

## EXPLANATORY STATEMENT

**Issued by authority of the Assistant Treasurer, the Hon Stuart  
Robert MP**

*Corporations Act 2001*

*Corporations Amendment (Design and Distribution Obligations and Product  
Intervention Powers) Regulations 2018*

Section 1364 of the *Corporations Act 2001* (the Corporations Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Corporations Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Corporations Act.

These Regulations complement the operation of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*<sup>1</sup> ('the Act'). The Act amends the Corporations Act to introduce design and distribution obligations (the DDO) in relation to financial products. The Act also amends the Corporations Act and the *National Consumer Credit Protection Act 2009* ('Credit Act') to introduce a product intervention power for ASIC to prevent or respond to significant consumer detriment.

The purpose of these Regulations is to enhance the DDO and product intervention regimes by altering the products and persons in relation to which the DDO regime applies and the products that may be subject to a product intervention order by ASIC.

These Regulations exclude the following products from the DDO regime:

- interests in eligible rollover funds (ERFs);
- defined benefit interests;
- medical indemnity insurance products; and
- depository interests in foreign fully paid ordinary shares, being shares in relation to which, if they were offered directly to retail clients, the DDO obligations in the Act would not apply.

The Regulations extend the DDO regime so that it applies in relation to the following products:

- simple corporate bonds depository interests in simple corporate bonds, where the simple corporate bonds are, or are to be, issued under a 2 part simple corporate bonds prospectus;

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<sup>1</sup> The Bill that would become this Act upon Royal assent is currently before Parliament. As these regulations would not be made until that Bill has received Royal assent, this draft explanatory statement refers to the Bill and its provisions as if they had been enacted for explanatory purposes.

- debentures of a body that is an Australian ADI or registered under section 21 of the *Life Insurance Act 1995*;
- basic banking products;
- custodial arrangements that are not already subject to the new regime, including an interest in an investor directed portfolio service (IDPS); and
- products sold in situations where the DDO could be avoided.

The Regulations extend the DDO to additional persons in situations where the DDO could be avoided by those persons. The regulations also extend the DDO to certain distributors of financial products that are subject to the DDO. Both of these measures ensure that the DDO operates as intended.

The Regulations also extend the product intervention regime contained in Part 7.9A of the Corporations Act so that product intervention orders can be made in relation to:

- funeral expenses policies;
- certain extended warranties that are functionally equivalent to add-on insurance; and
- short-term credit that is not regulated under the Credit Act.

The Regulations that relate to the DDO commence on the later of the day after registration of these Regulations or the commencement of the DDO amendments in the Act (which is two years after the Act receives Royal Assent). The regulations that extend the PIP commence on the day after registration of these Regulations.

The Corporations Act does not specify any conditions that need to be met before the power to make regulations may be exercised.

Details of the Regulations are set out in the Attachment.

## **ATTACHMENT**

### **Details of the Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018**

#### **Section 1 – Name of the Regulations**

This section provides that the name of the Regulations is the *Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018* ('the Regulations').

All references in this Attachment relate to the Regulations unless stated otherwise.

#### **Section 2 – Commencement**

Schedule 1 to the Regulations, which relates to the DDO regime, commences on the later of the day after the Regulations are registered, or the day on which Schedule 1

to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018* ('the Act') commences. Schedule 1 to the Act commences the day after the end of the period of 2 years beginning on the day the Act receives the Royal Assent.

Schedule 2 to the Regulations, which contains the product intervention regime, commences on the day after the Regulations are registered.

### Section 3 – Authority

The Regulations are made under the Corporations Act.

### Section 4 – Schedules

#### Schedule 1 – Amendments in relation to the design and distribution obligations

##### **Item 1**

Item 1 makes amendments to the *Corporations Regulations 2001* (the Corporations Regulations) that are related to the design and distribution obligations (DDO) regime in Part 7.8A of the Corporations Act. The amendments:

- extend the DDO to additional persons;
- extend the DDO to additional products; and
- exclude certain products from the DDO.

