

15 August 2018

Manager
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: ProductRegulation@treasury.gov.au

Dear Consumer and Corporations Policy Division Manager

Revised draft legislation for Design and Distribution Obligations and Product Intervention Power

Thank you for the opportunity to provide comment on the revised exposure draft Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (**the revised Bill**).

Legal Aid NSW continues to strongly support the introduction of the Design and Distribution Obligations (**DDO**) and Product Intervention Power (**PIP**) for the reasons outlined in our previous submissions. Our comments below relate to the following matters raised by the revised Bill:

1. Application of DDOs to regulated and unregulated credit products
2. Accessibility of remedies for consumers for breaches of DDOs
3. Notification to ASIC
4. Extension of coverage of PIPs
5. Length of PIPs.

For ease of reference, we have attached our letter to Treasury, dated 13 February 2018 about the earlier exposure draft as **Annexure A**. Where our comments remain unchanged we refer to the discussion set out in our earlier submission.

Design and Distribution Obligations

- 1. The obligations should apply to credit, including unregulated credit and financial products not regulated under the Corporations Act**

Legal Aid NSW remains concerned about the exclusion of regulated and unregulated credit products from the Design and Distribution Regime.

The Design and Distribution regime as currently framed applies only to financial products as defined by Division 3 of Chapter 7 of the *Corporations Act 2001* (**Corporations Act**). This definition does not extend to:

- regulated credit products
- unregulated credit products, and
- financial products not regulated under the Corporations Act.

We maintain, as per the discussion set out in our letter to Treasury dated 13 February 2018, that there are still strong reasons for preferring an adoption of the definition of financial product at section 12BAA of the *ASIC Act 2001* (**ASIC Act**). This would ensure consistency across financial services and avoid confusion created by relying on multiple definitions of “financial product”.

We understand that the Government considers that applying DDOs to regulated credit products would create overlap with responsible lending obligations under the *National Consumer Protection Credit Act 2009* (**Credit Act**) and cause confusion for consumers. Legal Aid NSW does not agree with this analysis because:

- DDOs regulate product offerings at a market level
- DDOs are a form of early intervention aimed at preventing sales to unsuitable consumers before point of sale, and
- Consumer confusion is more likely to be caused by the regulatory gap created by the proposed regime.

While the Design and Distribution regime can be extended to other financial products through regulation, Legal NSW sees it as a missed opportunity not to establish a comprehensive DDO regime from the outset.

In the event that the Government maintains the view that the exclusion of regulated credit is justified, Legal Aid NSW recommends, at a minimum, the inclusion of unregulated credit through the regulations. Failure to do this would leave a large regulatory gap where consumers do not benefit from DDOs at a market level or responsible lending at an individual level. For consistency between the DDO and PIP regimes, Legal Aid NSW would submit that all three extensions considered within the context of the PIP should be included in DDO coverage.

2. Target market determinations should be publicly available *and* readily accessible

Legal Aid NSW supports the requirement to provide target market determinations to the public free of charge. We agree that this assists in resolving evidentiary problems associated with establishing non-compliance with target market determinations.

However, from a practical point of view, in order to assist consumers, distributors and ASIC, the obligation should also extend to making the target market determinations readily accessible. This would ensure these determinations are not buried in long standard form policy documents or within the issuer's website and that the issuer turns their mind to accessibility requirements for vulnerable consumers including those without access to internet.

3. The obligation to make target market determinations publicly available should be extended to distributors

As the revised Bill currently reads, the obligation to make a target market determination publicly available is limited only to the product issuer. For many consumers, they may not be able to distinguish between the product issuer and the product distributor. Moreover, the consumer is more likely to have a direct relationship with the product distributor rather than the issuer.

Legal Aid NSW recommends that the obligation should be extended to distributors. This would ensure that lines of communication are established between issuer and distributors and, as a result, that the DDO regime operates more effectively overall.

4. Consumers should have access to redress where a product is sold as a result of an inappropriate target market determination

The Exposure Draft Explanatory Memorandum sets out four design obligations and five distribution obligations for product issuers and distributors. We acknowledge that amendments to Schedule 1, clause 994M of the revised Bill do give consumers broader rights to commence civil action for losses as a result of the contravention of clauses 994C, 994D or 994E(1) or (3), eg where a target market determination is not reviewed as required. However, these remedies do not extend to losses arising from an inappropriate target market determination in the first instance.

We refer to the discussion contained in our letter to Treasury dated 13 February 2018 and our recommendation to extend avenues available for consumer redress where a product is sold as a result of an inappropriate target market determination.

The accessibility of civil remedies is also contingent upon a consumer being able to particularise his/her loss. The test for setting a target market determination is set out in Schedule 1, clause 994B(8)(b) in the following terms:

To a retail client in the target market – (a financial product) would likely be consistent with the likely objectives, financial situation and needs of the retail client.

