

# MinterEllison

15 August 2018

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

**Email: [ProductRegulation@treasury.gov.au](mailto:ProductRegulation@treasury.gov.au)**

Dear Sir/Madam

## **Design and Distribution Obligations and Product Intervention Power – Revised Exposure Draft**

We appreciate the opportunity to provide feedback on the revised exposure draft of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018 (Bill)*.

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers and other financial intermediaries in Australia and overseas.

As noted in our previous submissions, we support the need for a strong regulatory regime to maintain and enhance trust and confidence in the financial system by consumers and market participants. We therefore support the introduction of a requirement for product issuers to make target market determinations and for ASIC to have a product intervention power.

However, we have reservations regarding the proposal in its current form and we do not believe that the reform should be legislated on the basis of the current proposal. We have not reiterated all of our concerns from our earlier submission (on the December 2017 version) in this submission. We have highlighted some of our more significant concerns, as well as making more technical or specific submissions on particular provisions in the **Attachment**.

We welcome many of the changes made in the revised exposure draft of the Bill, including extension of transition period for new products to 2 years, although we believe a 3 year period would be more appropriate.

While we believe the Bill is an improvement on the version of the Bill released for consultation on 21 December 2017, we still have concerns about the proposal for product issuers and sellers to ensure the conduct of distributors is consistent with target market determinations. As we noted in our earlier submission, this is likely to increase vertical integration at the expense of small businesses and the ability to develop innovative solutions tailored to individual client needs.

The proposed regime will have the effect of making issuers responsible for the conduct of distributors, rendering the separate licensing of distributors redundant. This risks returning the industry to the days when distributors were agents of issuers. It undermines the best interests duties recently imposed on personal advisers by the Future of Financial Advice (FOFA) regime because it takes the responsibility for determining suitability for clients away from advisers and moves it to the product issuer. It is also inconsistent with the drive to enhance the financial advice profession – increased professionalism should mean increasing responsibility not decreasing it.

While we believe that these matters represent serious flaws in the proposed regime, we have not raised them again in our comments on specific provisions of the Bill in the Attachment.



Other key concerns that we have raised previously include:

- (a) We remain concerned about the impact of the new regime on annually renewing products, such as general insurance policies and term deposits. As it stands, it appears that issuers of such products will be required to comply with the new regime on renewal or roll-over of existing products which is inconsistent with the way the regime will apply to other product issuers. Similar concerns apply to further investments in managed investment schemes which are treated as issuing new products, unlike further investments in superannuation funds or deposit accounts.
- (b) Permanent intervention should only occur under full Parliamentary oversight. We do not believe that the Minister should have the ability to make product intervention orders permanent. This should require an Act of Parliament.

The views expressed in our submission are ours alone and do not necessarily reflect the views of our clients.

We would be very happy to discuss or provide further details about any aspect of our submission.

Yours faithfully  
**MinterEllison**

A handwritten signature in black ink, appearing to read 'R. Batten', with a long, sweeping underline that extends to the right.

Richard Batten  
Partner

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## ATTACHMENT – COMMENTS ON PROVISIONS

Provision	Concern	Recommendation
<p>Item 4 of Schedule 1 Advice definition</p>	<p>While we welcome the proposal to exclude asking for information to determine whether a person is in a target market, we are concerned that the reference to 'solely' will unduly limit the application of this provision. There is also a risk that making or providing a target market determination could itself be viewed as financial product advice and submit that this should also be exempted from the definition of financial product advice.</p>	<p>Section 766B should be amended by deleting 'solely' from proposed subsection (3A) and adding the following subsection: <i>(3B) The acts of making, providing, publishing or otherwise disseminating a target market determination made under subsection 994B(1) do not constitute the provision of financial product advice.</i></p>
<p>Clause 994A Excluded conduct definition</p>	<p>As noted in our previous submission, the proposed regime will have a different effect on certain products, like general insurance, than other financial products. Unlike other financial products, general insurance products typically renew annually. Each renewal involves the product issuer (the insurer) issuing a new financial product. Similarly, each roll-over of a term deposit results in a new product being issued. This means that they deal in the product on each renewal or roll-over date and this conduct is prohibited if the issuer has grounds for believing the target market determination should be reviewed (clause 994C(3) and (4)) or issuing the product to the client would no longer be consistent with the target market determination (clause 99E(1)).</p> <p>A similar issue arises for managed investment schemes where subsequent investments are made into the same or a related scheme, where each issue of a scheme interest is treated as issuing a new financial product, unlike superannuation, bank accounts and life investment policies.</p> <p>The position of general insurance companies, term deposit providers and responsible entities is therefore different from other product issuers who are not required to ensure products remain suitable for existing clients.</p>	<p>The definition of 'excluded conduct' in clause 994A should be amended by adding the following: <i>(c) the renewal of a general insurance product; and</i> <i>(d) the roll-over of a term deposit; and</i> <i>(e) the acquisition of a interest in a financial product by a person who already has an interest in the financial product (<b>original product</b>) or another financial product which is marketed and offered with the original product under one product disclosure statement.</i></p> <p>(We note that paragraph (e) is derived from the definition of multi-product offering in Regulation 7.7A.16B(6).)</p>

