
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2023: ANTI-AVOIDANCE RULE FOR PRODUCT INTERVENTION ORDERS

EXPOSURE DRAFT EXPLANATORY MATERIALS

DRAFT

Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act</i>
Corporations Act	<i>Corporations Act 2001</i>
Credit Act	<i>National Consumer Credit Protection Act 2009</i>

Chapter 1: Avoidance of certain product intervention orders

Outline of chapter

- 1.1 Schedule 1 to the Bill introduces new rules that prohibit schemes designed to avoid the application of a product intervention order (in relation to a credit facility) made under Part 7.9A of the Corporations Act.

Context of amendments

- 1.2 The *Financial Sector Reform Act 2022* contained a number of anti-avoidance measures to encourage compliance with the Credit Act. Those measures are designed to minimise financial and other harm to consumers and disincentivise businesses from undertaking avoidance practices.
- 1.3 As a supplement to the *Financial Sector Reform Act 2022*, the Bill introduces equivalent provisions regarding the prohibition to avoid relevant product intervention orders in the Corporations Act.

Comparison of key features of new law and current law

Table 1.1 Comparison of new law and current law

New law	Current law
A person must not enter into, begin to carry out, or carry out a scheme to avoid the application of a credit product intervention order.	No equivalent.

Detailed explanation of new law

- 1.4 Schedule 1 to the Bill introduces new rules that prohibit schemes designed to avoid the application of a product intervention order (in relation to a credit facility) made under Part 7.9A of the Corporations Act.

1.5 The amendments ensure that:

- where there is a product intervention order made in relation to a financial product that is a credit facility;
- a person (alone or with others) must not engage in activity in the avoidance of that product intervention order.

This is intended to ensure that a person cannot respond to a product intervention order by engaging in activity that is not covered by the order but results in similar detriment to consumers. As with general integrity provisions, the intended effect of the product intervention order is a relevant consideration in the operation of these amendments.

1.6 The general prohibition provides that a person (alone or with others) must not enter into a scheme, begin to carry out a scheme, or carry out a scheme if, having regard to any matters prescribed by the regulations, 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.

[Schedule 1, item 1, subsection 1023S(1)]

1.7 A credit product intervention order means a product intervention order made in relation to a financial product that is a credit facility (covered by paragraph 12BAA(7)(k) of the ASIC Act).

[Schedule 1, item 1, subsection 1023S(11)]

1.8 Under the amendments, the provisions require there to be an assessment of whether it is reasonable to conclude that the purpose of the scheme was to avoid the application of a credit product intervention order. The reference to whether it would be 'reasonable' to make such a conclusion ensures that the prohibition applies objectively. This is because having to prove the subjective intention of the person in question would otherwise not be feasible or would allow a person to artificially document the purpose of a scheme as being other than to avoid the application of a credit product intervention order. Using objective criteria of reasonableness ensures the integrity of the Corporations Act and ensures that the effectiveness of the anti-avoidance provisions is not undermined.

1.9 In addition to the objective criteria required under the amendments, regard must be had to any matters prescribed in the regulations if they are made. The regulation-making power recognises that industry participants may develop new avoidance practices which may require the law to specify additional matters that must be considered in determining whether the avoidance purpose exists. This flexibility is therefore necessary to ensure the prohibition remains fit for purpose as entities prepared to engage in avoidance purposes will respond to legislative changes by changing their practices accordingly.

[Schedule 1, item 1, subsection 1023S(8)]

1.10 The regulation-making power therefore gives additional flexibility to respond to evolving avoidance practices.

1.11 The legislation also makes clear that matters other than the matters provided for in the regulations may be considered in determining whether the scheme was to avoid the application of a credit product intervention order.

[Schedule 1, item 1, subsection 1023S(9)]

1.12 Under the framework, a scheme is defined broadly to capture:

- any agreement, arrangement, understanding, promise or undertaking whether express or implied; or
- any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise; or
- any combination of the above.

[Schedule 1, item 1, subsection 1023S(11)]

1.13 This definition mirrors the definition of scheme in other anti-avoidance provisions in the *A New Tax System (Goods and Services Tax) Act 1999* and the *Income Tax Assessment Act 1997*.

1.14 The nature of avoidance schemes means that a number of different people or entities can be involved, undertaking different activities that can change over time or altering the legal structure of the contracts they offer in response to legislative changes.

1.15 As with most general anti-avoidance legislation, the relevant inquiry is the substance and effect of the activity in avoiding the relevant product intervention order. In these situations, while the legislation applies broadly to ensure the effectiveness of a relevant product intervention order, it has limitations in that persons can adapt to change their practices to engage in conduct that is not prohibited by the product intervention order and does not result in the same or similar detriment to consumers. The intended policy outcome of the amendments is to ensure the effective operation of product intervention orders issued under the Corporations Act and prohibit persons engaging in schemes that circumvent the application of those orders in a contrived or artificial manner that results in, or is likely to result in, a similar outcome to the conduct that ASIC addressed in the product intervention order.

1.16 In addition to the general prohibition on persons, the amendments ensure that the prohibition also applies to:

- any constitutional corporations (either alone or with others) that enter into a scheme, begin to carry out a scheme or carry out a scheme;
- any person (either alone or with others) who enters into a scheme, begins to carry out a scheme or carries out a scheme in the course of constitutional trade or commerce; and
- any person (either alone or with others) using postal, telegraphic, telephonic or other like services (within the meaning of paragraph 51(v) of the Constitution) who

enters into a scheme, begins to carry out a scheme, or carries out a scheme.