##### **Item 1, Regulation 7.8A.01 – Additional persons subject to the DDO**

The Regulations extend the DDO regime by declaring that certain additional persons are regulated persons for the purposes of paragraph (c) of the definition of regulated person in subsection 994A(1) of the Corporations Act.<sup>2</sup>

##### *Sales Amounting to Indirect Issue and Sales Amounting to Off-Market Sales by Controller*

For the avoidance of doubt, the Regulations make two changes to ensure the DDO regime applies as intended to secondary sales. First, the Regulations declare that the obligation to make a target market determination applies in relation to financial products sold in circumstances that are intended to be subject to the DDO. That declaration is described further below in the explanatory material for Item 1, Regulation 7.8A.02 of the Regulations. Second, the Regulations prescribe the two following additional categories of regulated person to ensure that persons involved in such sales are subject to the distribution obligations under the DDO regime:

- the offeror of the financial product, if the sale would have taken place in the circumstances described in subsection 1012C(6) of the Corporations Act but for a voluntary issue of a Product Disclosure Statement or something purporting to be a Product Disclosure Statement; (Schedule 1, item 1, subregulation 7.8A.01(2))

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<sup>2</sup> As will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

- the offeror of the financial product, if the sale would have taken place in the circumstances described in subsection 1012C(8) of the Corporations Act but for a voluntary issue of a Product Disclosure Statement or something purporting to be a Product Disclosure Statement. (Schedule 1, item 1, subregulation 7.8A.01(3))

### *Product Distributors*

The Regulations declare authorised distributors of basic bank deposit products and risk insurance products (which comprise general insurance and bundled consumer credit insurance<sup>3</sup> products) to be regulated persons for the purposes of the DDO regime. This means that the distribution obligations in the DDO regime will extend to these distributors. (Schedule 1, item 1, subregulation 7.8A.01(4))

The term ‘product distributor’ is used in the Regulations to describe the distributors affected by this extension of the DDO regime. ‘Product distributor’ is defined in section 910A of the Act as modified by the *ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682*. That instrument provides relief to these distributors, so that they do not need to comply with the administrative requirements of the authorised representative regime.

Because of this relief the distribution obligations in the DDO regime would not apply to these distributors in the absence of the Regulations. In particular, the distribution obligations apply to ‘regulated persons’ which is defined to include ‘authorised representatives’.<sup>4</sup> However, as noted above ‘product distributors’ are not ‘authorised representatives’ due to the relief provided by the specified ASIC instrument. As such, the amendments made by the Regulations are necessary to ensure that these distributors are subject to the distribution obligations with the DDO regime.

The extension of the distribution obligations within the DDO regime to these distributors is desirable because the products they distribute are subject to the regime. The distribution obligations within the DDO regime should apply to all distributors of products to which it applies to ensure it operates as intended and consistently as between distributors.

### **Item 1, Regulation 7.8A.02 - Additional products subject to the DDO**

The Regulations apply the DDO regime in Part 7.8A of the Corporations Act to the following additional products:

- simple corporate bonds depository interests in simple corporate bonds, where the simple corporate bonds are, or are to be, issued under a two-part simple corporate bonds prospectus (‘depository interests in simple corporate bonds’);

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<sup>3</sup> A bundled consumer credit insurance product is defined in that instrument as a facility that is a consumer credit insurance product, as defined by regulation 7.1.15 and constitutes both a general life insurance product and a life risk insurance product. This is consistent with the definition of such products used in ASIC orders.

<sup>4</sup> See paragraph (d) of the definition regulated person in section 1011B of the Corporations Act, and paragraph (b) of the definition of regulated person in subsection 994A of the Corporations Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

- debentures of a body that is an Australian ADI or registered under section 21 of the *Life Insurance Act 1995*;
- basic banking products (as defined in the Act);
- custodial arrangements that are not already subject to the new regime;
- investor directed portfolio services (IDPSs); and
- sales of financial products in situations that amount to indirect issue and off-market sales.

*A simple corporate bonds depository interest, where the simple corporate bonds are to be issued under a 2-part simple corporate bonds prospectus*

The Regulations apply the DDO regime in Part 7.8A of the Corporations Act to simple corporate bonds depository interests, which are defined in section 9 of the Corporations Act. In particular, the Regulations extend the obligation to make a target market determination under Part 7.8A of the Corporations Act to simple corporate bonds depository interests. The issuer of the depository interest must make the target market determination before any person engages in ‘retail product distribution conduct’.<sup>5</sup> (Schedule 1, item 1, item 1 in the table in subregulation 7.8A.02(2))

Simple corporate bonds are bonds that meet the legislative criteria set out in section 713A of the Corporations Act. A depository interest in a simple corporate bond is a beneficial interest in the bond that is issued by the acquirer of the bond (a ‘depository nominee’) to a retail client, with the permission of the issuer.

