

FINANCE INDUSTRY DELEGATION
RESPONSE TO THE
TREASURY LAWS AMENDMENT (MEASURES FOR
CONSULTATION) BILL 2023:
Anti-Avoidance Rule for Product Intervention Orders

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Introduction

The 167 supporters of the Finance Industry Delegation, comprising small, medium and large non-bank lenders, are principally concerned about two issues arising from the current drafting of the Treasury Laws Amendment Bill.

Proposed Subsection 1023S(8)

This sub-section provides, what could be, unlimited powers for ASIC, with the detail being left to as yet unpublished regulations.

While we accept that new avoidance schemes might emerge that require additional regulation after the Bill becomes an Act (the “*additional flexibility*” noted as being required, in Paragraph 1.10 of the explanatory materials issued), stakeholders and parliamentarians must be given the opportunity to review what the Minister and Treasury currently consider is essential content for the regulations. This becomes an even more important issue when it is noted that the legislation does not provide an exhaustive list of matters to be considered by ASIC or a court, as noted in Paragraph 1.11.

No appropriate and informed comment can be made about this proposed subsection until it can be considered with the proposed regulations. At present, Parliament could be voting in ignorance.

Sub-subsection 1023S(11)

This gives the opportunity for ASIC to assess on the basis that “*it is reasonable to conclude that the purpose of the scheme (adopted by the credit provider) was to avoid the application of a credit product intervention order*” and introduces a highly subjective opportunity for ASIC.

The Finance Industry Delegation regards the rationale provided at paragraph 1.8 of the explanatory chapter to be unsound, “*Using objective criteria of reasonableness ensures the integrity of the corporations Act*”.

“*Reasonableness*” cannot be considered an objective criteria.

Recommendation:

That the relevant regulation be drafted and published for stakeholder and parliamentarian consideration – before the opportunity arises for parliament to vote on the final draft of the amending legislation.

Proposed Subsection 1023T

Introducing the opportunity for ASIC to presume a credit provider has adopted a scheme for the purpose of avoiding an existing credit product intervention order.

This means the burden of proof is removed from the over-resourced ASIC Goliath and placed on the accused credit provider who has far more limited resources, and then faces the challenge of proving their “innocence”, with the associated unrecoverable legal costs.

The impact of the penalties involved for a credit provider who is wrongly accused by ASIC of avoidance are considerable – loss of business reputation, loss of income while suspending the claimed avoidance measures, and the extra legal costs associated with establishing, on the balance of probabilities, that the product did not involve avoidance.

It must be for ASIC to bear the burden of proof to ensure diligent due process, not to simply have the opportunity to make a superficial and subjective judgement, frame an accusation or allegation and then sit back and have the accused credit provider do all the work, or capitulate, in the face of the management time and cost involved in fighting an ASIC decision that may have little or no diligent investigation support.

Further, to shift the onus to the accused credit provider – on the basis of that company’s specialised knowledge (“*particularly within the knowledge of the person to establish that it*

would not be a reasonable to conclude that there was an avoidance purpose” – Paragraph 1.28 in the explanatory materials) is not persuasive.

ASIC has and should have the capability to attract and develop the “*specialised knowledge*” applicable for it to fulfill its rightful role to prove an allegation.

Convenience for ASIC, or a lack of confidence in ASIC’s ability to acquire relevant knowledge, should not be a motive for the structure of credit and associated laws.

To assert that it would be “considerably easier” for the accused to bear the burden is no justification for letting ASIC avoid its fundamental responsibilities as a watchdog, as asserted in Paragraph 1.30.

We note that ASIC should have already demonstrated such competence, with its previous decision to impose the product intervention order in question.

Further, the earlier paragraphs in the explanatory materials are contradicted by Paragraph 1.30, which acknowledges that ASIC has “*relevant industry information*” as the administrator of corporations legislation in Paragraph 1.35.

Conclusion

The Finance Industry Delegation trusts that the above will be appropriately attended to before the Bill is presented to parliament.