

2002-2003

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

OPC drafter to complete	
1. Do any of these amendments need a message? (See H of R Practice, fourth ed, pp403-408, and OGC advice.) If yes: <ul style="list-style-type: none"> • List relevant amendments— • Prepare message advice (see DD 5/2000, Attachment D) • Give a copy of the amendments and the message advice to the Legislation area. 	No
2. Are these amendments for consideration by the Senate? If yes, go on to question 3.	No
3. Should any of these amendments be moved in the Senate as requests? (See OGC advice) If yes: <ul style="list-style-type: none"> • List relevant amendments— • Prepare section 53 advice and fax to relevant Ministers and Senate PLO (see DD 5/2000); • Give a copy of the request advice to the Legislation area with the copy of the amendments (see question 1). 	N/A

Financial Services Reform Amendment Bill 2003

(Government)

[These amendments are currently grouped according to topic. However, before they are moved in the Parliament, they will be organised into a single integrated sequence of amendments of the Bill. This will affect:

- *the parliamentary amendments numbers (these are the numbers in brackets such as (T1A)); and*
- *the item numbers of items inserted by those amendments (these are the bold Arial font numbers such as **4A**).]*

Topic 1—Omitting and remaking Schedule 1 to the Bill

(T1A) Schedule 1, page 3 (line 1) to page 12 (line 12), omit the Schedule, substitute:

Schedule 1—Amendment of the Corporations Act 2001 relating to unsolicited offers to purchase financial products off-market

1 Section 760B (table item 9, column 3)

Omit “and sale”, substitute “, sale and purchase”.

2 Part 7.9 of Chapter 7 (heading)

Repeal the heading, substitute:

Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

3 Subsection 1010A(1)

Omit “Division 6”, substitute “Divisions 5A and 6”.

4 Subsection 1010A(1)

Omit “that Division”, substitute “those Divisions”.

5 Subsection 1010A(2)

Omit “Division 6”, substitute “Divisions 5A and 6”.

6 Subsection 1010B(1)

Omit “Nothing in this Part”, substitute “Apart from Division 5A, nothing in this Part”.

7 After Division 5 of Part 7.9

Insert:

Division 5A—Unsolicited offers to purchase financial products off-market

1019C Definitions

In this Division:

date of offer has the meaning given by subsection 1019I(1).

offeree, in relation to an offer to which this Division applies, has the meaning given by subsection 1019D(1).

offeror, in relation to an offer to which this Division applies, has the meaning given by subsection 1019D(1).

offer to which this Division applies means an offer to which this Division applies because of section 1019D.

1019D Offers to which this Division applies

- (1) This Division applies to an offer in relation to which the following paragraphs are satisfied:
 - (a) the offer is an unsolicited offer to purchase a financial product made by a person (the *offeror*) to another person (the *offeree*);
 - (b) the offer is made otherwise than on a licensed market;
 - (c) one or more of the following apply:
 - (i) the offer is made in the course of a business of purchasing financial products;
 - (ii) the offeror was not in a personal or business relationship with the offeree before the making of the offer;
 - (iii) the offer is made in circumstances specified in regulations made for the purposes of this subparagraph;
 - (d) the offer is not:
 - (i) made to the issuer of the financial products; or
 - (ii) to buy back shares under a buy-back authorised by section 257A; or
 - (iii) made under a compromise or arrangement approved at a meeting held as a result of an order under subsection 411(1) or (1A); or
 - (iv) to acquire securities under an off-market bid; or
 - (v) to compulsorily acquire or buy out securities under Chapter 6A; or
 - (vi) to acquire shares from a dissenting shareholder under section 414; or
 - (vii) made in relation to particular financial products that are specified in regulations made for the purposes of this subparagraph; or
 - (viii) made in circumstances that are specified in regulations made for the purposes of this subparagraph;
 - (e) the offer is made or received in this jurisdiction.
- (2) The regulations may clarify:
 - (a) when an offer is, or is not, made in the course of a business of purchasing financial products; or
 - (b) when an offeror was, or was not, in a previous personal or business relationship with an offeree.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

1019E How offers are to be made

- (1) An offer to which this Division applies must not be made otherwise than by sending an offer document in printed or electronic form to the offeree in accordance with the following requirements:
 - (a) the document must be sent to an address of the offeree (which may be an electronic address); and
 - (b) either the envelope or the container in which it is sent, or the message that accompanies it, must be addressed to the offeree.
- (2) The offer document must be sent to the offeree as soon as practicable after the date of offer.

1019F Prohibition on inviting offers to sell

A person must not invite another person to make an offer to sell a financial product in circumstances in which, if the invitation were instead an offer to purchase the financial product, that offer would be an offer to which this Division applies.

1019G Duration and withdrawal of offers

- (1) An offer to which this Division applies cannot remain open more than 12 months after the date of offer.
- (2) The offer may be withdrawn by the offeror at any time, but not within 1 month of the date of offer.
- (3) The offer may only be withdrawn by the offeror by sending a withdrawal document in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b). The withdrawal document must identify the offeror and be dated.
- (4) A purported withdrawal of the offer contrary to subsection (2) or (3) is ineffective.