Without the amendments made by the Regulations, depository interests in simple corporate bonds would not be subject to the DDO regime. In relation to securities, the DDO regime generally applies to offers of products that require disclosure under Part 6D.2 of the Corporations Act.<sup>6</sup> However, simple corporate bonds depository interests where the simple corporate bonds were issued under a 2-part simple corporate bonds prospectus are excluded from this disclosure regime by paragraph 700(1)(b) of the Corporations Act.

*Debentures of a body that is an Australian ADI or registered under section 21 of the Life Insurance Act 1995*

The Regulations extend the target market determination obligation to debentures of a body that is an Australian ADI or a body that is registered under section 21 of the *Life Insurance Act 1995*. The issuer of the debenture must make the target market

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<sup>5</sup> Paragraph 994B(2)(b)(ii) of the Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

<sup>6</sup> Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, items 5, section 994B of the Corporations Act.

determination before any person engages in ‘retail product distribution conduct’.<sup>7</sup> (Schedule 1, item 1, item 2 in the table in subregulation 7.8A.02(2))

What constitutes a debenture and an Australian ADI is defined in section 9 of the Corporations Act.

Issuer has a meaning affected by section 761E of the Corporations Act (see section 761A of the Corporations Act).

Without the amendments made by the Regulations, offers of debentures of a body that is an Australian ADI or registered under section 21 of the *Life Insurance Act 1995* would not be subject to the DDO regime. In relation to securities, the DDO regime generally applies to offers of products that require disclosure under Part 6D.2 of the Corporations Act.<sup>8</sup> Offers of these debentures are exempt from needing such disclosure by section 708(19) of the Corporations Act.

### *Basic Banking Products*

The Regulations extend the obligation to make a target market determination to a basic banking product as defined under section 961F of the Corporations Act. The issuer of the product must make the target market determination before any person engages in ‘retail product distribution conduct’.<sup>9</sup> (Schedule 1, item 1, item 3 in the table in subregulation 7.8A.02(2))

A basic banking product includes a basic deposit product (which is defined in section 761A of the Corporations Act), a facility for making non-cash payments, a facility for providing traveller’s cheques and any other product prescribed by the regulations.

Without the amendments made by the Regulations, basic banking products would not be subject to the DDO regime. In relation to financial products which are not securities, the DDO regime generally applies in relation to products that require disclosure under Part 7.9 of the Corporations Act.<sup>10</sup> Under regulation 7.9.07FA of the Corporations Regulations, such disclosure is not required for basic banking products when specified conditions are met.

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<sup>7</sup> Paragraph 994B(2)(b)(ii) of the Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

<sup>8</sup> Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, items 5, section 994B of the Corporations Act.

<sup>9</sup> Paragraph 994B(2)(b)(ii) of the Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

<sup>10</sup> Section 994B of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*.

### *Investor Directed Portfolio Services*

The Regulations extend the obligation to make a target market determination to the financial product that consists of the rights of a client in connection with an investor-directed portfolio service ('IDPS'). The operator of the IDPS must make the target market determination before any person engages in 'retail product distribution conduct'.<sup>11</sup> (Schedule 1, item 1, item 4 in the table to subregulation 7.8A.02(2))

An IDPS is an unregistered managed investment scheme for holding and dealing with investments selected by investors. In broad terms, it provides custodial, transactional and reporting services where the investor makes all of the investment decisions.

Without the amendments made by the Regulations, IDPSs would not generally be subject to DDO regime. In relation to financial products which are not securities, the DDO regime generally applies in relation to products that require disclosure under Part 7.9 of the Corporations Act.<sup>12</sup> Under ASIC Class Order CO 13/763, such disclosure is not required in relation to IDPSs when certain conditions are met by IDPS operators.<sup>13</sup>

The Regulations identify an IDPS and its operator by reference to the meanings of those terms as set out in ASIC Class Order CO 13/763, as in force from time to time.<sup>14</sup> This ensures that the obligation to make a target market determination only extends to IDPSs and operators that are covered by the relief from disclosure given by the order.

### *Custodial or Depository Services*

The Regulations extend the obligation to make a target market determination to a financial product that includes a custodial or depository service. The issuer of the product must make the target market determination before any person engages in 'retail product distribution conduct'.<sup>15</sup> (Schedule 1, item 1, item 5 in the table to subregulation 7.8A.02(2))

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<sup>11</sup> Paragraph 994B(2)(b)(ii) of the Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

<sup>12</sup> Section 994B of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*.

<sup>13</sup> IDPSs that do require disclosure are already subject to DDO and not captured by the regulation (an IDPS may require disclosure because it does not satisfy the terms of the ASIC relief).

