



**ASIC**  
Australian Securities &  
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Committee Secretariat  
Senate Standing Committees on  
Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

17 October 2018

Dear Committee Secretariat

The Australian Securities & Investments Commission (**ASIC**) welcomes the opportunity to provide its views to the Senate Economics Legislation Committee on the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Bill)*.

We have previously outlined our support for and feedback on the reforms in our response to the Government's consultation on the revised exposure draft of the Bill (**ED submission**)<sup>1</sup>. This submission provides an outline of the key points made in our ED submission, which sets out our position in greater detail.

We support the Government's commitment to:

- creating new design and distribution obligations in relation to financial products; and
- strengthening consumer protection by introducing a product intervention power for ASIC.

Both reforms represent a fundamental shift away from relying predominantly on disclosure to drive good consumer outcomes, and are central to realising the vision of the Financial System Inquiry (**FSI**) of promoting consumer trust in the system and fair treatment of consumers.

We are committed to implementing the new design and distribution obligations, which will overcome gaps in the current regulatory regime across the lifecycle of financial products and promote better, fairer outcomes for consumers, by encouraging:

- the development of financial products that are appropriately designed for the consumers for whom they are intended;

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<sup>1</sup> [ASIC submission](#), Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018.

- distribution processes and controls that reduce the chance that products will be issued to consumers for whose objectives, financial situations and needs they are not appropriate; and
- a dynamic and responsive process where product design and distribution are reviewed and improved in response to feedback and experience.

We also welcome the introduction of the product intervention power, which will better equip ASIC to respond to market problems that are causing or could cause significant harm to consumers.

The product intervention power will allow ASIC to temporarily intervene in a graded way up to, where necessary, banning financial and credit products. ASIC will be able to take action to address significant harm associated with a product, including in the product's design, features, disclosure or distribution.

During the development of the legislation and most recently, in our ED submission, we have said that ideally, coverage of both the design and distribution obligations and product intervention power could be expanded to further areas. Our views on coverage issues are outlined in further detail below.

Notwithstanding, we think the Bill is an important step towards implementing reforms that will significantly improve outcomes for consumers. On this basis, ASIC is committed to supporting the implementation of the legislation in its current form.

## **1. Design and distribution obligations**

### **1.1 Support for the design and distribution obligations - increased accountability for financial product issuers and distributors**

ASIC supports the introduction of the design and distribution obligations for financial products regulated under the *Corporations Act 2001* (**Corporations Act**). Through our regulatory work, we have identified specific consumer issues that are currently not well addressed due to gaps in the current regulatory regime, which relies heavily on disclosure. These issues include:

- products that are not well designed to provide utility (e.g. value for money) to many types of consumers;
- products that are only likely to be suitable for a limited class of consumers, but are distributed without appropriate targeting, making it likely that they will ultimately be sold well beyond the class of consumers for which they are suitable; and
- instances where the volume and types of complaints entities are receiving suggest the distribution process is not working effectively to align customers with suitable products, but no action is taken.

It has been recognised for some time that disclosure alone is not adequate to achieve fair consumer outcomes.<sup>2</sup> The FSI, in seeking to improve the fairness of the design and distribution process, recommended that product issuers and distributors take greater responsibility for the design and targeted distribution

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<sup>2</sup> For example, the FSI noted that disclosure alone is unlikely to correct the effect of broader market structures and conflicts that drive product development or distribution practices that result in poor consumer outcomes: The Australian Government the Treasury, *Financial System Inquiry: Interim Report*, report, July 2014, p. 3-57.

of products to promote positive consumer outcomes.<sup>3</sup> Noting the range of problems that had been seen across different types of products, the FSI's proposed model was to impose broad, but scalable obligations on issuers and distributors. This approach, which is being implemented in the Bill, is strongly supported and welcomed by ASIC.

### 1.2 Extending the obligations to credit products

We consider that there would be benefit to further broadening the application of the design and distribution obligations to credit products under the *National Consumer Credit Protection Act 2009* (**National Credit Act**). The Bill's Explanatory Memorandum explains that the reason for not applying these obligations to credit products is that such products are already subject to specific rules such as the responsible lending obligations.

As set out in our ED submission<sup>4</sup>, we consider that the responsible lending obligations and other consumer protections are not equivalent to, or an adequate substitute for, the proposed design and distribution obligations.

Whereas the new obligations focus on an entity having appropriate processes and controls in place for the design and distribution of a product, the responsible lending obligations are more limited to a focus on the immediate impact of a transaction on an individual consumer.

### 1.3 Extending the obligations to all products regulated by the ASIC Act

Our ED submission suggests that there is benefit to the design and distribution obligations applying more broadly to all ASIC Act products, rather than only financial products under the Corporations Act, as currently proposed by the Bill.<sup>5</sup>

Whilst most consumer financial products are regulated under Ch 7 of the Corporations Act and most consumer credit products are regulated under the National Credit Act, there are a number of products sold to consumers which are financial in nature, but which are not covered by or are exempted from those two pieces of legislation. They are only covered by the *Australian Securities and Investments Commission Act 2001* (**ASIC Act**), which provides broad general consumer protection through, for example, prohibitions on misleading or deceptive conduct and unconscionable conduct.

Nevertheless, these "ASIC Act only" products may be functionally equivalent to and directly substitutable for products that are regulated in detail (examples are: funeral expenses policies, some extended warranties and certain buy now pay later arrangements). In ASIC's experience, these ASIC Act only products can at times be a source of significant detriment to consumers. With changes in technology, it is likely that further substitute products will develop.