1019H Terms of offer cannot be varied

- (1) The terms of an offer to which this Division applies, as set out in the offer document, cannot be varied.
- (2) A purported variation of the terms of the offer is ineffective.
- (3) This section does not:
 - (a) affect the offeror's obligation under section 1019J to update the market value of the financial product to which the offer relates; or
 - (b) prevent the offeror from withdrawing the offer in accordance with section 1019G or paragraph 1019J(2)(a) and making another offer on different terms; or
 - (c) prevent the offeree from making a counter-offer on different terms.

1019I Contents of offer document

- (1) The offer document by which an offer to which this Division applies is made must identify the offeror and be dated (this date is the *date of offer*).
- (2) The offer document must also contain the following:
 - (a) the price at which the offeror wishes to purchase the financial products;
 - (b) if the financial product is able to be traded on a licensed market and there is a market value for the product as traded on that market—the market value of the product as at the date of offer;
 - (c) if paragraph (b) does not apply—a fair estimate of the value of the product as at the date of offer, and an explanation of the basis on which that estimate was made;
 - (d) the period during which the offer remains open (which must be consistent with subsection 1019G(1));
 - (e) a statement to the effect that the offer may be withdrawn by sending a withdrawal document to the offeree, but generally not within 1 month of the date of offer;
 - (f) any other information specified in regulations made for the purposes of this paragraph.
- (3) The regulations may clarify:

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- (a) the manner in which a fair estimate of the value of a financial product (see paragraph (2)(c)) is to be worked out; and
 - (b) the level of detail required in the explanation of the basis on which the estimate was made.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

- (4) The offer document must be worded and presented in a clear, concise and effective manner.

1019J Obligation to update market value

- (1) This section applies if:
 - (a) the offer document by which an offer to which this Division applies is made states the market value of the financial product to which the offer relates as at the date of the offer; and
 - (b) while the offer remains open, there is an increase or decrease in the market value of the product when compared to:
 - (i) unless subparagraph (ii) applies—the market value (the *currently stated value*) stated as mentioned in paragraph (a); or
 - (ii) if this section has previously applied in relation to the offer and one or more supplementary offer documents have been sent to the offeree—the market value (the *currently stated value*) stated as mentioned in paragraph (3)(c) in the supplementary offer document most recently sent to the offeree; and
 - (c) the increase or decrease, expressed as a percentage of the currently stated value, exceeds the percentage specified in the regulations for the purposes of this paragraph.
- (2) The offeror must, within 10 business days of this section applying because of a particular increase or decrease in value:
 - (a) withdraw the offer by sending a withdrawal document, in printed or electronic form, to the offeree in accordance with paragraphs 1019E(1)(a) and (b):
 - (i) that identifies the offeror and that is dated; and
 - (ii) that contains a statement to the effect that the offer is withdrawn because of a change in the market value of the product, and that withdrawal for this reason is permitted even within 1 month of the date of offer; or
 - (b) send a supplementary offer document (see subsection (3)) in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b).

Nothing in section 1019G affects the effectiveness of a withdrawal of the offer under paragraph (a) of this subsection.

- (3) A supplementary offer document must:
 - (a) identify the offer to which it relates; and
 - (b) be dated; and
 - (c) state the market value of the financial product to which the offer relates as at that date; and
 - (d) state the price that was stated in the offer document as required by paragraph 1019I(2)(a), and contain a statement to the effect that this is still the price at which the offeror wishes to purchase the product and that the terms of the offer remain unchanged; and
 - (e) contain a statement to the effect that the document has been prepared because the market value of the product has changed.

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- (4) A supplementary offer document must be worded and presented in a clear, concise and effective manner.
 - (5) In this section, a reference to stating a market value of a financial product includes a reference to purporting to state the market value of the product.

1019K Rights if requirements of Division not complied with

First situation covered by this section—offers to which this Division applies

- (1) This section applies if, in relation to an offer to which this Division applies, the offeree (the **seller**) accepts the offer and enters into a contract for the sale of the financial product to the offeror (the **buyer**), and one or more of the following paragraphs applies:
 - (a) section 1019E was not complied with in relation to the offer;
 - (b) the offer was accepted after the period referred to in subsection 1019G(1);
 - (c) the offeror gave the offeree an offer document and either:
 - (i) the offer document did not comply with section 1019I; or
 - (ii) there was a misleading or deceptive statement in the offer document;
 - (d) in a situation to which section 1019J applies, either:
 - (i) subsection 1019J(2) was not complied with; or
 - (ii) subsection 1019J(2) was complied with, but the offeree did not receive the withdrawal document, or the supplementary offer document, as the case requires, until after the offeree had accepted the offer;
 - (e) in a situation to which section 1019J applies, the offeror gave the offeree a supplementary offer document and either:
 - (i) the supplementary offer document did not comply with subsection 1019J(3); or
 - (ii) there was a misleading or deceptive statement in the supplementary offer document.

Second situation covered by this section—invitations prohibited by section 1019F

- (2) This section applies if, in response to an invitation prohibited by section 1019F, a person (the **seller**) makes an offer to sell a financial product to the person who made the invitation (the **buyer**), and that person accepts the offer and enters into a contract for the purchase of that financial product from the seller.

