

# Chapter 2

## Views on the bill

### General comments on the bill

2.1 Most contributors to the inquiry generally welcomed the bill.

2.2 A joint submission from consumer groups supported the reforms as a fundamental shift away from reliance on disclosure as the chief protection for consumers.<sup>1</sup> The legislation is seen as a move towards a 'product safety' approach, where the focus is on getting the design and distribution right rather than addressing individual detriment after the event.<sup>2</sup>

2.3 Allianz Australia Insurance Limited noted that the bill deals with important matters that the company has already started to incorporate in its business.<sup>3</sup> The Australian Banking Association recognised the limitations of disclosure and supported the intention of the design and distribution obligations.<sup>4</sup>

2.4 However, some submissions were highly critical. The Financiers Association of Australia described the bill as 'Orwellian', argued that it would merely add complexity and lacked clarity, and noted that 'ASIC already has immense powers but doesn't use them.'<sup>5</sup> The National Insurance Brokers Association expressed concern that consumers might identify themselves as falling within a target market and have a false sense that they were protected, and that the changes would result in less innovation, greater complexity and less competition.<sup>6</sup> The Finance Industry Delegation opened its submission with

This proposed legislation is a major concern—providing ASIC with autocratic and uncontrolled power to intervene in the marketplace.<sup>7</sup>

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1 Australian Shareholders Association, CHOICE, Care inc. Financial Counselling Service and Consumer Law Centre ACT, Consumer Credit Law Centre SA, Consumer Credit Legal Service WA, Consumer Action Law Centre, Consumers' Federation of Australia, COTA Australia, Financial Counselling Australia, Financial Rights Legal Centre (hereinafter referred to as Consumer Groups), *Submission 2*, p. 2.

2 Ms Katherine Temple, Senior Policy Officer, Consumer Action Law Centre, *Committee Hansard*, 31 October 2018, p. 5; Mr Greg Kirk, Senior Executive Leader, Strategy Group, ASIC, *Committee Hansard*, 1 November 2018, p. 23; Mr John Anning, General Manager, Regulatory Policy, Insurance Council of Australia, *Committee Hansard*, 31 October 2018, p. 20.

3 Allianz Australia Insurance Limited, *Submission 5*, p. 2.

4 Australian Banking Association, *Submission 13*, p. 1.

5 Financiers Association of Australia, *Submission 7*, p. 9.

6 National Insurance Brokers Association, *Submission 11*, covering letter and p. 3.

7 Finance Industry Delegation, *Submission 15*, p. 1.

2.5 The Finance Industry Delegation further argued that the objectives of the bill, as far as they related to credit products, could be met by simple amendments of the Credit Code.<sup>8</sup>

### Scope

2.6 Several submissions and witnesses argued that the scope of the bill should be expanded as the proposed legislation did not cover what had been envisaged by the Financial System Inquiry (FSI).<sup>9</sup> The Australian Institute of Superannuation Trustees (AIST) believed that there were too many exclusions and that this weakened the legislation.<sup>10</sup> Consumer Groups argued that exemptions and carve-outs cause complexity, which makes it more difficult to apply the laws.<sup>11</sup> ASIC argued that the bill envisaged a base level environment of protections and, as such, should have as broad coverage as possible.<sup>12</sup>

2.7 ASIC and consumer groups called for the bill to cover all products regulated by ASIC.<sup>13</sup> This would mean that the design and distribution obligations would cover credit products, buy-now-pay-later products, and products that are substitutes for products regulated under the Corporations Act and the Credit Act.

2.8 The Australian Banking Association noted that the distribution of credit products is different from other financial products:

...when a credit product is sold, there's an individual suitability test at the point of sale and in relation to any credit limit increases. So the customer's actual circumstances are taken into account by the credit issuer and any intermediary as part of that process...<sup>14</sup>

2.9 ASIC also argued that the scheme should cover self-managed superannuation funds (SMSFs).<sup>15</sup> The SMSF Association disagreed:

We believe that the obligations may be impractical and onerous as determining a class of potential SMSF trustees would be difficult given that

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8 Mr Phillip Smiles, Co-ordinator, Finance Industry Delegation, *Committee Hansard*, 31 October 2018, p. 14.

9 Consumer Groups, *Submission 2*, p. 2; Dr Nicholas Coates, Head, Research and Campaigns, Industry Super Australia, *Committee Hansard*, 1 November 2018, p. 11.