<sup>14</sup> The definitions of IDPS and IDPS operator are in subsection 912AD(42) of the Corporations Act as modified by that order.

<sup>15</sup> Paragraph 994B(2)(b)(ii) of the Act, as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*, provides that, if there is no time or event specified for a particular financial product that regulations declare a target market determination must be made for, the target market determination must be made before any person engages in retail product distribution conduct (as defined in subsection 994A(1) of the Act) in relation to the product. The regulation does not specify a time or event.

A custodial or depository service is an arrangement where a provider holds financial products or interests on trust or on behalf of a client or the client's nominee. A financial product that includes such a service is anything that meets the definition of a financial product in Division 3 of Part 7.1 of Chapter 7 of the Corporations Act and also includes the provision of those services.

An example of such a product is an arrangement where a provider manages a client's portfolio of assets on behalf of a client on an individual basis at the provider's discretion. The arrangement would be a financial product by falling within the definition of a financial investment in section 763B of the Corporations Act by virtue of the provider using the arrangement to generate a return for the investor; and would include the provision of a custodial or depository services through terms of the arrangement which allow the provider to hold the assets on the client's behalf.

The amendments made by the Regulations only extend the DDO regime to financial products that include a custodial or depository service where those products would not otherwise be subject to DDO regime. Such a product would generally not be subject to the DDO regime if it does not require disclosure under Part 7.9 of the Corporations Act, for example, because of ASIC relief from the relevant disclosure obligations.

*Financial Products Offered by way of Sale Amounting to Indirect Issue and Off-Market Sale by Controller*

The Regulations extend the obligation to make a target market determination to ensure that it applies to a financial product that is offered in situations that amount to an indirect issue or off-market sale by a controller as described in Regulation 7.8A.01 above. The issuer of the product must make the target market determination before: the seller acquires the product in the case of an indirect issue; and before the product is offered to the retail client in the case of an off-market sale by controller. (Schedule 1, item 1, items 6 and 7 in the table to subregulation 7.8A.02(2))

**Item 1, Regulation 7.8A.03 - Products excluded from the DDO**

The Regulations exclude the following financial products from the requirement to make a target market determination under Part 7.8A of the Corporations Act.

*Eligible Rollover Funds*

The Regulations exempt interests in eligible rollover funds (ERFs), as defined in the *Superannuation Industry (Supervision) Act 1993*, from the requirement to make a target market determination under the DDO regime in Part 7.8A of the Corporations Act.<sup>16</sup> (Schedule 1, item 1, paragraph 7.8A.03(a))

Superannuation funds are required by law to nominate an ERF to hold the balances of their lost or ineligible members. ERFs are intended to be a temporary repository for transferred super benefits, with the expectation that members will find their lost

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<sup>16</sup> See subsections 994B(1) and (2) of the Corporations Act to be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

superannuation and transfer their balances to their main super account. ERFs are regulated and tend to rely on passive investment strategies with no fees.

Given that ERFs are required by law and operate in circumstances such as where contact has been lost with the account holder (e.g. inactive accounts), it would not be appropriate or practicable to apply the DDO regime in relation to ERFs.

### *Defined Benefit Interests*

The Regulations exempt defined benefit interests, as defined in the *Superannuation Industry (Supervision) Regulations 1994*, from the requirement to provide a target market determination under the DDO regime in part 7.8A of the Corporations Act.<sup>17</sup> This exemption applies in relation to superannuation interests that are defined benefit in nature only. Where a superannuation fund issues both defined benefit interests and other interests, the exemption only applies with respect to the defined benefit interests. (Schedule 1, item 1, paragraph 7.8A.03(b))

A defined benefit interest is defined in regulation 1.03AA of the *Superannuation Industry (Supervision) Regulations 1994* as: a superannuation interest where benefits are payable by reference to salary, specified amounts or specified factors; or an unfunded public sector superannuation scheme with at least one defined benefit member.

Offers of defined benefit interests are only available through employer arrangements. As such, it is unlikely that such interests are inappropriately distributed. It is not appropriate or practicable to apply the DDO in relation to those interests.

### *Medical Indemnity Insurance*

The Regulations exempt medical indemnity insurance products from the requirement to provide a target market determination under the DDO regime in part 7.8A of the Corporations Act.<sup>18</sup> (Schedule 1, item 1, paragraph 7.8A.03(c))

A ‘medical indemnity insurance product’ is currently defined in regulation 1.0.02 of the Corporations Regulations. That regulation defines medical indemnity insurance product to mean an arrangement to which the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* applies, under which medical indemnity cover is provided to a medical practitioner as defined in section 4 of that Act or to a registered health professional prescribed under that Act.