Seller's right to refuse to transfer, or to seek the return of, the financial product

- (3) The seller has:
 - (a) the right to refuse to transfer the financial product to the buyer; or
 - (b) if the seller has already transferred the financial product to the buyer—the right to have the financial product returned to the seller, if the buyer still holds the product.The seller's right under paragraph (a) or (b) is conditional on the seller repaying any money that has been paid to the seller for the purchase of the financial product.

How the seller's right is to be exercised

- (4) The seller's right under subsection (3) must be exercised by notifying the buyer in one of the following ways:
 - (a) in writing;
 - (b) electronically;

(c) in any other way specified in regulations made for the purposes of this paragraph. Also, if the regulations require the seller to comply with other requirements in order to exercise that right, those other requirements must be complied with.

- (5) The seller's right under subsection (3) can only be exercised during the period of 30 days starting on the day the contract was entered into.

Effect of exercise of seller's right

- (6) On the exercise of the seller's right under subsection (3), the contract referred to in subsection (1) or (2) is, by force of this section, terminated from that time without penalty to the seller.

Regulations made provide for certain matters

- (7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the seller's right under subsection (3) is exercised.
- (8) The regulations may provide that, in specified circumstances, the amount to be repaid as mentioned in subsection (3) is to be increased or reduced in accordance with the regulations.

8 Paragraph 1020E(7)(a)

After "paragraph (b)", insert "or (c)".

9 At the end of subsection 1020E(7)

Add:

- ; or (c) if subparagraph (1)(a)(i) applies and the disclosure document or statement is an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J—the offeror referred to in subsection 1019D(1).

10 At the end of Subdivision A of Division 7 of Part 7.9

Add:

1021P Offences relating to offers to which Division 5A applies

Failure to comply with requirements of section 1019E relating to how offers are made

- (1) A person commits an offence if:
- (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) in making the offer, the person fails to comply with a requirement of section 1019E.

Contravening section 1019F by inviting offers to sell

- (2) A person commits an offence if:
- (a) the person invites another person to make an offer to sell a financial product; and
 - (b) in making the invitation, the person contravenes section 1019F.

Failure to comply with requirements of section 1019G relating to duration and withdrawal of offers

- (3) A person commits an offence if:
- (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) either:
 - (i) the offer remains open for longer than is permitted by subsection 1019G(1); or
 - (ii) in purporting to withdraw the offer, the person fails to comply with a requirement of subsection 1019G(2) or (3).

Failure to comply with requirements of section 1019I relating to price or value

- (4) A person commits an offence if:
- (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) the person gives the offeree an offer document; and
 - (d) either:
 - (i) the offer document does not comply with paragraph 1019I(2)(a), (b) or (c); or
 - (ii) material of a kind referred to in paragraph 1019I(2)(a), (b) or (c) that is included in the offer document is misleading or deceptive.

Failure to comply with other requirements of section 1019I

- (5) A person commits an offence if:
- (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) the person gives the offeree an offer document; and
 - (d) either:
 - (i) the offer document does not comply with subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f); or
 - (ii) material of a kind referred to in subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f), that is included in the offer document is misleading or deceptive.

Failure to comply with requirements of section 1019J

- (6) A person commits an offence if:
- (a) the person makes an offer; and
 - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
 - (c) section 1019J applies because of an increase or decrease in the market value of the financial product to which the offer relates; and
 - (d) one of the following subparagraphs applies:
 - (i) the person fails to comply with subsection 1019J(2) in relation to that increase or decrease; or
 - (ii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but that document does not comply with subsection 1019J(3); or
 - (iii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but material of a kind referred to in subsection 1019J(3) that is included in that document is misleading or deceptive.

11 Subsection 1022A(1) (at the end of the definition of *defective*)

Add:

- ; or (e) if it is an offer document of a kind referred to in section 1019E—there is an omission from the document of material required by section 1019I; or
- (f) if it is a supplementary offer document of a kind referred to in section 1019J—there is an omission from the document of material required by subsection 1019J(3).

12 Subsection 1022A(1) (at the end of the definition of *disclosure document or statement*)

Add:

- ; or (d) an offer document of a kind referred to in section 1019E; or
- (e) a supplementary offer document of a kind referred to in section 1019J.

13 After paragraph 1022B(1)(a)

Insert:

- (aa) a person makes an offer to which Division 5A applies (see section 1019D) to another person (the *client*) otherwise than by sending the client an offer document in accordance with section 1019E; or
- (ab) a person makes an invitation prohibited by section 1019F to another person (the *client*); or
- (ac) a person:
 - (i) is required by subsection 1019J(2), in relation to an offer made to another person (the *client*), to send the client a withdrawal document or a supplementary offer document; and
 - (ii) does not send (in accordance with paragraphs 1019E(1)(a) and (b)) the client anything purporting to be either of those things by the time they are required to do so; or

14 Subparagraph 1022B(1)(c)(i)

After “statement “ (first occurring), insert “(other than an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J)”.