In its current formulation, the language is confusing and would be difficult for a consumer (or even industry) to understand what test they have to meet. It is not clear whether this is an objective or subjective test and it is not clear how a consumer could rely upon it in

practice. We recommend that the wording of the test could be improved by using words which have more clear jurisprudential understanding and that 'likely be consistent with' in Schedule 1 clause 994B(8)(b) be replaced with 'suitable for' in line with the objects of the DDO regime.

5. Notification to ASIC

Clause 994G of the revised Bill sets out an obligation on an issuer to report to ASIC within 10 business days about "significant dealings" that are not consistent with a target market determination. The wording of this section does not make plain when the 10 days reporting period begins.

Legal Aid NSW recommends that ASIC notification obligations be clarified to ensure that the 10 day reporting period begins from the date of the 'significant dealing', rather than the date that the issuer forms the view that the dealing was significant.

Legal Aid NSW also recommends that this obligation be extended to distributors to avoid under-reporting, reporting delays and to ensure ASIC has the requisite information to be able to regulate the regime.

Product Intervention Power

6. Coverage of the Product Intervention Power

Legal Aid NSW strongly supports the inclusion in the PIP regime of all products that may be provided by a person in the course of engaging in credit activity or proposed credit activity under the Credit Act.

Further, Legal Aid NSW welcomes the Government's proposed extension of the product intervention power through regulations to:

- funeral expenses insurance
- certain extended warranties that are functionally equivalent to add-on insurance, and
- short term credit that is not regulated under the Credit Act.

However, in order to capture funeral expenses insurance for the purposes of the product intervention power in line with the intention of Government, we submit that there may also be a need for amendments to other laws. Regulation 7.1.07D of the Corporations Act made pursuant to section 765(1)(y) of the Corporations Act currently states that funeral expenses only insurance is not considered a financial product for the purposes of the Corporations Act. In order to avoid inconsistency with the proposed product intervention regulations, it may be that Regulation 7.1.07D needs to be repealed or at least limited to provisions not including the product intervention provisions.

There is also some ambiguity around the definition of “funeral benefit” in section 765A(w) of the Corporations Act which explicitly states that funeral benefits are not considered financial products for the purposes of the Act. The meaning of funeral benefits in this context is ambiguous, as was discussed in the current Royal Commission into Financial Services. This definition would benefit from further clarity that “funeral benefits” only refer to goods and services provided in the course of a funeral, and not to the payment of money on the death of someone without the attached goods and services.

7. Intervention orders should continue until the consumer harm is redressed

We note that the intervention order may only extend for 18 months unless the period is extended by ASIC at the approval of the Minister. We refer to the discussion contained in our letter to Treasury dated 13 February 2018 and our recommendation that the intervention order should remain in place until the risk to consumers has been remedied. We note that if an order ceases to be in force then ASIC may not remake the order unless the circumstances have materially changed or the Minister has approved the remaking of the order (Schedule 2, section 1023M of the Corporations Act).

Additional Matters

Legal Aid NSW notes that a number of other concerns raised in our letter to Treasury dated 13 February 2018 were not taken up in the drafting of the revised Bill.

8. The consultation process requirement should not prevent ASIC from responding to consumer harm in a timely way

Legal Aid NSW refers to the discussion contained in our letter to Treasury dated 13 February 2018 and our recommendation that ASIC can make temporary product intervention orders without consultation which lapse after 12 months to ensure that ASIC can respond to consumer harm in a timely way.

9. ASIC should be empowered to make interventions in respect of staff training and remuneration

The product intervention power as set out in the revised Bill does not extend to ASIC making an order in respect of training and remuneration. We refer to the discussion contained in our letter to Treasury dated 13 February 2018 and our recommendation that ASIC’s intervention power be extended to these two areas to effectively limit consumer harm.

Conclusion

Again, Legal Aid NSW strongly supports the policy objectives behind the introduction of this legislation. We provide further comment in order to close any regulatory gaps, increase trust and confidence in the financial system and provide increased protection

so that consumers are prevented from purchasing financial products which are harmful, unfair or unsuitable.

Legal Aid NSW believes that in order to achieve the intended outcomes of the 2014 Financial Systems Inquiry, the regime could go further to: (a) make the scheme easier to understand, so that industry understands the obligations it must comply with, and (b) consumers can easily seek redress where industry does not meet those standards.

We are grateful for the opportunity to comment on the revised Bill and welcome the introduction of the DDO and PIP. If you have any questions about any matters raised in this letter please contact Tami Sokol, Senior Solicitor, Combined Civil Law Specialist Team, Civil Law Division on [REDACTED] or [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to be 'Brendan Thomas', written in a cursive style.

Brendan Thomas
Chief Executive Officer