10 Mr David Haynes, Australian Institute of Superannuation Trustees (AIST), *Committee Hansard*, 1 November 2018, p. 15.

11 *Hansard*, 31 October 2018, p. 3.

12 Mr Greg Kirk, Senior Executive Leader, Strategy Group, Australian Securities and Investments Commission, *Committee Hansard*, 1 November 2018, p. 24.

13 Australian Securities and Investments Commission (ASIC), *Submission 4*, pp.3–4; Consumer Groups, *Submission 2*, p. 4.

14 Miss Christine Cupitt, Executive Director, Policy, Australian Banking Association, *Committee Hansard*, 1 November 2018, p. 9.

15 Australian Securities and Investments Commission (ASIC), *Submission 4*, p. 4.

SMSFs can be suitable for individuals in a wide variety of circumstances. The decision to establish an SMSF is contingent on a person's individual traits and circumstances. This makes it difficult to describe a narrow 'target market' for which SMSFs are a suitable superannuation vehicle.<sup>16</sup>

Treasury argued that it would be inappropriate to include SMSFs because the design and distribution obligations require the issuer to determine a class of consumers, whereas a person designs an SMSF and in effect is 'selling it to themselves'.<sup>17</sup>

2.10 There was some debate about the application of the bill to new products and therefore the exclusion of 'legacy'—that is, already existing—products.<sup>18</sup> However, ASIC pointed out that this exclusion applies only to the design and distribution obligations. They would still be subject to product intervention orders if they were causing consumer detriment.<sup>19</sup> This feature, that a product that is on sale quite legally could still be subject to such an order, was strongly objected to by the Financial Industry Delegation.<sup>20</sup>

2.11 Consumer representatives noted that the FSI (and since then the Hayne Royal Commission interim report and the Productivity Commission report on competition in the Australian financial system) had assumed that personal advice would be included. They pointed out that the exclusion of personal financial advice and products sold consistent with such advice could rule out whole classes of product, such as timeshare arrangements, which are marketed only in that way.<sup>21</sup>

2.12 The Financial Planning Association of Australia welcomed the exclusion of financial advice and associated dealing. Its view is that including it in the design and distribution obligations could have hindered the requirement to act in the best interest of the client.<sup>22</sup> ASIC suggested that if both personal advice obligations and design and distribution obligations applied to the same transaction there could be tension between them. If there was a problem with the quality of personal advice, it should be fixed separately.<sup>23</sup>

2.13 Industry Super Australia argued there should be no 'carve-outs', suggesting that they had been made to meet the needs of product issuers rather than consumers.<sup>24</sup>

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16 SMSF Association, *Submission 17*, p. 1.

17 Ms Kate O'Rourke, Principal Adviser, Consumer and Corporations Policy Division, The Treasury, *Committee Hansard*, 1 November 2018, p. 35.

18 For example, Mr David Haynes, Australian Institute of Superannuation Trustees (AIST), *Committee Hansard*, 1 November 2018, p. 16, p. 17.

19 ASIC, *Committee Hansard*, 1 November 2018, p. 24.

20 Mr Phillip Smiles, *Committee Hansard*, 31 October 2018, p. 15.

21 Ms Katherine Temple, *Committee Hansard*, 31 October 2018, p. 4; Ms Erin Turner, Director, Campaigns and Communications, CHOICE, *Committee Hansard*, 31 October 2018, pp. 2–3; Consumer Groups, *Submission 2*, p. 4.

22 Financial Planning Association of Australia, *Submission 6*.

23 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 25.

24 Industry Super Australia, *Submission 17*, p. 1; Industry Super Australia, *Submission 17*, p. 3.

The Australian Institute of Superannuation Trustees (AIST) suggested that best practice in consumer protection starts with product manufacturers. In this industry these would include investment managers and product providers who provide information to platforms; and they are exempted.<sup>25</sup>

2.14 An argument for exempting some products is that they are already regulated elsewhere. ASIC and Industry Super Australia argued that the purpose and therefore the obligations under the separate regulation were different, and that there should be no incompatibility between the different types of regulation.<sup>26</sup> Ms Turner of CHOICE said:

The best-interest duty is an important obligation, but it doesn't remove the need for the design and distribution obligation to cover as much of the market as possible, including financial advice.<sup>27</sup>

2.15 Treasury argued that the existing regime of responsible lending obligations had the same regulatory goal as this bill: to assess whether a particular product is suitable for a consumer. There was no need to have both.<sup>28</sup>

2.16 On the other hand, there were calls for a number of products and classes of products to be left out of the new arrangements.