15 After subparagraph 1022B(1)(c)(i)

Insert:

- (ia) makes an offer to which Division 5A applies (see section 1019D) by sending another person (the *client*) an offer document in accordance with section 1019E, but that offer document is defective; or
- (ib) in a situation to which section 1019J applies, sends a person (the *client*) a supplementary offer document in accordance with that section but that supplementary offer document is defective; or

16 After paragraph 1022B(2)(a)

Insert:

- (aa) if paragraph (1)(aa) applies—because the client was not sent an offer document in accordance with section 1019E; or
- (ab) if paragraph (1)(ab) applies—because the client received an invitation prohibited by section 1019F rather than being sent an offer document in accordance with section 1019E; or

(ac) if paragraph (1)(ac) applies—because the client was not sent a withdrawal document or a supplementary offer document as required by subsection 1019J(2);
or

17 Paragraph 1022B(2)(c)

After “given”, insert “or sent”.

18 Subsection 1022B(2)

After “paragraph (a),” insert “(aa), (ab), (ac),”.

19 Paragraph 1022B(3)(a)

After “paragraph (1)(a)”, insert “, (aa), (ab), (ac)”.

20 Paragraph 1022B(3)(b)

After “paragraph (1)(c)”, insert “(other than subparagraph (1)(c)(ia) or (ib))”.

21 After paragraph 1022B(3)(b)

Insert:

(ba) if subparagraph (1)(c)(ia) or (ib) applies—the person who made the offer; or

22 Paragraph 1022B(5)(a)

After “paragraph (1)(c)”, insert “(other than subparagraph (1)(c)(ia) or (ib))”.

23 After paragraph 1438(2)(e)

Insert:

(ea) Division 5A (unsolicited offers to purchase financial products off-market);

24 Schedule 3 (after table item 309A)

Insert:

309AA	Subsection 1021P(1)	100 penalty units or imprisonment for 2 years, or both.
309AB	Subsection 1021P(2)	100 penalty units or imprisonment for 2 years, or both.
309AC	Subsection 1021P(3)	50 penalty units.
309AD	Subsection 1021P(4)	100 penalty units or imprisonment for 2 years, or both.
309AE	Subsection 1021P(5)	50 penalty units.
309AF	Subsection 1021P(6)	50 penalty units.

[omitting and remaking Schedule 1]

Topic 2—Amendments relating to the definition of professional investor

(T2A) Schedule 2, page 13 (before line 5), before item 1, insert:

1A Section 9

Insert:

body regulated by APRA has the meaning given by subsection 3(2) of the *Australian Prudential Regulation Authority Act 1998*.

[definition of professional investor]

(T2B) Schedule 2, page 13 (after line 20), after item 4, insert:

4A Section 9 (paragraph (b) of the definition of *professional investor*)

Repeal the paragraph, substitute:

- (b) the person is a body regulated by APRA, other than a trustee of any of the following (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) if the fund, trust or scheme has net assets of less than \$10 million:
 - (i) a superannuation fund;
 - (ii) an approved deposit fund;
 - (iii) a pooled superannuation trust;
 - (iv) a public sector superannuation scheme;

4B Section 9 (paragraph (d) of the definition of *professional investor*)

Repeal the paragraph.

[definition of professional investor]

(T2C) Schedule 2, page 13 (after line 28), after item 7, insert:

7A Section 761A (definition of *body regulated by APRA*)

Repeal the definition.

[definition of professional investor]

Topic 3—Omitting items 19 to 24 of Schedule 2 to the Bill

(T3A) Schedule 2, items 19 to 24, page 15 (lines 7 to 32), omit the items.

[omitting items 19 to 24 of Schedule 2]

Topic 4—Amendments relating to bundled insurance products

(T4A) Schedule 2, page 14 (after line 17), after item 12, insert:

12A After subsection 764A(1)

Insert:

- (1A) If a single contract of insurance provides 2 or more kinds of cover, paragraph (1)(d) applies separately in relation to that contract, in relation to each of those kinds of cover, as if the contract only provided that kind of cover.

Note: Because of this subsection (including as it is affected by subsection (1B)), a single contract of insurance may constitute 2 or more separate general insurance products.

- (1B) If a contract of insurance provides a kind of cover in relation to 2 or more kinds of asset, subsection (1A) applies to the contract, in relation to each of those kinds of asset, as if the cover provided by the contract in relation to that kind of asset constituted a separate kind of cover.

12B Subsection 764A(2)

After “paragraphs (1)(d), (e) and (f)”, insert “and subsections (1A) and (1B)”.

[bundled insurance products]

Topic 5—Amendments relating to expert statements

(T5A) Schedule 2, item 13, page 14 (lines 18 to 23), omit the item, substitute:

13 Subsection 766B(1)

Omit all the words from and including “However”.

13A After subsection 766B(1)

Insert:

(1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.

(1B) Subsection (1B) does not apply for the purpose of determining whether a recommendation or statement of opinion made by an outside expert, or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice provided by the outside expert.

13B Subsection 766B(9)

Insert:

outside expert, in relation to an exempt document or statement, means an expert who is not:

- (a) the person by whom, or on whose behalf, the exempt document or statement was prepared; or
- (b) an employee or director of that person.

[expert statements]

Topic 6—Amendments relating to stop orders by ASIC

(T6A) Schedule 2, page 31 (after line 30), after item 91, insert:

91A Subsection 1020E(11) (paragraph (a) of the definition of defective)

Omit “Subdivision A”, substitute “Subdivision B”.

