

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for Consultation) Bill 2023: Anti-
avoidance rule for product intervention
orders**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details

1. Schedule 1	The day after this Act receives the Royal Assent.	
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Schedule 1—Avoidance of certain product intervention orders

Corporations Act 2001

1 At the end of Part 7.9A

Add:

1023S Avoidance schemes—prohibition

General prohibition

(1) A person must not, either alone or with others, engage in any of the following conduct:

- (a) enter into a scheme;
- (b) begin to carry out a scheme;
- (c) carry out a scheme;

if, having regard to any matters as required under subsection (8), it would be reasonable to conclude that the purpose, or one of the purposes, of the person engaging in that conduct was to avoid the application of a credit product intervention order.

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.

Constitutional corporations

(2) A constitutional corporation must not, either alone or with others, engage in any of the following conduct:

- (a) enter into a scheme;
- (b) begin to carry out a scheme;
- (c) carry out a scheme;

if, having regard to any matters as required under subsection (8), it would be reasonable to conclude that the purpose, or one of the purposes, of the constitutional corporation engaging in that conduct was to avoid the application of a credit product intervention order.

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.

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Constitutional trade and commerce

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2 (3) A person must not in the course of constitutional trade and
3 commerce, either alone or with others, engage in any of the
4 following conduct:

- 5 (a) enter into a scheme;
6 (b) begin to carry out a scheme;
7 (c) carry out a scheme;

8 if, having regard to any matters as required under subsection (8), it
9 would be reasonable to conclude that the purpose, or one of the
10 purposes, of the person engaging in that conduct was to avoid the
11 application of a credit product intervention order.

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

Use of communications service

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16 (4) A person must not use postal, telegraphic, telephonic or other like
17 services (within the meaning of paragraph 51(v) of the
18 Constitution), either alone or with others, in order to engage in any
19 of the following conduct:

- 20 (a) enter into a scheme;
21 (b) begin to carry out a scheme;
22 (c) carry out a scheme;

23 if, having regard to any matters as required under subsection (8), it
24 would be reasonable to conclude that the purpose, or one of the
25 purposes, of the person engaging in that conduct was to avoid the
26 application of a credit product intervention order.

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

Prohibitions independent of each other

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31 (5) To avoid doubt, subsections (1), (2), (3) and (4) are independent
32 from and do not limit each other.

33 (6) If conduct constitutes a contravention of 2 or more subsections of
34 this section, proceedings may be started against a person in relation
35 to the contravention of any one or more of those subsections.

36 (7) However, the person is not liable to more than one pecuniary
37 penalty in relation to the same conduct.

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Matters to which regard must be had

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- 2 (8) In determining, for the purposes of subsection (1), (2), (3) or (4),
3 whether it would be reasonable to conclude that a purpose of a
4 person entering into or carrying out (to any extent) a scheme was to
5 avoid the application of a credit product intervention order, regard
6 must be had to any matters prescribed by the regulations.
- 7 (9) Subsection (8) does not limit the matters to which regard may be
8 had in making a determination described in that subsection.

9 *Offence*

- 10 (10) A person commits an offence if:
11 (a) the person is subject to a requirement under subsection (1),
12 (2), (3) or (4); and
13 (b) the person engages in conduct; and
14 (c) the conduct contravenes the requirement.

15 *Definitions*

- 16 (11) In this section:

17 ***constitutional corporation*** means a corporation to which
18 paragraph 51(xx) of the Constitution applies.

19 ***constitutional trade and commerce*** means trade and commerce:

- 20 (a) between Australia and places outside Australia; or
21 (b) between the States; or
22 (c) between a State and a Territory; or
23 (d) between 2 Territories; or
24 (e) within a Territory.

25 ***credit product intervention order*** means a product intervention
26 order made in relation to a financial product of the kind covered by
27 paragraph 12BAA(7)(k) of the *Australian Securities and*
28 *Investments Commission Act 2001* (which is about credit facilities).

29 ***scheme*** means:

- 30 (a) any agreement, arrangement, understanding, promise or
31 undertaking, whether express or implied; or
32 (b) any scheme, plan, proposal, action, course of action or course
33 of conduct, whether unilateral or otherwise; or

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(c) any combination of 2 or more things that are schemes because of paragraph (a) or (b).

1023T Avoidance schemes—presumption of avoidance for certain schemes in civil cases

- (1) For the purposes of subsection 1023S(1), (2), (3) or (4), it is reasonable to conclude, unless the contrary is proved, that a person entered into or carried out a scheme for the purpose of avoiding a credit product intervention order (within the meaning of subsection 1023S(11)) if:
- (a) the scheme is of a kind prescribed by the regulations; or
 - (b) the scheme is of a kind determined by ASIC under subsection (3).
- (2) In proving the contrary for the purposes of subsection (1), regard must be had to any matters as required under subsection 1023S(8).
- (3) ASIC may, by legislative instrument, determine a scheme, or a class of schemes, for the purposes of paragraph (1)(b) of this section.
- (4) This section does not have effect for the purposes of determining whether a person has committed an offence against subsection 1023S(10).

1023U Avoidance schemes—exemption by ASIC

- (1) ASIC may, by legislative instrument, exempt a scheme, or class of schemes, from all or specified provisions of section 1023S.
- (2) The exemption may apply subject to any specific conditions imposed by ASIC.

2 In the appropriate position in the table in subsection 1317E(3)

Insert:

subsection 1023S(1), (2), (3) or (4)	schemes for avoiding certain product intervention orders	uncategorised
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1 **3 In the appropriate position in Chapter 10**

2 Insert:

3 **Part 10.71—Application provisions relating to the**
4 **Treasury Laws Amendment (Measures for**
5 **Consultation) Act 2023**
6

7 **1701 Schemes for avoiding certain product intervention orders**

8 Section 1023S, as inserted by Schedule 1 to the *Treasury Laws*
9 *Amendment (Measures for Consultation) Act 2023* applies in
10 relation to conduct that is engaged in on or after the
11 commencement of that section, whether the credit product
12 intervention order was made before, on or after that
13 commencement.

14 **4 In the appropriate position in Schedule 3**

15 Insert:

Subsection 1023S(10) 100 penalty units

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