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Clause 994B(1)(d) and (2)(b)(i) Regulations can extend application	We reiterate our concerns that these provisions would permit regulations to be made which apply the requirements of Part 7.8A to wholesale products and clients. We submit that this is not appropriate.	We recommend amending 994B(1)(d) as follows: <i>(d) regulations made for the purpose of this paragraph require the person to make a target market determination for the product <u>in relation to retail clients</u>.</i>
Clause 994B(7) Frequency of reviews	<p>The requirement to ensure that reviews are conducted sufficiently frequently to enable prompt identification that the determination is no longer appropriate is impractical. The only way to ensure that occurs 'promptly' would be to have the periods to be extremely short, e.g. a day. That way the identification of the need to review the determination will be identified 'promptly'. Anything longer may not be regarded as 'prompt'.</p> <p>We submit that this is the wrong test. Clause 994C(3) already requires the person who makes a target market determination to review the determination as soon as they become aware that a review trigger or other event or circumstance that suggests the determination should be reviewed occurs. The requirement for a review at any other time, i.e. when the person who makes a determination has not become aware of a reason to review it, should be at appropriate intervals having regard to the nature of the product and the likelihood that it would cease to be appropriate for the target market. We submit that this is consistent with the objective of encouraging issuers to adopt a risk management approach in determining a reasonable review period (see paragraph 1.60 of the Exposure Draft Explanatory Memorandum).</p>	<p>We submit that clause 994B(7)(a) should be amended as follows: <i>(a) the nature of the financial product and the likelihood that it would cease to be appropriate for the target; and</i></p> <p>We also recommend giving more guidance to issuers by including a statement in the Explanatory Memorandum that even for complex products with a high risk profiles issuers would not be expected to have a review period of less than one year.</p>
Clause 994B(8) Target market determination to be appropriate	We remain concerned with the requirement for an issue or regulated sale of a product which is consistent with a target market determination to be likely to be consistent with the likely objectives, financial situation and needs of the retail client. This provision does not recognise that clients can have inconsistent	We recommend amending paragraph (8)(b) as follows: <i>(b) to a retail client in the target market— it would likely be consistent with <u>one or more of the likely objectives, financial situation and needs of the retail clients in the target market</u>.</i>

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	<p>objectives, etc. It suggests that any issue or sale of the product to clients must be consistent with all of their likely objectives, financial situation and needs, which is unlikely to be case for any product. Furthermore the requirement that the issue or sale of the product is likely to be consistent with the objectives, financial situation and needs of <b>the</b> retail client, indicates that issuers and sellers need to have a basis for be satisfied that the product is consistent with each client's particular objectives, financial situation and needs. This would mean that issuers and sellers would in effect need to apply a suitability test at the individual client level, similar to responsible lending obligations applying to lenders.</p> <p>It should be sufficient for the person making the determination to determine that the product is suitable for any objective, financial situation or need of the target market, provided they identify the objectives, financial situation or needs for which they believe the product is suitable.</p>	
<p>Clause 994E Reasonable steps</p>	<p>Clause 994E requires product issuers, sellers and distributors to take reasonable steps to ensure dealings are consistent with the target market determination. The clarification in clauses 994E(2) and (4) that a person does not contravene this requirement only because a retail client acquires the product. However, there is an inherent tension between the requirement and this clarification. In what circumstances will an inconsistent dealing be permitted? We suggest that one circumstance where it is and should be permitted is where the client acquires the product as a result of following personal advice. Personal advice should be a clear exemption from the requirement to ensure dealings are consistent with the target market determination, as is suggested by the inclusion of personal advice in the definitions of 'excluded conduct' and 'excluded dealing'.</p>	<p>We submit that clause 994E should be amended by adding the following:</p> <p><i>(6) For the purposes of subsections (1) and (3), a person will be taken to have taken reasonable steps in relation to retail distribution conduct if the person takes reasonable steps to ensure that the conduct is consistent with personal advice received by the client.</i></p>

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<p>Clause 994F(5) Notice of significant inconsistent dealings</p>	<p>In our previous submission, we noted that the meaning of It is not clear what a 'significant dealing' is unclear and uncertain. We note that no change has been made to this element of the reporting requirement.</p>	<p>We submit that at the minimum the Explanatory Memorandum should give some examples of what could be a significant dealing to assist regulated persons to comply with the requirement.</p>