91C Subsection 1020E(11) (paragraph (b) of the definition of defective)

Omit all the words from and including “being a statement”.

91D Subsection 1020E(11) (definition of disclosure document or statement)

Omit “Subdivision A”, substitute “Subdivision B”.

[removal of materiality test for stop orders]

(T6B) Schedule 2, item 91, page 31 (lines 26 to 30), omit subparagraph (ia), substitute:

- (ia) a disclosure document or statement does not comply with a requirement of this Part that it be worded and presented in a clear, concise and effective manner;
or

[stop orders and the clear concise and effective requirement]

Topic 7—Amendments relating to interaction between provisions of Part 7.9 (sections 1012J, 1016A to 1016E and Division 7)

(T7A) Schedule 2, page 26 (after line 31), after item 77, insert:

77A Subsection 1016A(1)

Insert:

defective, in relation to a Product Disclosure Statement as at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been *defective* as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

77B Subsection 1016A(1) (subparagraph (b)(i) of the definition of *eligible application*)

Repeal the subparagraph, substitute:

- (i) was included in, or accompanied, a Product Disclosure Statement (relating to the product) that was given to the applicant and that was not defective as at the time when the application was made; or

[interaction between provisions of Part 7.9]

(T7B) Schedule 2, page 27 (after line 2), after item 78, insert:

78A Paragraph 1016A(2)(f)

Omit “it is a restricted issue that” insert “the issue or sale”.

78B Subsection 1016A(2) (note)

Repeal the note, substitute:

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

78C Subparagraph 1016A(3)(b)(i)

Repeal the subparagraph, substitute:

- (i) was included in, or accompanied, a Product Disclosure Statement (relating to an interest in the entity) that was given to the person and that was not defective as at the time when the application was made; or

78D Subsection 1016B(1)

Omit “to which the Statement applies”, substitute “, pursuant to an application made in response to the Statement,”.

78E Subsection 1016B(1) (note)

Repeal the note, substitute:

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

78F Section 1016C

After “a financial product of that kind”, insert “, pursuant to an application made in response to the Statement,”.

78G Section 1016C (after note 1)

Insert:

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

78H Subsection 1016D(1)

After “a financial product of that kind”, insert “, pursuant to an application made in response to the Statement,”.

78I Subsection 1016D(1) (after note 1)

Insert:

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

78J Paragraphs 1016D(2)(c) and (d)

Repeal the paragraphs, substitute:

- (c) an issue or transfer to a person of a financial product of that kind is void if:
 - (i) the issue or transfer is pursuant to an application made in response to the Statement; or
 - (ii) the person should have been given the Statement; and
- (d) if:
 - (i) an issue or transfer of a financial product to a person is void because of paragraph (c); and
 - (ii) the responsible person received money from that person on account of the issue or transfer—the responsible person must, as soon as practicable, return the money to that person.

78K Subsection 1016D(2) (note)

Repeal the note, substitute:

Note 1: Paragraphs (c) and (d) do not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with paragraph (d) is an offence (see subsection 1311(1)).

78L Paragraphs 1016E(1)(c) and (d)

Repeal the paragraphs (but not the note), substitute:

- (c) in relation to a Product Disclosure Statement for a financial product, the responsible person becomes aware that the Product Disclosure Statement was defective as at the time when it was prepared, or that it became or has become defective as at some later time.

78M Subsection 1016E(2)

After “the Product Disclosure Statement”, insert “(the *first Product Disclosure Statement*)”.

78N After paragraph 1016E(2)(a)

Insert:

- or (aa) the responsible person must give the applicant:
 - (i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and
 - (ii) 1 month to withdraw their application and be repaid; or

78O Subparagraph 1016E(2)(b)(i)

Omit “paragraph (1)(c) or (d)”, substitute “paragraph (1)(c)”.

78P After paragraph 1016E(2)(b)

Insert:

- (ba) the responsible person must issue or sell the financial products to the applicant and give them:
 - (i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and
 - (ii) 1 month to return the financial products and be repaid; or

78Q Subparagraph 1016E(2)(c)(i)

Omit “paragraph (1)(c) or (d)”, substitute “paragraph (1)(c)”.

78R Subsection 1016E(2) (note)

Repeal the note, substitute:

- Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- Note 2: If the responsible person chooses the option given by paragraph (aa) or (b), that option does not require the responsible person to wait until the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) before going ahead and issuing or selling the financial products to the applicant if the applicant indicates before then that they still wish to proceed with the application.
- Note 3: However if the responsible person chooses the option given by paragraph (aa) or (b), whether the responsible person may go ahead and issue or sell the financial products to the applicant at the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) (or earlier, as mentioned in note 2) is affected by subsection (2) and sections 1016A to 1016E (including as those provisions are affected by subsections (2A) and (2B) of this section).
- Note 4: If the responsible person chooses the option given by paragraph (c), sections 1016A to 1016D do not prohibit the issue or sale of the financial products under that paragraph (see subsection (2C) of this section).

