

5 November 2018

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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Members

Design and Distribution Obligations and Product Intervention Powers - Responses to Questions on Notice

Please find below our responses to questions on notice from the Committee's hearing on 31 October 2018 on the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (the Bill)*.

Transition period for the UK regime¹

The UK equivalent of the design and distribution obligations (**DADO**) regime is known as *The Responsibilities of Providers and Distributors for the Fair Treatment of Customers (RPPD)*.² The detailed obligations outlined in the RPPD were initially canvassed by the Financial Services Authority (**FSA**), now known as the Financial Conduct Authority, in a discussion paper released in September 2006. This discussion paper invited submissions on the respective regulatory responsibilities of providers and distributors to treat customers fairly.³ The Discussion Paper gave the FSA's view of the respective responsibilities of product providers and distributors under the existing Principles for Businesses (**the Principles**)⁴ during the product life-cycle. The FSA committed to do this in *Treating Customers Fairly – Building on Progress* (published in July 2005) and in the FSA Business Plan 2006/07.

After considering feedback in response to the Discussion Paper, the FSA released a publishing a revised Statement of responsibilities for providers and distributors (**the Statement**) as a Regulatory Guide. The

¹ Proof Hansard transcript, p. 3.

² https://www.handbook.fca.org.uk/handbook/document/RPPD_FCA_20130401.pdf

³ http://www.fsa.gov.uk/pubs/discussion/dp06_04.pdf

⁴ <https://www.handbook.fca.org.uk/handbook/PRIN.pdf>

Statement was released in July 2007, coming into effect on 16 July 2007. The FSA's aim was not to change the existing responsibilities on providers and distributors under the Principles, but to clarify these responsibilities.

The *Principles for Businesses Instrument 2001*, which implemented the Principles for which the Regulatory Guide clarified the responsibilities of providers and distributors, was released in June 2001⁵ and came into effect in September 2001.⁶

We reiterate our previous submissions that the proposed 24-month transition period for Australian firms is far too generous, particularly given that a similar regime has been in place in the UK for more than a decade. We strongly recommend a transition period of 12 months for existing products, and application from the date of Royal Assent for new products.

Exemption for ordinary shares

The Committee requested further details on our position relating to the proposed exemption from the DADO regime for ordinary shares in the Bill.⁷

Our position is that the DADO regime should apply to all financial products as defined in the *Australian Securities and Investments Commission Act 2001* (Cth). This means that, in principle, we consider that no type of equity or derivative product should be exempt from the DADO regime.

However, as a matter of pragmatism, we have accepted that some ordinary shares might be justifiably exempted to ease the time and cost burden of raising capital in Australian listed equity markets. Nevertheless, we consider that the proposed exemption for all ordinary shares is too broad. Instead, we recommend that the exemption be limited to ordinary shares listed on the ASX. We do not consider it appropriate for companies using small alternative exchanges in Australia to take advantage of the exemption – ASIC has highlighted problems with some such capital raisings in the past.

Preference shares, exchange-traded options and warrants are not ordinary shares, and therefore would not fall within the proposed exemption. We consider that this is appropriate, and do not support extending the exemption for ordinary shares to these products. We also strongly support the anti-avoidance provisions relevant to this exemption.

⁵ https://www.handbook.fca.org.uk/instrument/2001/2001_2.pdf

⁶ <http://www.legislation.gov.uk/uksi/2001/2632/made>

⁷ Proof Hansard transcript, p. 8.

Other

We would also like to clarify our response relating to Afterpay's position on the application of the product intervention power (**PIP**) and DADO regimes.⁸ Our understanding is based on a recent article in the Australian Financial Review⁹ reporting that Afterpay has supported the application of the PIP regime to the buy now pay later sector. We are unaware of any reports on Afterpay's position on the application of the DADO regime.

Your sincerely

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⁸ Proof Hansard transcript, p. 4

⁹ <https://www.afr.com/business/banking-and-finance/financial-services/afterpay-backs-asic-product-intervention-powers-20181017-h16rez>

