the significant detriment to retail clients that has
22 resulted from, or will or is likely to result from, the financial
23 product or class of financial products to which the order
24 relates, and sets out why the order is an appropriate way of
25 reducing the detriment; and
26 (b) describes the consultation that ASIC undertook in relation to
27 the order; and
28 (c) if the day the order comes into force is later than the day after
29 the day of publication of the order—specifies the day the
30 order comes into force.

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

1

Amendments of product intervention orders

2

(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.

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

7

8

(6) ASIC must also publish on its website, with the amendment, a notice that:

9

10

(a) sets out why the amendment is appropriate; and

11

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

12

13

(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.

14

15

16

Revocation of product intervention orders

17

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

18

19

1023M Re-making product intervention orders

20

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:

21

22

23

(a) ASIC is satisfied the circumstances have materially changed since the order was made; or

24

25

(b) the Minister approves, in writing, the remaking of the order.

26

1023N Product intervention orders may require notification

27

(1) A product intervention order in relation to a financial product may require:

28

29

(a) that a specified person who has:

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

- 1 (i) dealt in, or dealt in a specified way in, a financial
2 product in relation to a retail client; or
3 (ii) provided financial product advice, or a specified kind of
4 financial product advice, to a retail client in relation to,
5 a financial product;
6 take reasonable steps to notify the retail client:
7 (iii) of the terms of the order; and
8 (iv) of any other matter specified in regulations made for the
9 purposes of this subparagraph; and
10 (b) as to ways in which, and the periods within which, those
11 notifications are to be given.
12 (2) In this section, *dealing* in a financial product has the meaning
13 given by subsection 994A(1).

14 **1023P Enforcement of product intervention orders**

- 15 (1) A person must not engage in conduct contrary to a product
16 intervention order that is in force in relation to the person.
17 Note 1: Failure to comply with this subsection is an offence (see
18 subsection 1311(1)).
19 Note 2: This subsection is also a civil penalty provision (see section 1317E).
20 For relief from liability to a civil penalty relating to this subsection,
21 see section 1317S.
22 (2) A person who is required by a product intervention order to take
23 reasonable steps to notify a retail client must comply with the
24 requirement.
25 Note 1: For this requirement, see subsection 1023N(1).
26 Note 2: Failure to comply with this subsection is an offence (see
27 subsection 1311(1)).
28 Note 3: This subsection is also a civil penalty provision (see section 1317E).
29 For relief from liability to a civil penalty relating to this subsection,
30 see section 1317S.
31 (3) Subsections (1) and (2) do not apply if:
32 (a) the product intervention order is not a legislative instrument;
33 and
-

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

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

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

5 (4) If a product intervention order has been served on a person, the
6 person must take all reasonable steps as soon as practicable to
7 ensure that other persons who engage in conduct to which the order
8 applies are aware of the order.

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

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

14 **1023Q Civil liability**

15 (1) If:

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

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

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

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

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

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

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

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

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

1 **1023R Additional powers of court to make orders**

2 (1) The Court dealing with an action under subsection 1023Q(1) may,
3 in addition to awarding loss or damage under that subsection and if
4 it thinks it necessary in order to do justice between the parties:

- 5 (a) make an order declaring void a contract relating to the
6 financial product that was entered into by the retail client
7 who suffered the loss or damage; and
8 (b) if it makes an order under paragraph (a)—make such other
9 order or orders as it thinks are necessary or desirable because
10 of that order.

11 (2) Without limiting paragraph (1)(b), an order under that paragraph
12 may include either or both of the following:

- 13 (a) an order for the return of money paid by a person;
14 (b) an order for payment of an amount of interest specified in, or
15 calculated in accordance with, the order.

16 **8 Section 1101J**

17 Before “The”, insert “(1)”.

18 **9 At the end of section 1101J**

19 Add:

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

23 **10 After paragraph 1317C(gdl)**

24 Insert:

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

27 **11 Subsection 1317E(1) (before table item 41)**

28 Insert:

40P subsection 1023P(1) engaging in conduct contrary to a
product intervention order

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

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

1 **12 Schedule 3 (after table item 309AF)**

2 Insert:

309AG	Subsections 1023P(1), (2) and (4)	200 penalty units or imprisonment for 5 years, or both.
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3 ***National Consumer Credit Protection Act 2009***

4 **13 After Part 6-7**

5 Insert:

6 **Part 6-7A—Product intervention orders**

7 **Division 1—Introduction**

8 **301A Guide to this Part**

9 This Part aims to reduce the risk that credit contracts, mortgages,
10 guarantees or consumer leases (*credit products*) or proposed credit
11 products result in significant detriment for consumers.