78S After subsection 1016E(2)

Insert:

- (2A) If, in accordance with paragraph (2)(aa), the responsible person gives the applicant a new Product Disclosure Statement for the financial products and the additional statement referred to in subparagraph (2)(aa)(i):
 - (a) subsection (2), and sections 1016B, 1016C, 1016D and 1016E, apply in relation to the application, from the time when the applicant is given the new Product Disclosure Statement (the *correction time*), as if the application had been made in response to the new Product Disclosure Statement; and
 - (b) if:
 - (i) the reason for giving the new Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and
 - (ii) the financial products are *relevant financial products* as defined in section 1016A;
section 1016A applies in relation to the application, from the correction time, as if the first Product Disclosure Statement had instead contained the content of the new Product Disclosure Statement.

Note 1: Because of paragraph (a):

- (a) if this section applies to the new Product Disclosure Statement, the responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the new Product Disclosure Statement (even though the application was actually made in response to the first Product Disclosure Statement); and
- (b) sections 1016B, 1016C and 1016D, as they relate to the first Product Disclosure Statement, cease to apply in relation to the application.

Note 2: Because of paragraph (b), the application may be an *eligible application* as defined in section 1016A, even though the first Product Disclosure Statement was actually defective as at the time when the application was made.

(2B) If:

- (a) in accordance with paragraph (2)(b), the responsible person gives the applicant a Supplementary Product Disclosure Statement that relates to the financial products; and
- (b) the reason for giving the Supplementary Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and
- (c) the financial products are *relevant financial products* as defined in section 1016A; section 1016A applies in relation to the application, from the time when the applicant is given the Supplementary Product Disclosure Statement, as if the Supplementary Product Disclosure Statement had been given to the applicant before the application was made; and

Note 1: Because of this subsection and section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements), the application may be an *eligible application* as defined in section 1016A, even though the Supplementary Product Disclosure Statement was not actually given until after the time when the application was made.

Note 2: The responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the first Product Disclosure Statement as affected by the Supplementary Product Disclosure Statement and any other Supplementary Product Disclosure Statements.

(2C) If the responsible person chooses to comply with paragraph (2)(c), nothing in sections 1016A to 1016D applies to the issue or sale of the financial products under that paragraph.

Note: This subsection affects the elements of the offences under sections 1016A to 1016D, and so it is not an exception in relation to which a defendant bears an evidential burden under subsection 13.3(3) of the *Criminal Code*.

78T At the end of section 1016E

Add:

- (5) For the purposes of this section, *defective*, when used in relation to a Product Disclosure Statement at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been *defective* as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

[interaction between provisions of Part 7.9]

(T7C) Schedule 2, page 32 (after line 9), after item 95, insert:

95A Section 1021A

Omit “This Division”, substitute “This Subdivision”.

95B Subsection 1021B(1)

Omit “this Division”, substitute “this Subdivision”.

95C After subsection 1021B(1)

Insert:

- (1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement then, for the purposes of the definition of *defective* in subsection (1):
- (a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and
 - (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note 1: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

Note 2: Whether the inclusion of out of date information, or the failure to include information, results in the Product Disclosure Statement being *defective* as defined in subsection (1) depends on whether the materiality test set out in that definition is satisfied.

[interaction between provisions of Part 7.9]

(T7D) Schedule 2, page 32 (after line 11), after item 96, insert:

96A After subsection 1022A(1)

Insert:

- (1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement then, for the purposes of the definition of *defective* in subsection (1):
- (a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and
 - (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

[interaction between provisions of Part 7.9]

Topic 8—Amendment relating to exemptions from the section 949A obligation to warn the client]

(T8A) Schedule 2, page 22 (after line 9), after item 47, insert:

47A At the end of subsection 949A(1)

Add:

; and (c) the advice is not provided in circumstances specified in regulations made for the purposes of this paragraph.

[exemptions from the section 949A obligation to warn the client]

Topic 9—Amendments relating to the section 1012G oral statements requirements

(T9A) Schedule 2, page 26 (after line 11), after item 71, insert:

71A Paragraph 1012G(3)(a)

Omit “read the client a statement, prepared by or on behalf of the product issuer, that contains”, substitute “orally communicate the following information to the client”.

71B After subsection 1012G(3)

Insert:

(3A) The information referred to in paragraph (3)(a) must be communicated in a clear, concise and effective manner.

[the section 1012G oral statements requirements]

(T9B) Schedule 2, page 32 (after line 9), after item 95, insert:

95AA Subsection 1021B(1) (paragraph (d) of the definition of *defective*)

Repeal the paragraph, substitute:

(d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph;

95AB Subsection 1021B(1) (paragraph (c) of the definition of *disclosure document or statement*)

Repeal the paragraph, substitute:

(c) information required by paragraph 1012G(3)(a).

95AC Subsection 1021B(2)

After “to a document or statement”, insert “, or to information,”.

95AD Subsection 1021B(2)

After “to be a document or statement”, insert “, or to be information,”.

95AE Subparagraph 1021C(1)(a)(ii)

Repeal the subparagraph, substitute:

(ii) is required by paragraph 1012G(3)(a) to orally communicate information (the ***required disclosure document or statement***) to another person; and

95AF Subparagraph 1021C(1)(b)(ii)

Repeal the subparagraph, substitute:

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- (ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

95AG Subparagraph 1021C(3)(a)(ii)

Repeal the subparagraph, substitute:

- (ii) is required by paragraph 1012G(3)(a) to orally communicate information (the *required disclosure document or statement*) to another person; and

95AH Subparagraph 1021C(3)(b)(ii)

Repeal the subparagraph, substitute:

- (ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

95AI Paragraph 1021C(4)(a)

After “giving”, insert “or communication”.