2.17 UniSuper argued that defined benefit superannuation schemes should be omitted: it is not a conventional financial product but rather a trustee managing deferred remuneration and membership is not purchased but conferred automatically by virtue of employment.<sup>29</sup> It appears that such schemes will be excluded under the regulations, drafts of which were recently published.

2.18 The Customer Owned Banking Association suggested that simple deposit products are common and well understood.<sup>30</sup> The Australian Banking Association also argued that basic deposit products, including transaction accounts, term deposits, and savings accounts should be left out. They are generally suitable for most consumers and do not carry significant investment risk.<sup>31</sup> However consumer representatives and ASIC suggested that such accounts may attract fees and there had been many examples of consumers, particularly those on low incomes, being disadvantaged because the industry did not market its lowest cost accounts to them.<sup>32</sup>

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25 Australian Institute of Superannuation Trustees (AIST), *Submission 12*, p. 2.

26 ASIC, *Submission 4* p. 3; Industry Super Australia, *Submission 17*, p. 3.

27 Ms Erin Turner, *Committee Hansard*, 31 October 2018, p. 5.

28 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 35.

29 UniSuper, *Submission 1*.

30 Customer Owned Banking Association, *Submission 3*, pp. 1–3.

31 Miss Christine Cupitt, *Committee Hansard*, 1 November 2018, p. 7.

32 Ms Erin Turner, *Committee Hansard*, 31 October 2018, p. 7; Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 22.

2.19 Ms O'Rourke of Treasury also referred to consumer detriment associated with basic banking products. She noted that the regulatory requirements are scalable, that is, a simple product requires only simple measures for compliance, so that including them in the legislation should not be onerous.<sup>33</sup>

2.20 It was also suggested that 'commoditised' insurance products need not be included.<sup>34</sup>

2.21 Insurance groups raised the issue of packaged products which might include, say, home insurance and product liability, or insurance within a superannuation product. They noted that it was not clear how the retail component would be separated from the other components, given there is a single product disclosure statement.<sup>35</sup>

2.22 There was concern that the bill would apply the design and distribution obligations to renewals of policies which would formerly have been automatic. This would involve unnecessary (possibly large) costs and could lead people to drop policies and be left underinsured.<sup>36</sup> The same concern was expressed with respect to rollovers of term deposits.<sup>37</sup>

2.23 ASIC noted that each renewal was contractually a new product, so that it was appropriate to have some scrutiny.<sup>38</sup> Several submitters and witnesses pointed out that the industry had relied on the 'set and forget' approach and general inertia of consumers to take advantage of automatic renewals.<sup>39</sup> ASIC noted that a 'low-friction' solution was desirable, as there could be a trade-off between protection for consumers and overall outcomes.<sup>40</sup>

2.24 There was some discussion of whether an inquiry into a consumer's circumstances for the purpose of determining if they were in the target market might be construed as financial advice.<sup>41</sup> ASIC noted that it was aware of the issue and of the need for guidance on it.<sup>42</sup>

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33 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, pp. 30–1.

34 National Insurance Brokers Association, *Submission 11*, p. 11.

35 Allianz, *Submission 5*, p. 4; National Insurance Brokers Association, *Submission 11*, p. 4.

36 Allianz, *Submission 5*, p. 8; Insurance Council of Australia, *Submission 9*, p. 2; Mr John Anning, General Manager, Regulatory Policy, Insurance Council of Australia, *Committee Hansard*, 31 October 2018, p. 22, p. 23; National Insurance Brokers Association, *Submission 11*, p. 5.

37 Miss Christine Cupitt, *Committee Hansard*, 1 November 2018, p. 8.

38 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 23.

39 For example, Ms Katherine Temple, *Committee Hansard*, 31 October 2018, p. 7.

40 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 21.

41 For example, Mr Jon Ireland, Partner, Norton Rose Fulbright, Financial Services Council, *Committee Hansard*, 1 November 2018, p. 3; Ms Christine Cupitt, Australian Banking Association, *Committee Hansard*, 1 November 2018, p. 6, p. 9.

42 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 21.