Medical indemnity insurance is already subject to an existing regulatory regime and has a target market that is obliged to purchase the product. Therefore, it is not necessary to apply the DDO regime to medical indemnity insurance.

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<sup>17</sup> See subsections 994B(1) and (2) of the Corporations Act to be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

<sup>18</sup> See subsections 994B(1) and (2) of the Corporations Act to be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

### *Depository interests in foreign fully paid ordinary shares*

The Regulations exempt depository interests in foreign fully paid ordinary shares from the requirement to make a target market determination under the DDO regime in Part 7.8A of the Corporations Act.<sup>19</sup> However, the exemption only operates where the requirement (and Part 7.8A of the Corporations Act more generally) would not apply if the shares were offered directly to retail clients. (Schedule 1, item 1, paragraph 7.8A.03(d))

Foreign fully paid ordinary shares are already exempt from DDO. Depository interests in those shares are the primary means by which foreign shares are held, and so are exempt on the same basis.

### Schedule 2 – Amendments in relation to product intervention orders

Schedule 2 makes amendments to the Corporations Regulations that are related to the product intervention orders regime that is set out in Part 7.9A of the Corporations Act. The amendments make additional products subject to the product intervention power.

### **Items, 1, 2 and 3 - Products Subject to the Product Intervention Power**

The product intervention power currently applies to products regulated under the Corporations Act and Credit Act.

In the case of the Corporations Act, the intervention power generally only applies to financial products that are, or are likely to be, available for acquisition by retail clients by way of issue. However, the power also applies to such products in certain anti-avoidance sale situations.<sup>20</sup>

In the case of the Credit Act, the intervention power applies to all products that may be provided by a person in the course of engaging in a credit activity or proposed credit activity. Such products consist of credit contracts, mortgages and guarantees in relation to those contracts, and consumer leases.<sup>21</sup>

Subsection 764A(3) of the Corporations Act<sup>22</sup> provides for the Regulations to declare additional things to be financial products for specified provisions of Chapter 7 of the Corporations Act. The Regulations use that subsection to declare a number of things to be financial products for the purposes of Part 7.9A (Product intervention orders) of

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<sup>19</sup> See subsections 994B(1) and (2) of the Corporations Act to be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

<sup>20</sup> Section 994B of the Corporations Act as will be inserted by item 5 of Schedule 1 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

<sup>21</sup> Paragraphs 1023D(1)(a) and 1023D(3)(a) of the Corporations Act and paragraphs 301D(1)(a) and 301D(3)(a) of the Credit Act, as inserted by items 7 and 13 of Schedule 2 of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

<sup>22</sup> As inserted by item 4 of Schedule 2 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

the Corporations Act<sup>23</sup>. These things are funeral expenses policies, extended warranties and short term credit contracts.

#### *Funeral expenses policies*

The Regulations declare a funeral expenses policy to be a financial product for the purposes of the product intervention regime in Part 7.9A of the Corporations Act<sup>24</sup>. This means that such policies may be subject to a product intervention order under that part of the Corporations Act (Schedule 2, item 3, paragraph 7.9A.01(1)(a)).

Regulation 7.1.07D of the Corporations Regulations currently excludes a funeral expenses policy from being a financial product for the purposes of Chapter 7 of the Corporations Act. That regulation defines ‘funeral expenses policy’ as a scheme or arrangement for the provision of a benefit consisting of the payment of money, payable only on the death of a person, for the sole purpose of meeting the whole or part of the expenses of, and incidental to, the person’s funeral and burial or cremation.

The Regulations amend the Corporations Regulations so that a funeral expenses policy is a financial product for the purposes of only Part 7.9A (Product intervention orders) of the Corporations Act. In particular, the Regulations:

- amend existing regulation 7.1.07D of the Corporations Regulations to provide that a funeral expenses policy is not a financial product for the purposes of the provisions of Chapter 7 of the Corporations Act except Part 7.9A (schedule 2, item 2, subregulation 7.1.07D(1)); and
- insert a new provision into the Corporations Regulations which provides that a funeral expenses policy is a financial product for Part 7.9A of the Corporations Act (schedule 2, item 3, paragraph 7.9A.01(1)(a)).

