



23 February 2018

Manager  
Financial Services Unit  
Financial System Division  
The Treasury  
Langton Crescent  
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By email: [productregulation@treasury.gov.au](mailto:productregulation@treasury.gov.au)

Dear Financial Services Unit Manager,

## **Exposure Draft of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (“Exposure Draft”)**

We thank you for the opportunity to comment on the Exposure Draft. Please accept our apology for this late submission.

### **About BMW Australia Finance**

BMW Australia Finance Ltd (**BMWAF**) is an Australian Credit Licence (**ACL**) holder. Its principal activities are the provision of retail and wholesale financing facilities in respect of mainly prestige motor vehicles.

BMWAF would like to comment on the proposed inclusion of new Part 6-7A in the National Consumer Credit Protection Act 2009.

### **Submission 1: seek guidelines concerning causation of consumer detriment**

Under proposed subsections 301C(1) and (2), ASIC may exercise its product intervention powers if ASIC is satisfied that a person is engaging or likely to engage in a credit activity in relation to a credit product or class of credit products (actual or proposed products) that has resulted in or will, or is likely to, result in significant detriment to consumers.

Proposed subsection 301D provides guidance as to when consumer detriment may be significant.

However, nothing in the Exposure Draft offers guidance on the preliminary issue, namely: what ASIC must take into account in deciding whether a product or class of products has/will/is likely to result in – or be the cause of – the detriment.

For instance:

- What if there is more than one possible cause of the detriment – how will ASIC determine if the detriment has ‘resulted from’ the product?
- To what degree is ASIC required to try to understand the product – and thereby be in a better position to identify if the cause of the detriment is the product itself or, for instance, the way it is sold or explained to the consumer?
- To what degree is ASIC required to try to understand the particular demographic to whom the product appeals – and thereby be in a better position to identify if the cause of detriment is the product or particular attributes associated with that demographic?

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- Most importantly, the concepts of ‘detriment from credit product’ and ‘specified conduct’ (being conduct that is the subject of these orders) are intertwined under s310C(1) and (3). To what degree is ASIC required to take the credit product or class into account in determining the cause of the detriment, or can ASIC merely focus on the conduct as the primary cause of consumer detriment in making these orders?

We submit that appropriate guidance would benefit not only participants in the market but also, ASIC itself, by giving more certainty to how the legislation is intended to operate.

**Proposition 2: clarify the inter-relationship between conduct and product**

Proposed s301C deals with the pre-conditions that must be satisfied for ASIC to make product intervention orders – which by the terms of s301C(1)(c),(e) & (e) and s301C(3)(c),(d) & (e) are truly orders to a person engaging in a “credit activity” to not engage in “specified conduct” in respect of a product or class. In light of this, to describe these orders as “product intervention orders” could be seen as a misnomer.

Our concern is that contextually – given that so much of s301C concerns conduct, credit activities, behaviour – s301C(1)(b) and 301C(3)(b) are construed to permit the conduct/credit activity (and not necessarily the product or class or products) to be the cause of the detriment. We seek more guardrails against this happening, for instance, for it to be made clear that where it is truly the “credit activity” that is being conducted unsuitably, a “product intervention order” is not available.

Alternatively, if the legislature wishes to extend the ambit of these product intervention orders to unsuitable conduct, that they be called “conduct intervention orders” instead.

**Proposition 3: clarify the situations when disclosure under NCC is not sufficient**

Under proposed s301D(3), ASIC may make a product intervention order even if the disclosure requirements in the NCC have been complied with in respect of the credit product.

Product designers often respond to gaps, challenges or desired outcomes in the market. If ASIC intends to capture new products such as these – for instance, the innovation and risks brought into the retail customer space by foreign exchange contracts, decades ago – we consider a subsection along the lines of s301D(3) to be appropriate.

However, in respect of credit products that are not new or innovative, we submit that proposed s301D(3) could have the feel of “moving the goalposts”. We accordingly ask that the intent and ambit of this proposed subsection is made clearer, so that it does not have the potential consequence of subjecting a credit product (or class) that is already heavily regulated to the burden of potential non-compliance or uncertainty, despite complying with all applicable disclosure requirements under the NCC. Again, including some guidelines as to what ASIC must take into account would assist.

We thank you for considering our submissions.

If you have any queries, please do not hesitate to contact our Legal Department at [legal\\_au@bmwfinance.com.au](mailto:legal_au@bmwfinance.com.au).

Yours faithfully

BMW Australia Finance Limited