2.25 AustralianSuper and the Law Council suggested tightening the definition of 'retail product distribution conduct' so that it does not apply if the person has already acquired the product. Otherwise, a range of legitimate activities, such as varying an interest or refreshing a product disclosure statement or giving general advice to a member, could fall within the definition.<sup>43</sup>

2.26 The Australian Timeshare and Holiday Ownership Council noted that Timeshare products involve the issue of new interests in existing products. It would be detrimental to investors if ASIC's product intervention power could prevent the issue of new interests.<sup>44</sup>

2.27 Treasury noted that the bill has been drafted deliberately with a step-by-step approach:

The approach that has been adopted instead [of extending coverage to all products covered by the ASIC Act] is to have regulation-making power which allows particular product classes to be brought into the product intervention power or the design and distribution obligations regime if it has been established that they are suitable—that is, if it is appropriate to extend it.<sup>45</sup>

### ***Committee view***

2.28 The committee understands that this bill takes a different approach to consumer protection in the financial services industry, demanding that issuers and distributors of products take responsibility for marketing appropriate products. It appreciates that there are a range of views on whether certain products should be ruled in or out of the legislation.

2.29 The committee notes that draft regulations with the effect of including and excluding specific products have already been published. It believes that this step-by-step approach is appropriate, and that the industry must be ready for continual refinement of the bill.

2.30 The committee is of the view that there can be a conflict between complete consumer protection and maximising consumer benefits. The question of automatic renewals and rollovers illustrates this trade-off. The committee believes that they should be within the scope of the bill, but that rules governing them should be scaled to the risk to consumers involved in the product.

### **Content of target market determinations and product intervention orders**

2.31 Allianz, the Insurance Council of Australia, and the National Insurance Brokers Association all complained that there was too little guidance as to how the target market is to be defined. The market for motor vehicle insurance might be anyone who owns a car; or specific features of a particular policy might apply to

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43 AustralianSuper, *Submission 16*, p. 1; Law Council of Australia, *Submission 18*.

44 Australian Timeshare and Holiday Ownership Council, *Submission 10*, p. 2.

45 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 33.

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people who want comprehensive insurance, or only third party property insurance.<sup>46</sup> AIST also called for more detail on what should be considered in determining target markets to be included in the bill.<sup>47</sup>

2.32 The National Insurance Brokers Association noted that there was also a location specific element to many insurance policies and it would be difficult to deal with that in the new arrangements.<sup>48</sup>

2.33 Industry Super Australia argued that the TMD should also include a statement of non-target groups:

Non-target markets are important because they make product issuers responsible for working out who the product shouldn't be sold to (for example, vulnerable consumers, people who are likely to be not eligible, or unable to use or claim on the product, or consumers that the product might do harm to.)<sup>49</sup>

2.34 AIST also believed identification of a non-target market was necessary. It would force the product issuer to think about the borderline of its market, rather than defining it as broadly as possible.<sup>50</sup>

2.35 Ms O'Rourke of Treasury argued that a definition of a target market is equivalent to defining a non-target market: the non-target was everyone who was not in the target market. If it were not so, there would be a group in the middle. Having to identify both markets (target and non-target) would create a complex system with two sets of rules and less clarity. Further, it was not a simple binary division, as there would be some people for whom a product might not really work, but for whom it might not be damaging.<sup>51</sup>

2.36 ASIC suggested that there would be benefit in being able to use the product intervention power to improve the training of staff. In some cases this would be the best intervention.<sup>52</sup> Many cases of inappropriate sales could be attributed to the sales staff's not understanding the product.<sup>53</sup> Sometimes most of the training that is supplied is about 'how to sell the product and overcome consumer objections', and it might be useful to be able to direct a better balance.<sup>54</sup>

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46 Allianz, *Submission 5*, p. 2; Insurance Council of Australia, *Submission 9*, p. 2; National Insurance Brokers Association, *Submission 11*, p. 4.

47 Dr Nicholas Coates, *Committee Hansard*, 1 November 2018, p. 15.

48 National Insurance Brokers Association, *Submission 11*, p. 8.

49 Industry Super Australia, *Submission 17*, p. 2.

50 Mr David Haynes, *Committee Hansard*, 1 November 2018, p. 15.

51 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 31, p. 32.

52 ASIC, *Submission 4*, p. 5.

53 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 26.

54 Mr Christian Mikula, Senior Specialist, Deposit Takers Credit and Insurance, ASIC, *Committee Hansard*, 1 November 2018, p. 26.

