11 10 2019

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Re: Corporations Amendment (Design and Distribution Obligations) Regulations 2019

Dear Ms Moore

The Westpac Group (**Westpac**) welcomes the opportunity to provide a response to the Corporations Amendment (Design and Distribution Obligations) Regulations 2019 (**draft Regulations**) supporting the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (**the Act**).

As stated in earlier submissions in March 2017, February 2018, August 2018, October 2018 and August 2019 (**earlier Submissions**), Westpac supports the introduction of both design and distribution obligations (**DDO**) and a product intervention power.

We note that the draft Regulations released by Treasury relate to the products and persons to which the DDO regime applies, rather than how the scheme will be operationalised. Whilst we continue to seek clarity on the latter, we have confined our comments in this submission to the scope of the regime, as defined by the draft Regulations.

Westpac's key concerns in this regard relate to:

Basic Deposit Products/ Basic Banking Products

We note that the draft Regulations extend the regime to 'basic banking products'. This increase in breadth of application is, in our view, inconsistent with the Explanatory Memorandum (**EM**) to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (**Bill**) which was limited to the inclusion of 'basic deposit products'. This is a material change in scope noting that the Explanatory Statement (**ES**) to the draft Regulations refers to the definition of 'basic banking products' in section 961F of the Corporations Act 2001 (Cth) (**Corporations Act**) which includes 'basic deposit products', 'a facility for providing traveller's cheques' and 'non-cash payments' under section 763D of the Corporations Act (e.g. direct debit and other non-cash payments facilities accessible through online banking).

As stated in our earlier Submissions, 'basic deposit products' should be easily accessible to every Australian to manage their finances. These products are commonly regarded as simple, highly standardised (often with common features and operation), easily understood and generally suitable for a wide target market (**TM**). It is our experience that customers expect us to facilitate easy access to standard products with frictionless, high quality service. It is important that we avoid poor customer outcomes from overly complex regulation of simpler products, suitable for almost all the retail market. We therefore

continue to recommend that these products be excluded or, if that is not possible, that the regime be sufficiently scalable to avoid complexity in application. It would be a poor outcome if customers were dissuaded from accessing simple products that could help them manage their finances (*e.g.* if a customer is dissuaded from a product because too many questions were necessary to ensure that an ADI took 'reasonable steps' to ensure they met a target market determination (**TMD**).

Further, extending DDO to additional products caught by the broader definition of 'basic banking products' will have no or limited benefit to customers. For example, a direct debit facility is simple, low-risk product likely to be suitable for almost anyone, making a TMD extremely broad and offering no benefit to customers.

Mortgages and other Credit Products

Almost every Australian will at some point in their life, require access to consumer credit. As noted above, on the basis that DDO will be scalable depending on the nature of the product, the application of DDO, in particular TMDs for these products will need to be simple. This will particularly be the case for standardised common consumer credit products such as home loans and credit cards.

As a separate point, it is also important to note that consumer credit is regulated by the responsible lending regime which includes a "not unsuitable" assessment. This involves a comprehensive assessment of the individual's financial position and verification of the information provided. Accordingly, for the consumer to answer questions for the purposes of both determining whether they are in a target and whether the product is unsuitable may lead to increase complexity and duplication where the policy objective is already met by the existing responsible lending regime.

Finally, from the customer perspective, as with basic banking products, a TM for credit products should be sufficiently broad to facilitate switching and enable customers to freely select credit products to meet their needs.

Platforms/ IDPS

In our earlier Submissions, we raised the complexities that arise when applying the DDO regime to platforms. The DDO regime will capture superannuation platforms and 'IDPS-like' schemes that are made available by way of a Product Disclosure Statement (**PDS**). This broad approach in relation to distribution means that the platform operator will not only be considered as distributing interests in the IDPS itself, but also distributing the products available on the platform. This is because the platform operator's acquisition of a financial product on behalf of a customer constitutes dealing in the financial product.

Further, if the draft Regulations are intending to require IDPS operators to make a TMD in relation to the IDPS itself, and not the underlying financial products made available through the IDPS (which may have their own TMDs) as suggested in the ES, this should be made clearer in the draft Regulations to avoid any unintended consequences of IDPS operators being required to make a TMD in relation to the products they offer on the IDPS.

Superannuation

We note that MySuper products are exempt from the DDO regime and other superannuation products are captured by the legislation (noting the draft Regulations propose to exclude defined benefit interests and interests in eligible rollover funds). In our earlier submissions we noted the unintended consequences of including some superannuation products in the DDO regime, but not others. Many MySuper products (which are excluded products) are offered within a superannuation product as a MySuper investment

option together with other investment options. This provides choice to members as to how their super is invested without having to change super funds. By including superannuation more generally within the scope of the DDO regime, additional steps will be required when a customer applies for a superannuation product (that is not excluded from the DDO regime) that offers both MySuper and choice investment options. Therefore, it continues to be our view that, in the interests of streamlining the process for customers, TMD requirements should not apply to all Superannuation products.

We also note here that under the Act, employers who nominate their employees to join a default superannuation plan or provide superannuation information to their employees may be considered to be distributors for DDO purposes and if so must therefore meet the distribution obligations (under s994A employers may be considered in engaging in 'retail production distribution conduct').