95AJ Paragraph 1021C(4)(b)

After “give”, insert “or communicate”.

95AK Paragraphs 1021D(1)(a) and (2)(a)

After “disclosure document or statement”, insert “(not being information required by paragraph 1012G(3)(a))”.

95AL Subsection 1021D(3)

Omit “or paragraph 1012G(3)(a)”.

95AM Paragraphs 1021E(1)(a) and (2)(a)

After “disclosure document or statement”, insert “(not being information required by paragraph 1012G(3)(a))”.

95AN Subsection 1021E(5)

Omit “or paragraph 1012G(3)(a)”.

95AO Paragraph 1021F(1)(a)

After “disclosure document or statement”, insert “(not being information required by paragraph 1012G(3)(a))”.

95AP Subsection 1021F(2)

Omit “or paragraph 1012G(3)(a)”.

95AQ After section 1021F

Insert:

1021FA Paragraph 1012G(3)(a) obligation—offences relating to communication of information

Offence where information known to be defective

- (1) A person (the **providing entity**) commits an offence if:
 - (a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and
 - (b) the providing entity knows that the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

Offence whether or not information known to be defective

- (2) A person (the **providing entity**) commits an offence if:
 - (a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and
 - (b) the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Defences

- (4) In any proceedings against a person for an offence based on subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the information communicated would not be defective.

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

- (5) In any proceedings against a person for an offence based on subsection (2), it is a defence if the information communicated was defective because of information, or an omission from information, provided to the person (whether in a document or otherwise) by the issuer of the financial product concerned.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

1021FB Paragraph 1012G(3)(a) obligation—offences relating to information provided by product issuer for communication by another person

Product issuer knows information is defective

- (1) The issuer of a financial product commits an offence if:
 - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of the information being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that the information will be so communicated; and
 - (b) the issuer knows that, if the person communicates the provided information for the purpose of paragraph 1012G(3)(a), the information communicated will be defective.

Product issuer knows information is not all the required information

- (2) The issuer of a financial product commits an offence if:
- (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that it will be so communicated; and
 - (b) the provided information relates to a matter or matters, but the issuer knows that it is not all of the information relating to the matter or matters that is required to be so communicated; and
 - (c) the issuer is reckless as to whether the person will or may communicate information for the purposes of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated.

Product issuer provides information that results in information required by paragraph 1012G(3)(a) being defective

- (3) The issuer of a financial product commits an offence if:
- (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that it will be so communicated; and
 - (b) the person communicates the information for the purpose of paragraph 1012G(3)(a); and
 - (c) the information communicated is defective because it includes the provided information (whether or not it is defective for other reasons).
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in paragraph (3)(c).

Note: For *strict liability*, see section 6.1 of the Criminal Code.

Defence to subsection (3) offence

- (5) In any proceedings against the issuer of a financial product for an offence based on subsection (3), it is a defence if the issuer took reasonable steps to ensure that the information they provided would not be such as to make the information communicated for the purpose of paragraph 1012G(3)(a) defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

Product issuer does not provide all the required information

- (6) The issuer of a financial product commits an offence if:
- (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
 - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
 - (ii) knowing that it is likely that it will be so communicated; and
 - (b) the provided information relates to a matter or matters, but it is not all of the information relating to the matter or matters that is required to be so communicated; and

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- (c) the person communicates information for the purpose of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated; and
 - (d) the information communicated is defective because it includes only that information about the matter or matters (whether or not it is also defective for other reasons).
- (7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(b) and (d).

Note: For *strict liability*, see section 6.1 of the Criminal Code.

Defence to subsection (6) offence

- (8) In any proceedings against the issuer of a financial product for an offence based on subsection (6), it is a defence if the issuer took reasonable steps to ensure that the information they provided about the matter or matters would be all the information about the matter or matters that would be required by paragraph 1012G(3)(a) to be communicated.

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

95AR Section 1021G

Omit “read”, substitute “communicate”.

[the section 1012G oral statements requirements]

(T9C) Schedule 2, page 32 (after line 11), after item 96, insert:

96AA Subsection 1021H(3)

Omit “or paragraph 1012G(3)(a)”.

96AB Subparagraphs 1021I(1)(a)(i) and (ii)

After “disclosure document or statement”, insert “(not being information required by paragraph 1012G(3)(a))”.

96AD Paragraph 1021I(1)(b)

Omit “or paragraph 1012G(3)(a)”.

96AE Subsection 1021I(2)

Omit “or paragraph 1012G(3)(a)”.

96AF Paragraphs 1021J(1)(a) and (3)(a)

After “disclosure document or statement”, insert “(not being information required by paragraph 1012G(3)(a))”.

96AG Subsection 1021J(4)

Omit “or reading”.

96AH Subsection 1022A(1) (paragraph (d) of the definition of *defective*)

Repeal the paragraph, substitute:

- (d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph.