2.37 Consumer representatives agreed that ASIC should be able to intervene on training, and further noted that it should be able to make orders with regard to remuneration, because remuneration had driven some of the worst practices that had been uncovered in the industry.<sup>55</sup>

2.38 Treasury's view was different. It believed that the intervention had to be associated with the product itself, not the business:

...how companies or financial services firms run their business, train their staff, hire them and pay them—all of those things are business decisions. If the consequence is that they have a product which causes damage, absolutely, ASIC can intervene in relation to that product, but going beyond that is stepping inside a business.<sup>56</sup>

### ***Committee view***

2.39 The committee appreciates that industry does not yet know what the rules about content of target market determinations will be, but observes that ASIC cannot publish guidance before the legislation is in place.

2.40 The committee understands the argument that the regime applies to products, not firms, and therefore intervention in management issues may not be appropriate. On the other hand, the history of bad practices in the finance industry may suggest that orders relating to training and remuneration may be valuable in securing good outcomes for consumers.

2.41 The committee urges the government to maintain a watching brief on the efficacy of the Act. If it appears to be falling short, consideration should be given to extending ASIC's power to making orders dealing with training and remuneration.

### **Reviews of target market determinations**

2.42 AIST made a number of suggestions as to the timing and content of reviews of target market determinations. It noted that there is insufficient guidance as to what events or circumstances might trigger a review. It pointed out that the concept of 'target market' suggests that the review should include examining product take-up rates and consumer outcomes.<sup>57</sup>

### **Information**

2.43 Consumer representatives suggested that leaving the definition of the information requirements to the issuer could lead to greater regulatory burdens, and that ASIC should prescribe additional minimum requirements.<sup>58</sup>

2.44 The National Insurance Brokers Association expressed concern that the information required in the TMD could breach commercial confidentiality. The

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55 Ms Erin Turner, *Committee Hansard*, 31 October 2018, p. 6.

56 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 36.

57 AIST, *Submission 12*, p. 2.

58 Ms Katherine Temple, *Committee Hansard*, 31 October 2018, p. 5.

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reporting requirements, especially with regard to the provision of personal advice, could breach confidentiality and could cause conflicts of interest.<sup>59</sup>

2.45 The Australian Banking Association called for guidance as to digital record keeping.<sup>60</sup> Allianz noted that record keeping is costly; Industry Super Australia, however, argued that with modern information technology there is little added cost.<sup>61</sup>

2.46 Treasury noted that the information requirements are flexible and scalable. The detail that needs to be recorded varies with the risk of the product.<sup>62</sup>

## Consultation

2.47 Several submitters argued that the requirements for ASIC to consult were inadequate. The Australian Timeshare and Holiday Ownership Council thought that ASIC's consultation before making product intervention orders should at least require ASIC to notify the person to whom the order will apply.<sup>63</sup> The Financial Services Council also suggested that there should be provision for ASIC to consult privately with those affected before making a product intervention order.<sup>64</sup>

2.48 The Finance Industry Delegation was of the view that the bill gives ASIC extraordinarily wide discretion and allows it to make subjective judgements; such consultation as the bill requires can be public rather than specifically with those affected; and ASIC's record was that they generally did not consult.<sup>65</sup>

2.49 The Finance Industry Delegation also objected to the lack of Parliamentary scrutiny on ASIC, as stop orders and product intervention orders applying to specific persons and products are not legislative instruments. It considered that the orders should be regulations.<sup>66</sup>

2.50 On the other hand, consumer representatives pointed out that the UK regime on which this legislation is, to some extent, modelled allows for the authorities to intervene summarily, but requires them to consult after issuing a product intervention order. They point to the 'need for a regulator to move as fast as industry does' in the case of consumer detriment.<sup>67</sup>

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59 National Insurance Brokers Association, *Submission 11*, p. 6, p.10.

60 Australian Banking Association, *Submission 13*, p. 5.

61 Allianz, *Submission 5*, p. 10; Industry Super Australia, *Submission 17*, p. 11.

62 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 30.