#### *Extended warranty arrangements*

The Regulations extend the product intervention regime in Part 7.9A of the Corporations Act to certain extended warranties that would otherwise be excluded from the regime. This is achieved by inserting a new provision into the Corporation Regulations which provides that an extended warranty arrangement is a financial product for the purposes of Part 7.9A of the Corporations Act (schedule 2, item 3, paragraph 7.9A.01(1)(b)).

The Regulations define what constitutes an ‘extended warranty arrangement’ for the purposes of this new provision. In particular, to be an extended warranty arrangement the arrangement must meet each of the following three requirements. First, the arrangement must be between a person (the warranty provider) and a person who acquired goods or services as a consumer (as described in section 3 of the Australian consumer law). Second, the arrangement must provide that the warranty provider will

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<sup>23</sup> Part 7.9A of the Corporations Act as inserted by item 7 of Schedule 2 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

<sup>24</sup> As inserted by item 7 of Schedule 2 to the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2018*.

or may<sup>25</sup> (unconditionally or on specified conditions) repair or replace goods or part of them, provide again or rectify the services or part of them, or wholly or partially compensate the consumer, if the goods or services or part of them are defective. Third (and finally), the arrangement must be an incidental product as described in section 763E of the Corporations Act. That section excludes ‘incidental products’<sup>26</sup> from being financial products<sup>27</sup> for the purposes of Chapter 7 of the Corporations Act. (Schedule 2, item 3, paragraphs 7.9A.01(2)(a) to (c))

An extended warranty arrangement is functionally equivalent to add-on insurance which is currently subject to the product intervention regime in Part 7.9A of the Corporations Act. Extended warranty arrangements do not include ordinary warranties against defects given by manufacturers of goods.

For the avoidance of doubt, consumer guarantees that are required by the Australian Consumer Law are excluded from the definition of ‘extended warranty arrangement’. (Schedule 2, item 3, subregulation 7.9A.01(2))

The Regulations also amend existing regulation 7.1.07A of the Corporations Regulations to ensure that an extended warranty arrangement is subject to the product intervention regime even if it is associated with a rental agreement. Existing regulation 7.1.07A excludes certain arrangements associated with rental agreements from being a financial product for the purposes of Chapter 7 of the Corporations Act. Some of these excluded arrangements could include extended warranty arrangements, for example, where a person who leases goods to another person agrees to compensate that person through reduced rental payments if the leased goods are defective.

The amendments made to existing regulation 7.1.07A provide that an arrangement covered by that regulation which is also an extended warranty arrangement is not a financial product for the purposes of the provisions of Chapter 7 of the Corporations Act except for Part 7.9A. This ensures that all ‘extended warranty arrangements’ are subject to the product intervention regime in Part 7.9A of the Corporations Act. The existing operation of regulation 7.1.07A is not otherwise affected by the Regulations. (Schedule 2, item 1, subregulations 7.1.07A(2) and 7.1.07A(3))

### *Short Term Credit Contracts*

The Regulations apply the product intervention regime in Part 7.9A of the Corporations Act to short term credit contracts.

As already noted, the product intervention regime currently applies in relation to products regulated under the Credit Act. However, that Act does not regulate short term credit contracts,<sup>28</sup> which are credit contracts where, under the contract, credit is provided for not more than 62 days and credit fees and charges, and interest charges,

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<sup>25</sup> The reference to ‘may’ ensures that an arrangement may be an extended warranty arrangement for the purposes of the new law even if under its terms the warranty provider retains, or purports to retain, a complete or partial discretion as to whether or not to fulfil the extended warranty.

<sup>26</sup> As defined in section 763E of the Corporations Act, an ‘incidental product’ is a product: that is an incidental component of a facility that also has other components or is a facility that is incidental to one or more other facilities; and, that has a main purpose which is not a financial product purpose.

<sup>27</sup> See Subdivision B of Division 3 of Part 7.1 of the Corporations Act.

<sup>28</sup> The Credit Act’s operation with respect to short term credit contracts is expressly excluded by subsection 6(1) of the National Credit Code at Schedule 1 of the Act.

under the contract are less than specified amounts (Schedule 2, item 3, subregulation 7.9A.01(3)).

The Regulations declare a short term credit contract to be a financial product for the purposes of the product intervention regime in Part 7.9A of the Corporations Act. This means that such contracts may be subject to a product intervention order under Part 7.9A of the Corporations Act. (Schedule 2, item 3, paragraph 7.9A.01(1)(c))