12 Division 2 provides ASIC with powers that it can use proactively
13 to reduce the risk of significant detriment to consumers resulting
14 from credit products.

15 **Division 2—Product intervention orders**

16 **301B Definitions**

17 In this Part:

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

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

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

4 (3) If ASIC is satisfied that:

5 (a) a person is engaging, or is likely to engage, in credit activity
6 in relation to a class of credit products or proposed credit
7 products; and

8 (b) the class of products has resulted in, or will or is likely to
9 result in, significant detriment to consumers;

10 ASIC may, in accordance with this Part and by legislative
11 instrument, order that a person must not engage in specified
12 conduct in relation to the class of products, either entirely or except
13 in accordance with conditions specified in the order.

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

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

19 *Restrictions on product intervention orders*

20 (4) A product intervention order may not specify any of the following
21 for subsection (1) or (3):

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

25 (b) a condition that a person who is not required to hold a
26 Australian credit licence become a member of an external
27 dispute resolution scheme;

28 (c) a condition related to a person's remuneration, other than a
29 condition related to so much of the person's remuneration as
30 is conditional on the achievement of objectives directly
31 related to the credit product.

32 (5) Conduct covered by a product intervention order must be limited to
33 conduct in relation to a consumer.

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

301E Significant detriment to consumers

- 1
- 2 (1) In considering whether a credit product has resulted in, or will or is
- 3 likely to result in, significant detriment to consumers for the
- 4 purposes of this Part, the following must be taken into account:
- 5 (a) the nature and extent of the detriment;
- 6 (b) without limiting paragraph (a), the actual or potential
- 7 financial loss to consumers resulting from the product;
- 8 (c) the impact that the detriment has had, or will or is likely to
- 9 have, on consumers;
- 10 (d) any other matter prescribed by regulations made for the
- 11 purposes of this paragraph.
- 12 (2) Subsection (1) does not limit the matters to be taken into account in
- 13 considering whether a credit product has resulted in, or will or is
- 14 likely to result in, significant detriment to consumers for the
- 15 purposes of this Part.
- 16 (3) A credit product may result in significant detriment to consumers
- 17 even if a person has complied with the disclosure requirements in
- 18 the National Credit Code in relation to the product.

301F ASIC to consult before making product intervention orders

- 19
- 20 (1) ASIC must not make a product intervention order unless ASIC has:
- 21 (a) consulted persons who are reasonably likely to be affected by
- 22 the proposed order; and
- 23 (b) if the proposed order will apply to a body that is regulated by
- 24 APRA—consulted APRA; and
- 25 (c) complied with any other requirements as to consultation
- 26 prescribed by regulations made for the purposes of this
- 27 paragraph.
- 28 (2) Without limiting paragraph (1)(a), ASIC is taken to comply with
- 29 paragraph (1)(a) if ASIC, on its website:
- 30 (a) makes the proposed order, or a description of the content of
- 31 the proposed order, available; and
- 32 (b) invites the public to comment on the proposed order.

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

- 1 (3) A failure to comply with subsection (1) does not invalidate a
2 product intervention order.
- 3 (4) Section 17 of the *Legislation Act 2003* (rule-makers should consult
4 before making legislative instruments) does not apply to the
5 making of a product intervention order.

6 **301G Commencement and duration of product intervention orders**

7 *Commencement of product intervention orders*

- 8 (1) A product intervention order comes into force:
9 (a) for an order that is a legislative instrument—on the day after
10 the instrument is registered under the *Legislation Act 2003*;
11 or
12 (b) otherwise—on the day after the notice under
13 subsection 301L(3) in relation to the order is published;
14 or a later day specified in the order.

15 *Duration of product intervention orders*

- 16 (2) Subject to this Part, a product intervention order remains in force
17 for:
18 (a) 18 months, or any shorter period specified by the regulations;
19 or
20 (b) any shorter period specified in the order.
21 However, if a court makes an order staying or otherwise affecting
22 the operation or enforcement of a product intervention order, then,
23 in determining when the period referred to in paragraph (a) or (b)
24 ends, disregard the period during which the court's order has that
25 effect.
- 26 (3) Subsection (2) does not apply to a product intervention order if a
27 declaration under section 301H (which refers to extensions of
28 product intervention orders) is in force in relation to the order.
- 29 (4) Subsection (2) does not prevent the revocation of a product
30 intervention order.