If employers come within these provisions, there appear to be several unintended consequences as a result, for example:

- If an employee does not meet the TMD for the super product, there could be a conflict between the employer's Super Guarantee obligations and their DDO obligations.
- If a TMD for a default superannuation product does not cover every potential employee, then employers may be forced to limit diversity in the workplace to ensure employees meet the TMD, or employees may be forced to open their own super account.
- This may force super funds to restructure their default products to only offer MySuper (as MySuper is exempt from the DDO regime), without investment choice. This will limit choice for members.

If the intention is that the distribution obligations should not apply to employers, then to remove any doubt we recommend this is specified in the regulations.

Insurance

On the basis of the Act and the draft Regulations, the obligation to take reasonable steps to ensure consistency with the TMD when engaging in "retail product distribution conduct" will apply prior to the renewal of contracts of general insurance, which must typically be renewed annually. This creates a very real risk that customers may unwittingly be left uninsured where they have not responded to a TMD request at renewal resulting in a failed renewal. The potential customer impact of this will be material and expose them to potentially serious, financial consequences. This risk arises in the following way.

Before annual renewal, insurers are required to comply with section 58 of the *Insurance Contracts Act* 1984 by providing a renewal notice to the customer informing them of the imminent expiry of their insurance cover and the need to renew it. In the notice, the notifying insurer is required to state whether or not it is prepared to offer a renewal. When the DDO obligations become effective, the insurer's ability to offer renewal will in part depend upon the customer confirming they remain within the TMD.

Currently, the accepted and widely understood industry practice for home and contents insurance and motor vehicle insurance is for an insurer to send a renewal invitation to the customer, who accepts that invitation by simply continuing to pay the required premium, quite often by simply allowing direct debit arrangements to continue in effect. Customers are also asked to comply with their 'Duty of Disclosure' but, again, this is done on an exceptions basis – if no relevant details have changed since the last renewal, the customer is under no further obligation to make disclosure.

In other words, customers commonly need take no active step to remain insured and the renewal process occurs with minimal if any direct interaction between insurer and customer.

If the insurer is now required to confirm the customer remains with the TMD, there is a real risk that many customers will misinterpret their insurer's (new and unexpected) attempt to collect target market information to be the 'do nothing and you remain insured' letter they have customarily received. However, having complied with section 58 of the *Insurance Contracts Act 1984*, made the relevant TMD inquiries, but received no positive response from a customer, the insurer may be left with no choice but to allow the insurance cover to lapse.

Noting that these covers indemnify customers for very large financial risks, such as their home being destroyed in a flood or bushfire, or their motor vehicle causing serious damage to the property of another person (including the possibility of causing serious structural damage to a building), the consequences of becoming uninsured may be quite serious for the impacted customer.

In the meantime, the DDO regimes seek to ensure customers are sold products that are generally suitable for their needs. TMDs for the most common, well understood and simple general insurance products are likely to be very broadly stated, and where a customer continues to own the same property, it is unlikely they will fall outside a broadly stated TMD on renewal. It is difficult to see why a very small risk of deviation from a likely broadly stated TMD should be allowed to give rise to such a serious risk of financial ruin for customers.

At the very least, customers are put to additional, unexpected, administrative burdens, the necessity of which is questionable, and which may delay the renewal of their cover and leave them uninsured for a period. We again note that ASIC has acknowledged the policy tension involved and provided evidence at the Senate Inquiry that, whilst customers at the point of renewal should consider whether the insurance policy still meets their needs at an appropriate price, "you don't want to make the renewal process so difficult that people give up and don't have insurance at all."[1]

We therefore recommend that the draft Regulations provide that, under section 994B(3)(e) of the Act, the TMD requirements not apply to the renewal of an existing risk insurance product. We note that this is consistent with other obligations under the Corporations Act and the Insurance Contracts Act 1984, which effectively provide exemptions from certain obligations upon the renewal of insurance.

Conclusion

We thank Treasury for the opportunity to provide comment above. We support the regime and have an existing Policy to address TMDs. Our overriding goal is to ensure that implementation results in customer benefit across the board. We understand the key objective being addressed by the DDO is 'to assist consumers to obtain appropriate financial products'[2]. Westpac shares this goal – it is our vision to become one of the world's great service companies; helping our customers, communities and people to prosper and grow is our destination.

Finally, early guidance from ASIC on their expectations for operationalising the regime, including minimum standards for TMDs and reporting and monitoring requirements is essential. Late guidance may not allow

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[1] Hansard, 1 Nov. 2018: Senate Economics Legisla ive Committee, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*

[2] EM Paragraph 1.5

licensees time to fully implement the changes in consultation with the regulator, which could lead to inconsistent positions across the industry. In our earlier submissions we stated that we looked forward to final ASIC regulatory guidance by October 2019. Clarification within the ES or Regulation regarding the application of DDO will provide necessary certainty for timely implementation, especially in the context of ASIC requiring additional time to issue its guidance.

If you would like any further information on our views please contact Jaimie Lovell (Head of Government Affairs, Consumer) on 0450 132 858.

Yours sincerely,

Michael Choueifate
Group Head of Government and Industry Affairs