We think there would be benefit to the foundational framework set by the design and distribution obligations applying universally to all consumer

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<sup>3</sup> The Australian Government the Treasury, *Financial System Inquiry: Final Report*, report, 7 December 2014, p. 193.

<sup>4</sup> [ASIC submission](#), Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, pp. 14-19.

<sup>5</sup> [ASIC submission](#), Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, pp. 19-22.

products that are financial in nature. In turn, we think this would help address some instances of consumer detriment that we have seen in these areas.

#### **1.4 Extending coverage of the obligations to the establishment of a self-managed superannuation fund (SMSF)**

Our ED submission suggests that extending the design and distribution obligations to cover SMSF promoters (those who promote or arrange for the establishment of an SMSF) could have the potential to improve consumer outcomes.<sup>6</sup>

Our examination of the SMSF industry has identified concerns with consumers being encouraged or advised to open an SMSF when they only have a low balance, and do not properly understand the risks and ongoing costs involved.<sup>7</sup> Applying the design and distribution obligations to SMSFs, as a class of product, could address these issues by facilitating service providers of SMSFs promoting and recommending these products appropriately.

#### **1.5 Remedies**

We support the Bill providing private rights of action for most breaches of the design and distribution obligations. In our ED submission, we suggest that the regime could provide for a further private cause of action where an entity fails to make a target market determination.<sup>8</sup>

In addition, we have suggested that ASIC be given standing under the regime to seek compensation on behalf of affected consumers who are non-parties to the legal proceedings. This would be consistent with existing provisions of the ASIC Act.<sup>9</sup>

### **2. Product intervention power**

#### **2.1 Enhancing ASIC's regulatory toolkit**

The FSI recommended that ASIC be provided with a product intervention power to enhance its regulatory toolkit where there is a risk of significant consumer detriment.

The product intervention power will help us to:

- act more quickly and effectively to address the causes of problems in the market;
- reduce the number of consumers for whom the risks of a product are misaligned with their objectives, financial situation and needs; and
- facilitate informed decision making by consumers.

It will also provide us with a more timely and responsive regulatory tool than relying on legislation alone to address gaps in the current law.

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<sup>6</sup>ASIC submission, Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, pp. 23-25.

<sup>7</sup>ASIC Report 575 SMSFs: Improving the quality of advice and member experiences, June 2018.

<sup>8</sup>ASIC submission, Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, pp. 25-26.

<sup>9</sup> See s12GNB and 12GNC of the *Australian Securities and Investments Commission Act 2001*.

Accompanying the product intervention power are rigorous procedural and accountability requirements for ASIC. These include consultation requirements and public reporting. Further, to provide greater transparency, we will consult publicly on our approach to using the product intervention power after legislation is passed by Parliament.

## **2.2 Extending the scope of the power to all products regulated by ASIC**

As outlined above, there are consumer financial products and consumer credit products that are only regulated by the ASIC Act. For similar reasons to those set out above, we think there would be benefit to extending the scope of the product intervention power to include ASIC Act only products. In our regulatory experience, we have seen that these ASIC Act only products can be a source of harm for consumers.

We are very supportive of the Government's proposal to include some ASIC Act only products (i.e. funeral expenses products, certain extended warranties and short-term credit that is currently not regulated under the National Credit Act) within the scope of the product intervention power. We are also supportive of the Bill providing for additional products to be brought within scope of the power through regulations.

However, as outlined in our ED submission<sup>10</sup>, we think the more efficient route to achieving comprehensive coverage would be to include **all** ASIC Act products within the scope of the product intervention power from the outset. Without the broadest power, we may be limited in responding to emerging risks in an effective and timely way.

One example of a lightly regulated, but rapidly growing sector is the buy now pay later sector. Most buy now pay later arrangements would technically fall outside the scope of the product intervention power, despite these services being financial in nature.<sup>11</sup>

## **2.3 Removing the training limitation on the product intervention power**

Finally, we think that there is benefit in ASIC being able to use the product intervention power to require improvement to the training of staff.<sup>12</sup> Under the Bill, ASIC would generally be able make interventions relating to a product or class of products. However, we could not require a person to satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person by or under the Corporations Act (**training limitation**).

If the training limitation were removed, it would provide us with a useful, additional alternative to address identified consumer harm. In some cases, it could be the best possible solution to the problem. We acknowledge that with the training limitation in place, we may be able to find other ways to address the market problem. However, the form of the intervention could be blunter and more intrusive (such as, at the extreme end of the range, a product banning).

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<sup>10</sup> [ASIC submission](#), Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, p. 27-29

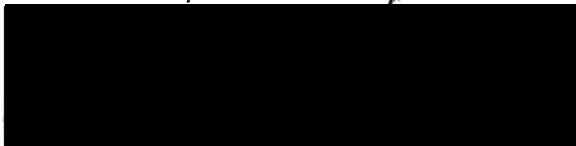
<sup>11</sup> [ASIC submission](#), Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, p. 28.

<sup>12</sup> [ASIC submission](#), Design and distribution obligations and product intervention power: Revised exposure draft legislation, August 2018, p. 29-31.

We envisage that any training intervention would be focussed on the poor practices which need to be improved in relation to the particular product involved, rather than being more general or involving the prescription of a particular training method or requirement.

We would be pleased to respond to any questions the Committee has in relation to this submission or on the Bill more generally.

Yours sincerely

A large black rectangular redaction box covering the signature of Greg Kirk.

Greg Kirk  
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ASIC