[Schedule 1, item 1, subsections 1023S(2), (3), (4) and (11)]

- 1.17 These prohibitions are independent from and do not limit each other. However, the amendments ensure that, while the same conduct may engage more than one of these prohibitions, a person can only be ordered to pay a pecuniary penalty under one of the prohibitions.

[Schedule 1, item 1, subsections 1023S(5), (6) and (7)]

Consequences of failing to comply with the prohibition

- 1.18 Failure to comply with any of the new prohibitions attracts a civil penalty in accordance with the Corporations Act. The maximum pecuniary penalties applicable to the contravention of a civil penalty provision by an individual or a body corporate are set out in subsections 1317G(3) and (4) of the Corporations Act.
- 1.19 The amendments update the table in subsection 1317E(3) of the Corporations Act where a comprehensive list of civil penalty provisions are included. The penalties relating to the avoidance of product intervention orders under the amendments are uncategorised.

[Schedule 1, items 1 and 2, subsections 1023S(1), (2), (3) and (4) and subsection 1317E(3)]

- 1.20 For an individual, the maximum pecuniary penalty is the greater of:
- 5,000 penalty units; and
 - if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3.
- 1.21 For a body corporate, the maximum pecuniary penalty is the greatest of:
- 50,000 penalty units;
 - if the Court can determine the benefit derived and detriment avoided because of the contravention – that amount multiplied by 3; and
 - Either
 - 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
 - if the amount worked out above is greater than an amount equal to 2.5 million penalty units – 2.5 million penalty units.

- 1.22 Civil penalties are designed to deter prohibited activities and are part of the standard suite of enforcement tools. Strong penalties are warranted given the harm of the avoidance conduct on the community, and to ensure that incurring a civil penalty is not considered a mere cost of doing business.
- 1.23 A contravention of any of the prohibitions also constitutes the commission of an offence, with a financial penalty of up to 100 penalty units if fault is proven in respect of the offence for an individual, and 1,000 penalty units for a body corporate.
- [Schedule 1, item 1, subsection 1023S(10)]***
- 1.24 The amendments also update the penalties table in Schedule 3 to the Corporations Act.
- [Schedule 1, item 4]***
- 1.25 These penalties reflect the serious financial impact that avoidance schemes have on consumers and regulated industry participants, and the need for a strong deterrent. It also supports the effectiveness of ASIC's enforcement action in respect of these schemes.

Presumption of avoidance for certain schemes

- 1.26 It is presumed, for proceedings other than criminal proceedings, that it is reasonable to conclude that a person entered into or carried out a scheme to avoid the application of a credit product intervention order if the scheme is a scheme prescribed by the regulations or determined by ASIC in a legislative instrument.
- [Schedule 1, item 1, subsections 1023T(1) and (3)]***
- 1.27 However, the presumption does not apply if the person proves that it would not be reasonable to conclude that the purpose was to avoid a credit product intervention order, having regard to any matters prescribed by the regulations.
- [Schedule 1, item 1, subsection 1023T(2)]***
- 1.28 Placing the legal burden of proof on the person is appropriate as it will be peculiarly within the knowledge of the person to establish that it would not be reasonable to conclude that there was an avoidance purpose, compared with requiring ASIC to disprove that matter. For example, if the scheme in question does have a legitimate (non-avoidance) purpose, that matter would be peculiarly within the knowledge of the person.
- 1.29 Further, the presumption applies only in civil cases (not in criminal proceedings), and any regulations or legislative instrument made to prescribe or determine schemes that are presumed to have the avoidance purpose will be subject to parliamentary scrutiny and disallowance.
- [Schedule 1, item 1, subsections 1023T(3) and (4)]***
- 1.30 Merely reversing the evidential burden of proof is insufficient as doing so will likely still result in ASIC being required to establish that it would not be

reasonable to conclude that there was an avoidance purpose. This is inappropriate as it will be considerably easier for the person, as opposed to ASIC, to establish that it would not be reasonable to conclude that there was an avoidance purpose. It also jeopardises the ability of the law to achieve its purpose of prohibiting avoidance schemes.

- 1.31 The conferral of a regulation-making power and a power for ASIC to make a legislative instrument in this context also reflects historical experience that avoidance schemes tend to proliferate quickly if they are seen by other industry participants to be effective. This flexibility therefore ensures that either the Government or ASIC can respond quickly to evolving practices as needed.

Exemption by ASIC

- 1.32 ASIC also has the power to, by legislative instrument, exempt a scheme or class of schemes from all or specified parts of the prohibitions set out in section 1023S. ASIC may impose any conditions on such an exemption. *[Schedule 1, item 1, section 1023U]*
- 1.33 This instrument making power ensures that ASIC is able to promptly provide clarity and certainty to industry and consumers where the scheme:
- does not cause harm to consumers or regulated industry participants; and
 - has a legitimate (non-avoidance) purpose.
- 1.34 The use of delegated legislation is critical to ensure that the legislative framework can respond promptly to changing circumstances. This power to exempt from the general anti-avoidance provisions is proportionate and necessary as it allows ASIC to ensure that the prohibition does not apply to schemes that should not be captured, and do not cause harm.
- 1.35 It is appropriate that ASIC has this instrument making power because, as the administrator of corporations legislation, ASIC has relevant industry information and understanding to effectively apply this exemption in accordance with the policy intention. Additionally, any instrument that ASIC makes would be subject to Parliamentary scrutiny and disallowance.

Commencement, application, and transitional provisions

- 1.36 The amendments commence on the day after Royal Assent.
- 1.37 These amendments apply to conduct engaged in on or after that day, whether the credit product intervention order was made before, on or after commencement.

[Schedule 1, item 3, section 1701]