63 Australian Timeshare and Holiday Ownership Council, *Submission 10*, p. 4.

64 Financial Services Council, *Submission 14*, p. 5.

65 Finance Industry Delegation, *Submission 15*, p. 5; Mr Phillip Smiles, *Committee Hansard*, 31 October 2018, p. 13.

66 Finance Industry Delegation, *Submission 15*, p. 1.

67 Ms Erin Turner, *Committee Hansard*, 31 October 2018, p. 6.

2.51 ASIC notes that it will in fact be accountable:

The new power that's being introduced will have rigorous procedural and accountability requirements for ASIC. We think that's appropriate. ASIC will be required to consult on the use of its power and to report on why it was appropriate to intervene.<sup>68</sup>

***Committee view***

2.52 The committee believes that the legislation strikes an appropriate balance between the right of industry participants to be consulted and the occasional need for swift action to prevent detriment to consumers.

**Enforcement**

2.53 Submissions did not include much comment on penalties, but the Australian Banking Association argued that some were too harsh. For example, failing to make a target market determination public should not attract a criminal penalty.<sup>69</sup>

2.54 ASIC suggested that there should be a civil offence for failing to make a target market determination, so that individuals have a right to take action.<sup>70</sup> At present, such a failure is a criminal offence only.

2.55 ASIC also suggests that it should be given standing under the regime to seek compensation for consumers who are not party to legal proceedings. This would be consistent with existing provisions in the ASIC Act.<sup>71</sup>

**Transition and costs**

2.56 The Customer Owned Banking Association suggested that the cost of implementing the measures would dampen product and service innovation. It would also reduce competition, because smaller organisations had fewer operations over which they could spread costs.<sup>72</sup>

2.57 Several submissions, including those of Allianz and the Financial Services Council, suggested that the transition period should be at least three years. The Financial Services Council's submission provided a timeline setting out the time it believed would be required for implementation.<sup>73</sup>

2.58 Mr Anning of the Financial Services Council pointed to the system changes that would be needed across the industry. He noted that no one could begin to work on them until they had seen ASIC guidance, which in turn could not be issued before the

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68 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 20.

69 Australian Banking Association, *Submission 13*, p. 4.

70 ASIC, *Submission 4*, p. 4.

71 ASIC, *Submission 4*, p. 4.

72 Mr Tommy Kiang, Senior Policy Manager, Customer Owned Banking Association, *Committee Hansard*, 31 October 2018, pp. 11–12.

73 Allianz, *Submission 5*, p. 3; Financial Services Council, *Submission 14*, p. 2 and timeline at Attachment 2.

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legislation was passed. He said that the corresponding reforms in the UK had been implemented over three-and-a-half years.<sup>74</sup> However the AIST believed that two years was an appropriate transition period.<sup>75</sup>

2.59 Mr Kirk of ASIC noted that many firms in the industry, knowing that these reforms were coming, have already begun to work in the new ways. He estimated that it will take 'a few months' to produce guidance for the industry.<sup>76</sup>

### ***Committee view***

2.60 The committee believes that the implementation period is adequate, given the long time that has elapsed since the government indicated that it would legislate along these lines.

### **Scrutiny of Bills Committee**

2.61 The Senate Committee for the Scrutiny of Bills examined the bill and commented that allowing ASIC to exempt persons or products or to declare that persons or products are covered by the bill is in effect to allow delegated legislation to modify the operation of primary legislation. These are 'Henry VIII' clauses, and:

...such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive.<sup>77</sup>

2.62 The Scrutiny of Bills Committee noted the provisions match other powers ASIC has with regard to disclosure, and that the intention was to allow ASIC to tailor the new regime. Treasury reiterated this, and said that a step-by-step approach to developing the regulatory regime was envisaged.<sup>78</sup> However, the Committee does not consider that administrative flexibility is sufficient justification for broad delegations of legislative power.

2.63 It is also concerned that the bill does not impose limits or conditions on the powers. It further notes that specific consultation obligations are not set out in the bill.<sup>79</sup> Treasury noted that there are limits set out in the bill—for example, that interventions cannot reach inside the firm—and that consultation processes are also indicated.<sup>80</sup>

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74 Mr John Anning, *Committee Hansard*, 1 November 2018, p. 2, p. 3.

75 Mr David Haynes, *Committee Hansard*, 1 November 2018, p. 17.

76 Mr Greg Kirk, *Committee Hansard*, 1 November 2018, p. 21.

77 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12/18*, 17 October 2018, p. 51.

78 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 34.

79 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12/18*, 17 October 2018, pp. 50–52.

80 Ms Kate O'Rourke, *Committee Hansard*, 1 November 2018, p. 34.

**Recommendation 1**

**2.64 The committee recommends that the bill be passed.**

**Senator Jane Hume  
Chair**