Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019

No. 50, 2019

An Act to amend the law relating to corporations and consumer credit protection, and for related purposes

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

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Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019

No. 50, 2019

An Act to amend the law relating to corporations and consumer credit protection, and for related purposes

[*Assented to 5 April 2019*]

The Parliament of Australia enacts:

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1 Short title

This Act is the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

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.	5 April 2019
2. Schedule 1	The day after the end of the period of 2 years beginning on the day this Act receives the Royal Assent.	5 April 2021
3. Schedule 2	The day after this Act receives the Royal Assent.	6 April 2019

Note: This table relates only to the provisions of this Act as originally enacted.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

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

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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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:

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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 made to a regulated person about the product, which is covered by a dispute resolution system complying with subsection 912A(2).

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(3).

excluded conduct means:

(a) an excluded dealing; or

(b) providing personal advice.

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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.

financial product has the meaning given by subsection 994AA(1).

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

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

(a) the seller of the financial product, if a sale takes place in circumstances described in subsection 707(2), (3) or (5) or 1012C(5), (6) or (8); or

(b) a regulated person as defined in section 1011B (modified so that the references to financial products include references to securities); or

(c) 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); or

(c) made in circumstances prescribed by regulations made for the purposes of this paragraph.

reporting period means:

(a) for information about the number of complaints about a financial product—a period specified under paragraph 994B(5)(g), in the target market determination for the product, as a reporting period for that kind of information; or

(b) for other kinds of information that must be reported under subsection 994F(5)—a period specified under subparagraph 994B(5)(h)(ii), in the target market

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determination for the product, as a 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.

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 last day of the maximum period specified in the determination under 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 last day of the maximum period specified in the determination under 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 described in the target market determination for the product under paragraph 994B(5)(b).

target market determination means a determination that:

(a) is made as required by section 994B; and

(b) meets the requirements of subsections 994B(5) and (8).

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(2) Section 1010C applies for the purposes of this Part.

Note: Section 1010C affects references to sale and offer.

994AA Extended operation of this Part in relation to ASIC Act financial products

(1) In this Part, ***financial product*** means each of the following:

(a) a financial product (within the meaning of this Chapter) (see section 761A);

(b) a financial product (within the meaning of Division 2 of Part 2 of the ASIC Act), other than a financial product covered by paragraph (a).

Note: Whether a target market determination is required to be made in relation to financial products covered by this extended definition is determined under section 994B, including any regulations made for the purposes of paragraph 994B(3)(f).

(2) In determining the meaning of a term used in a provision of this Part (other than this section), treat a reference in this Act to a financial product as being a reference to a financial product within the meaning of subsection (1) of this section.

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

(ba) the product is covered by paragraph 994AA(1)(b) (about the extended operation of this Part) and:

(i) the person issues the product to another person as a retail client; or

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(ii) the person sells the product under a regulated sale; or

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

(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 (ba) applies—any person engages in retail product distribution conduct in relation to the product; or

(b) if paragraph (1)(c) applies:

(i) the time or event specified in regulations made for the purposes of that paragraph; 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 issued, or offered for regulated sale, by an exempt body or an exempt public authority; or

(f) 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 share, the company intended that the share be converted into a preference share within 12 months after the date of issue; or

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(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 (within the ordinary meaning of the term) 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 start of the day the determination is made to the start of the day the first review of the determination under section 994C is to finish; and
  (f) specify the maximum period from the start of the day a review of the determination under section 994C is finished to the start of the day the next review of the determination is to finish; and
  (g) specify a reporting period for reporting information about the number of complaints about the product (see subsection 994F(4)); 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:

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(i) the regulated person or regulated persons that, under subsection 994F(5), are required to report the information to the person who made the determination; and

(ii) a reporting period for reporting the information under subsection 994F(5).

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.

Note 2: The requirements of this subsection also apply when a new target market determination is made as a result of a review under section 994C.

(6) A period specified under paragraph (5)(e) or (f), and a reporting period specified under paragraph (5)(g) or 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 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

(b) the likelihood, nature and extent of detriment to retail clients 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 the product were to be issued, or sold in a regulated sale:

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

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(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.

Note 3: This subsection applies to all target market determinations, including those that have ceased to apply.

994C Target market determinations to be reviewed

Reviews of target market determinations

(1) A person who makes 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 makes 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 or after the end of the review period; and
  (c) the person did not complete a review of the determination 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.

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Distribution where target market determinations not appropriate: maker of determination

(3) If:

(a) a person makes 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 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 determination is no longer appropriate;

then, from 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, the person must not engage in retail product distribution conduct in relation to the product unless:

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

(e) 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 the matters in paragraphs (d) and (e) (see subsection 13.3(3) of the *Criminal Code*).

(4) If:

(a) a person makes 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 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 determination is no longer appropriate;

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then, from 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, the person must not engage in retail product distribution conduct in relation to the product unless:

(d) 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

(e) the retail product 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.

(5) If:

(a) a person makes 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 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 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:

(d) the determination has been reviewed since the review trigger, event or circumstance occurred and, if a new target market determination is required, it has been made; or

(e) the retail product distribution conduct is excluded conduct.

