



Law Council
OF AUSTRALIA

Legal Practice Section

24 October 2018

Senator Jane Hume
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Senator

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018

1. The Superannuation Committee of the Law Council of Australia's Legal Practice Section (**the Committee**) is grateful for the opportunity to comment on the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (**the Bill**). The Committee has identified an apparent error in the drafting of the Bill, which it would like to bring to the attention of the Senate Economics Legislation Committee.
2. The apparent error relates to the obligations concerning the distribution of financial products, proposed to be included in a new Division 3 of Part 7.8A of the *Corporations Act 2001* (Cth). As is suggested by the term 'distribution', the apparent policy intention is that the obligations will apply to conduct occurring before a relevant financial product is acquired by a retail client, but not to conduct occurring after the product has been acquired by the retail client. This description of the apparent policy intention is borne out by a review of the Explanatory Memorandum (**EM**), including the reference at paragraph 1.80 of the EM to 'potential investors' (emphasis added).
3. However, as currently drafted the Bill would give the distribution obligations an operation that extends well beyond the apparent policy intention.
4. The distribution obligations will turn on the concept of 'retail product distribution conduct'. That concept is defined in proposed section 994A(1) as follows:

retail product distribution conduct, in relation to a financial product, means any of the following:

- (a) *dealing in the product in relation to a retail client;*
- (b) *under Part 6D.2, giving a disclosure document in relation to an offer of the product to a retail client;*
- (c) *under Part 7.9, giving a Product Disclosure Statement for the product to a retail client;*
- (d) *providing financial product advice in relation to the product to a retail client.*

5. The Committee notes that conduct that occurs *after* a financial product has been acquired could very easily fall within this definition. For example, in relation to paragraph (a) of the definition, a superannuation trustee may well deal in a superannuation product that is held by a fund member by varying the product. In relation to paragraph (c) of the definition, a superannuation trustee may well give a Product Disclosure Statement to an existing superannuation fund member as a means of reminding the member of the features of their product. And in relation to paragraph (d) of the definition, a superannuation trustee may well give financial product advice to an existing superannuation fund member in the course of the ongoing interaction between the trustee and the member during their membership of the fund.
6. **The Committee submits that the definition of ‘retail product distribution conduct’ should be amended so that it does not extend to conduct that occurs after a financial product has been acquired.** This amendment could be made in a number of different ways. However, one way of making it would be to add an overriding exclusion at the end of the definition in the following terms: ‘but excludes any conduct falling within paragraph (a), (b), (c) or (d) if the client already holds the product at the time the conduct occurs’.
7. The Committee notes that a similar limitation has already been included in the Bill in relation to the Australian Securities and Investments Commission’s product intervention power. That is, under proposed section 1023C(1), a product intervention order will not apply to a financial product that has already been acquired. Just as a product intervention order cannot apply to conduct that occurs after a financial product has been acquired, so too should the distribution obligations not apply to conduct that occurs after an acquisition has occurred.
8. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- [Redacted]
- [Redacted]

Yours sincerely

[Redacted Signature]

Jonathan Smithers
Chief Executive Officer