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

1 *Repeal of product intervention orders*

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

4 **301H Extension of product intervention orders**

5 (1) ASIC may, in accordance with an approval under subsection (3),
6 by legislative instrument, declare that a product intervention order
7 that is in force:

8 (a) remains in force until it is revoked; or

9 (b) remains in force for a specified period, unless it is revoked
10 earlier.

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

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

15 **301J Amendment of product intervention orders**

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

18 *Requirements before amending product intervention orders*

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

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

25 *Amendments of product intervention orders*

26 (4) An amendment of a product intervention order must not be such
27 that the order remains in force for a period longer than the
28 maximum period determined for the order in accordance with

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

1 subsection 301G(2). This subsection does not apply to an order if a
2 declaration under subsection 301H(1) is in force in relation to the
3 order.

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

12 *Amendments of orders that are legislative instruments*

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

15 **301K Revocation of product intervention orders**

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

18 *Requirements for revocation of product intervention orders*

- 19 (2) If a declaration under section 301H is in force in relation to a
20 product intervention order, ASIC must not revoke the order
21 without the Minister's approval, given after considering a report
22 from ASIC on whether the order should be revoked.
23 (3) ASIC may, at any time before the order ceases to be in force, give
24 the Minister a report on whether the order should be revoked.

25 *Revocation of orders that are legislative instruments*

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

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

- 1 (a) sets out why the amendment is appropriate; and
2 (b) describes the consultation that ASIC undertook in relation to
3 the amendment; and
4 (c) if the day the amendment is to take effect is later than the day
5 after the day of publication of the amendment—specifies the
6 day the amendment is to take effect.

7 *Revocation of product intervention orders*

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

10 **301M Re-making product intervention orders**

11 If a product intervention order ceases to be in force or is revoked,
12 ASIC may not remake the order, or make an order in substantially
13 the same terms, unless:

- 14 (a) ASIC is satisfied the circumstances have materially changed
15 since the order was made; or
16 (b) the Minister approves, in writing, the remaking of the order.

17 **301N Product intervention orders may require notification**

18 A product intervention order in relation to a credit product may
19 require:

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

28 **301P Enforcement of product intervention orders**

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

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Schedule 2 Amendments relating to product intervention orders

Part 1 Main amendments

- 1 Civil penalty: 200 penalty units.
- 2 (2) A person must not engage in conduct contrary to a product
3 intervention order.
- 4 Criminal penalty: 200 penalty units, or imprisonment for 5
5 years, or both.
- 6 (3) A person who is required by a product intervention order to take
7 reasonable steps to notify a consumer must comply with the
8 requirement.
- 9 Civil penalty: 200 penalty units.
- 10 Note: For this requirement, see subsection 301N.
- 11 (4) A person who is required by a product intervention order to take
12 reasonable steps to notify a consumer must comply with the
13 requirement.
- 14 Criminal penalty: 200 penalty units, or imprisonment for 5
15 years, or both.
- 16 Note: For this requirement see subsection 301N.
- 17 (5) Subsections (1), (2), (3) and (4) do not apply if:
18 (a) the product intervention order is not a legislative instrument;
19 and
20 (b) the person was not aware, and could not reasonably have
21 been aware, of the order.
- 22 (6) If a product intervention order has been served on a person, the
23 person must take all reasonable steps to ensure that other persons
24 who engage in conduct to which the order applies are aware of the
25 order.
- 26 Civil penalty: 200 penalty units.
- 27 (7) If a product intervention order has been served on a person, the
28 person must take all reasonable steps as soon as practicable to
29 ensure that other persons who engage in conduct to which the order
30 applies are aware of the order.
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Amendments relating to product intervention orders **Schedule 2**
Main amendments **Part 1**

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

3 **14 After subsection 337(1)**

4 Insert:

5 (1A) However, the Minister must not delegate the Minister's powers
6 under section 301H, 301J, 301K or 301M (which deal with product
7 intervention orders) to a person other than ASIC.

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Schedule 2 Amendments relating to product intervention orders

Part 2 Consequential amendments

1 **Part 2—Consequential amendments**

2 *Australian Securities and Investments Commission Act 2001*

3 **15 Subsection 102(2C)**

4 Omit “Part 2,”, insert “Part 2 of this Act or under Part 7.9A of the
5 *Corporations Act 2001* or Part 6-7A of the *National Consumer Credit*
6 *Protection Act 2009*,”.

7 **16 After subsection 102(2C)**

8 Insert:

9 (2D) ASIC must not delegate a function or power under:

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

11 (b) Part 6-7A of the *National Consumer Credit Protection Act*
12 *2009*;

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

14 **17 After paragraph 136(1)(ca)**

15 Insert:

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