96AI Subsection 1022A(1) (paragraph (c) of the definition of *disclosure document or statement*)

Repeal the paragraph, substitute:

- (c) information required by paragraph 1012G(3)(a).

96AJ Subsection 1022A(2)

After “to a document or statement”, insert “, or to information,”.

96AK Subsection 1022A(2)

After “to be a document or statement”, insert “, or to be information,”.

96AL Paragraph 1022B(1)(b)

Repeal the paragraph, substitute:

- (b) a person:
 - (i) is required by paragraph 1012G(3)(a) to orally communicate information (the *required disclosure document or statement*) to another person (the *client*); and
 - (ii) does not orally communicate to the other person anything purporting to be the information required by that paragraph by the time they are required to do so;or

96AM Paragraph 1022B(2)(b)

Repeal the paragraph, substitute:

- (b) if paragraph (1)(b) applies—because the information required by paragraph 1012G(3)(a) was not communicated to the client; or

96AN After paragraph 1022B(3)(a)

Insert:

- (aa) if paragraph (1)(c) applies and the disclosure document or statement is information required by paragraph 1012G(3)(a)—subject to subsection (5A), the person first-referred to in paragraph (1)(c) of this section; or

96AO Paragraph 1022B(3)(b)

After “applies”, insert “and the disclosure document or statement is not information required by paragraph 1012G(3)(a)”.

96AP Subsection 1022B(4)

After “paragraph (1)(a) or (b) applies”, insert “, or paragraph (1)(c) applies so far as it relates to information required by paragraph 1012G(3)(a),”.

96AQ Paragraph 1022B(5)(b)

After “disclosure document or statement”, insert “(not being information required by paragraph 1012G(3)(a))”.

96AR After subsection 1022B(5)

Insert:

- (5A) If:
 - (a) paragraph (3)(aa) applies; and

-
- (b) the person referred to in that paragraph is not the issuer, or an authorised representative of the issuer, of the financial product to which the required disclosure document or statement relates; and
- (c) the required disclosure document or statement was defective because of information, or an omission from information, provided to that person (whether in a document or otherwise) by the issuer of the product;
- the issuer of the product is the liable person, rather than the person who would otherwise be the liable person because of paragraph (3)(aa) or subsection (4).

96AR After subsection 1022B(7)

Insert:

- (7A) If subsection (5A) applies, the issuer of the financial product is not liable under subsection (2) if the issuer took reasonable steps to ensure that the information provided as mentioned in paragraph (5A)(c) would not be such as to make the required disclosure document or statement defective.

[the section 1012G oral statements requirements]

- (T9D) Schedule 2, page 34 (after line 24), at the end of the Schedule, add:

114 Schedule 3 (after table item 304C)

Insert:

304D	Subsection 1021FA(1)	200 penalty units or imprisonment for 5 years, or both.
304E	Subsection 1021FA(2)	100 penalty units or imprisonment for 2 years, or both.
304F	Subsection 1021FB(1)	200 penalty units or imprisonment for 5 years, or both.
304G	Subsection 1021FB(2)	200 penalty units or imprisonment for 5 years, or both.
304H	Subsection 1021FB(3)	100 penalty units or imprisonment for 2 years, or both.
304I	Subsection 1021FB(6)	100 penalty units or imprisonment for 2 years, or both.

[the section 1012G oral statements requirements]

Topic 10—Amendments relating to the transition period for sections 1414, 1426 and 1428

- (T10A) Schedule 2, page 33 (after line 16), after item 103, insert:

103A Paragraph 1414(2)(b)

Repeal the paragraph, substitute:

- (b) conditions on the licence are varied or revoked, or additional conditions are imposed on the licence, pursuant to an application by the licensee under subsection 796A(2) of the amended Corporations Act;

[the transition period for sections 1414, 1426 and 1428]

- (T10B) Schedule 2, page 33 (after line 26), after item 104, insert:

104A Paragraph 1426(2)(b)

Repeal the paragraph, substitute:

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- (b) conditions on the licence are varied or revoked, or additional conditions are imposed on the licence, pursuant to an application by the licensee under subsection 825A(2) of the amended Corporations Act.

104B Paragraph 1428(2)(b)

Repeal the paragraph, substitute:

- (b) conditions on the licence are varied or revoked, or additional conditions are imposed on the licence, pursuant to an application by the licensee under subsection 825A(2) of the amended Corporations Act.

[the transition period for sections 1414, 1426 and 1428]

Topic 11—Amendments of the ASIC Act

(T11A) Schedule 3, page 35 (before line 4) before item 1, insert:

Australian Securities and Investments Commission Act 2001

1A Subsection 12AE(1)

After “subsection (2),” insert “Subdivision C (sections 12CA to 12CC),”.

1B Subsection 12AE(3)

After “provided by” insert “Subdivision C (sections 12CA to 12CC),”.

1C Subsection 12BAB(10)

Omit “not to be”, substitute “to be, or not to be”.

1D At the end of subsection 12BAB(10)

Add “Regulations made for the purposes of this subsection have effect despite anything else in this section.”.

1E Paragraph 127(4C)(a)

After “conducts”, insert “, or is involved in the supervision of”.

[amendments of the ASIC Act]