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.

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Distribution where target market determinations not appropriate: 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, as soon as practicable, but no later than 10 business days, after the regulated person first became aware that the steps had been taken, cease to 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 in paragraph (5)(c) occurred and, if a new target market determination is required, 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)(c) occurred and, if a new target market determination was required, it had been made; or

(c) the retail product 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*).

(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, as soon as practicable, but no later than 10 business days, after the regulated person first became aware or should have become aware that the steps had been taken, cease to 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 in paragraph (5)(c) occurred and, if a new target market determination is required, it has been made; or

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(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)(c) occurred and, if a new target market determination was required, it had been made; or
(c) the retail product 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 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 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.

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Division 3—Distribution of financial products

994E Reasonable steps to ensure consistency with target market determinations

Persons who make target market determinations

(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 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.

(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.

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

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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)(d) 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 that will, or are reasonably likely to, result in retail product distribution conduct in relation to the financial product being 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.

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(6) A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(d) if the person engages in retail product distribution conduct that:
  (a) relates to a particular retail client; and
  (b) relates to a particular financial product; and
  (c) is necessary to implement personal advice given to the client in relation to the product.

994F Record keeping and notification obligations

Record keeping by 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) all target market determinations for the product;
    (ii) review triggers for those target market determinations;
    (iii) review periods for those target market determinations;
    (iv) the requirements of subsections 994B(5) and (8) for those 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 by other regulated persons

(2) Subsections (3) to (6) apply 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

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

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

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

(b) 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);

(c) 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;

(d) if the regulated person is not the person that made the determination—the dates on which the regulated person reported as required by subsection (4), (5) or (6) 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.

Reporting complaint information to persons who make target market determinations

(4) If the regulated person engages in the retail product distribution conduct during a reporting period specified under paragraph 994B(5)(g) (which relates to complaints), the regulated person must, as soon as practicable, but in any case within 10 business days, after the end of the reporting period, report in writing to the person who made the target market determination:

(a) whether the regulated person received complaints in relation to the product during the reporting period; and

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(b) if the regulated person received such complaints—the number of complaints the regulated person received.

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

(5) If:

(a) under the target market determination for the financial product, the regulated person is required to report information of a specified kind to the person that made the determination (see subparagraph 994B(5)(h)(i)); and

(b) the regulated person engages in the 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, 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:

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

(d) 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.

(6) If the regulated person:

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

(b) becomes aware that the dealing is not consistent with the target market 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.

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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

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

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

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, after becoming so aware.

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.

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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 relation to retail clients in respect of the financial product (except excluded

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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)).

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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

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.

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.

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(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 section 994B, 994C or 994D or subsection 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:

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(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.

994P Orders to redress loss or damage suffered by non-party consumers etc.

Orders

(1) If:

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(a) a person engaged in conduct (the ***contravening conduct***) in contravention of section 994B, 994C or 994D or subsection 994E(1) or (3); and

(b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons (***non-party consumers***) who have not been a party to proceedings under this Act in relation to the contravening conduct;

the Court may, on the application of ASIC, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the Court may make include all or any of the orders set out in section 994Q.

(2) An order under subsection (1) may be made against the person who engaged in the contravening conduct, or a person involved in that conduct.

(3) The Court must not make an order under subsection (1) unless the Court considers that the order will:

(a) redress, in whole or in part, the loss or damage suffered by the non-party consumers in relation to the contravening conduct; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct.

Application for orders

(4) An application may be made under subsection (1) even if a proceeding in relation to the contravening conduct has not been instituted.

(5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

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Determining whether to make an order

(6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), the Court may have regard to the conduct of the person, and of the non-party consumers in relation to the contravening conduct, since the contravention occurred.

(7) In determining whether to make an order under subsection (1), the Court need not make a finding about either of the following matters:

(a) which persons are non-party consumers in relation to the contravening conduct;

(b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party consumer is bound by an order etc.

(8) If:

(a) an order is made under subsection (1) against a person; and

(b) the loss or damage suffered, or likely to be suffered, by a non-party consumer in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and

(c) the non-party consumer has accepted the redress, prevention or reduction;

then:

(d) the non-party consumer is bound by the order; and

(e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party consumer; and

(f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party consumer in relation to that loss or damage.

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994Q Kinds of orders that may be made to redress loss or damage suffered by non-party consumers etc.

Without limiting subsection 994P(1), the orders that the Court may make under that subsection against a person (the ***respondent***) include all or any of the following:

(a) an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract:

(i) to be void; and

(ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:

(i) varying such a contract or arrangement in such manner as is specified in the order; and

(ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;

(d) an order directing the respondent to refund money or return property to a non-party consumer referred to in that subsection;

(e) an order directing the respondent, at the respondent's own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party consumer referred to in that subsection;

(f) an order directing the respondent, at the respondent's own expense, to supply specified services to a non-party consumer referred to in that subsection;

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument; or

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(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

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

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:

40A	subsections 994B(2) and (9)	failure to make and make available target market determinations for financial products
40B	subsection 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

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		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 (3)	failure to keep records
40J	subsections 994F(4), (5) and (6)	failure to report complaints and other information
40K	subsection 994F(8)	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

9 Schedule 3 (after table item 290C)

Insert:

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

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	and (8)	or both.

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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:

Declaring additional things to be financial products for specified provisions of this Chapter

(3) Subject to Subdivision D, a thing declared by regulations to be a financial product for a specified provision of this Chapter is a ***financial product*** for that provision.

5 Before subsection 765A(2)

Insert:

ASIC declarations

6 At the end of section 765A

Add:

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Regulations

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

(4) A declaration under subsection (2) that is inconsistent with 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:

ASIC Act financial product means a financial product within the meaning of Division 2 of Part 2 of the ASIC Act.

financial product includes an ASIC Act financial product but does not include:

(a) a financial product issued, or offered for regulated sale, by an exempt body or an exempt public authority; or

(b) a financial product specified in regulations made for the purposes of this paragraph.

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

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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) Subject to subsection (5), if ASIC is satisfied that a financial product:
  (a) is, or is likely to be, available for acquisition by issue, or for 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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Note 2: Section 1023E specifies 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.

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) Subject to subsection (5), if ASIC is satisfied that a class of financial products:

(a) is, or is likely to be, available for acquisition by issue, or for 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 a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

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 must 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;

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(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

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(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 that paragraph 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) 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.

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(3) Subsection (2) does not apply to a product intervention order if a declaration under section 1023H (which relates 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 (4), 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.

Note: A declaration under this subsection has the effect of overriding any provisions in a product intervention order about the duration of the order: see subsection 1023G(3).

(2) ASIC may make more than one declaration under subsection (1) in relation to a product intervention order that is in force.

Approval of Minister

(3) 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.

(4) 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.

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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 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) or 1023H(1).

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

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(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 order comes into force after it is published—specifies the day it comes into force.

(4) ASIC must publish on its website, with the product intervention order, each declaration under section 1023H (which relates to extensions of product intervention orders) that relates to the order.

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Amendments of product intervention orders

(5) 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.

(6) ASIC must publish on its website, with the product intervention order, each amendment of the product intervention order.

(7) 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

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

1023M Remaking product intervention orders

If a product intervention order ceases to be in force or is revoked, ASIC must 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 or making of the order.

1023N Product intervention orders may require notification

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

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(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) specify requirements in relation to giving those notifications (including requirements as to the periods within which to give those notifications).

(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.

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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:

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(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) any of the following decisions by ASIC:
(i) a decision under subsection 1023D(3) (which relates to making product intervention orders);
(ii) a decision under subsection 1023H(1) (which relates to extensions of product intervention orders);
(iii) a decision under section 1023J (which relates to amendments of product intervention orders) that, under subsection 1023J(6), must be by legislative instrument;
(iv) a decision under section 1023K (which relates to revocation of product intervention orders) that, under subsection 1023K(4), must be by legislative instrument; or

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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.

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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) Subject to subsection (5), 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

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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 a credit product has resulted in, or will or is likely to result in, significant detriment to consumers.

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) Subject to subsection (5), 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 and consumers, 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 a credit product has resulted in, or will or is likely to result in, significant detriment to consumers.

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 must 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

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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 that paragraph if ASIC, on its website:

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(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) 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 relates 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.

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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 (4), 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.

Note: A declaration under this subsection has the effect of overriding any provisions in a product intervention order about the duration of the order: see subsection 301G(3).

(2) ASIC may make more than one declaration under subsection (1) in relation to a product intervention order that is in force.

Approval of Minister

(3) 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.

(4) 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.

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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) or 301H(1).

(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.

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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 order comes into force after it is published—specifies the day it comes into force.

(4) ASIC must publish on its website, with the product intervention order, each declaration under section 301H (which relates to extensions of product intervention orders) that relates to the order.

Amendments of product intervention orders

(5) 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.

(6) ASIC must publish on its website, with the product intervention order, each amendment of the product intervention order.

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(7) 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

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

301M Remaking product intervention orders

If a product intervention order ceases to be in force or is revoked, ASIC must 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 or making of the order.

301N Product intervention orders may require notification

A product intervention order in relation to a credit product may:
  (a) require 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 subparagraph; and
  (b) specify requirements in relation to giving those notifications (including requirements as to the periods within which to give those notifications).

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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.

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 section 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 section 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

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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 subparagraph 327(1)(d)(ii)

Insert:

(iii) to make an order under subsection 301D(1) (which deals with product intervention orders); or

(iv) to amend a product intervention order under section 301J unless, under subsection 301J(6), the amendment must be by legislative instrument; or

(v) to revoke a product intervention order under section 301K unless, under subsection 301K(4), the revocation must be by legislative instrument; or

15 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.

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Part 2—Consequential amendments

Australian Securities and Investments Commission Act 2001

16 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*,".

17 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.

18 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*;

[*Minister's second reading speech made in—*
House of Representatives on 20 September 2018
Senate on 3 April 2019]

(193/18)

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