

14 November 2018

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COMMERCIAL-IN-CONFIDENCE

Dear Ms Moore

Submission: Corporations Amendment (Design and Distribution Obligations and Product Intervention Powers) Regulations 2018 (Regulations)

The Westpac Group (**Westpac**) welcomes the opportunity to provide a response to the Regulations pertaining to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (**Bill**).

As stated in earlier submissions in March 2017, February 2018 and August 2018 (**earlier Submissions**), Westpac supports the introduction of both design and distribution obligations (**DDO**) and a product intervention power (**PIP**) as recommended in the final report of the Financial System Inquiry released in December 2014. This is in line with our support of the initiatives contained in the Australian Banking Association's *Better Banking Program*, which include building a stronger ASIC, an enhanced breach reporting regime, and relevantly, new intervention powers.

Westpac's current product management processes are aligned with the intent of the proposed legislation. However, implementing the specific distribution obligations, e.g. re-assessing Westpac's existing target market assessments and ensuring we are capturing the necessary records (including for third party distributors), will require considerable work. As you will appreciate, time will be required to put in place processes to co-ordinate issuance and distribution activities.

Early guidance on minimum standards for target market determinations and reporting and monitoring requirements is essential. Late guidance may not allow licensees time to fully implement the changes in consultation with the regulator, which could lead to inconsistent positions across the industry. Practically, industry will require final guidance from ASIC to be completed within 6 months of assent of the legislation.

In addition to noting the need for appropriate guidance in order to implement the regime effectively, we do have some specific comments to make in the following key areas:

- 1) Simplicity for customers

- 2) Clarity for issuers; and
- 3) Avoiding poor customer outcomes.

1) Simplicity for customers

Westpac welcomes clarification in the Explanatory Memorandum (**EM**) and the Bill that:

- the proposed definition of ‘personal advice’ is to be amended to state that “the acts of asking for information solely to determine whether a person is in a target market (as defined in subsection 994A(1)) for a financial product, and of informing the person of the result of that determination, do not, of themselves, constitute personal advice” (Sch 1, s766B(3A) of the Bill); and
- where personal advice is being provided, most of the distributions obligations will not apply (because the customer’s individual circumstances will already have been considered).

Westpac will need to take steps to understand the customer’s circumstances to determine whether a customer falls within a Target Market (**TM**). In taking these steps, customers may believe that a conclusion has been reached that it is appropriate for their individual circumstances or needs, rather than because ‘reasonable steps’ have been taken to establish that their likely objectives, financial situation and needs match those of the target market.

The success of the regime requires customers to be able to discern between the issue of a financial product on the basis of the DDO and the issue of a financial product based on personal advice. While the clarification provided in the EM goes part of the way by providing some legislative clarity for issuers, it does not address the potential confusion for customers. To address this risk, we recommend that the Explanatory Statement (**ES**) to the Design and Distribution Obligations and Product Intervention Power - draft Regulations (**Regulations**) provides more detailed information on how the DDO can be met while minimising the risk that a reasonable person assumes their objectives, financial situation and needs have been considered in providing the advice.

2) Clarity for issuers

Scalability

We note that the Regulations declare authorised distributors of basic deposit products and risk insurance products (which comprise general insurance and bundled consumer credit insurance products¹) to be regulated persons for the purposes of the DDO regime². The EM states that

¹ As defined by regulation 7.1.15 and constitutes both a general life insurance product and a life risk insurance products. This is consistent with the definition of such products used in ASIC orders.

“the obligations are broad in nature and scalable in line with the nature of the product”³. We would, however, appreciate further direction in the ES as to how Treasury envisages such scalability will be applied by ASIC, particularly with regard to simpler products.

Interaction between the proposed DDO regime, and the personal and general advice regime

In our earlier Submissions, we noted the different regulatory regimes which already exist to ensure good consumer outcomes (including responsible lending, personal advice, and general advice). We noted, at that time, that we would require some clarity on how the new DDO regime would operate in conjunction with the existing regimes.

As noted above, we welcome the clarification in the proposed definition of ‘personal advice’. However there remains the issue of how the new DDO regime will operate in conjunction with the existing advice regimes and the unnecessary complexity it creates. Failing any change to the Bill in this regard, it would be helpful for ASIC to provide guidance (including by way of likely product use cases) on the steps an issuer/distributor could take to demonstrate that:

- the information was being collected ‘solely’ for the purpose of determining whether the customer was in the **TM**; and
- if a banker was to have a general advice conversation or no-advice conversation after a TM determination has been made and communicated to a customer, it has not inadvertently provided personal advice (it would be helpful if regulatory guidance addressed whether the risk of providing personal advice could be mitigated by providing a warning (similar to the general advice warning under the Corporations Act 2001 (Cth) to customers stating that information about their objectives, financial situation and needs is being collected for the above sole purpose).

TM determinations and ‘reasonable steps’

We note that the EM states that “what constitutes ‘reasonable steps’ will ultimately depend on the circumstances of each case”⁴.

We agree with Treasury’s view that it is incumbent on issuers to determine what would constitute ‘reasonable steps’ to ensure their product dealings are consistent with the TM. We suggest, however, that further direction is needed in the ES on what would constitute reasonable steps (perhaps with reference to examples for widely distributed products such as transaction, savings or superannuation products). This would help guide an issuer as to the

² Schedule 1, item 1, sub-regulation 7.8A.01(4): Target market determinations for financial products 7.8A.02(1)(2)

³ Explanatory Memorandum (EM) paragraph 3.20

⁴ EM paragraphs 1.65 and 1.66

types of 'reasonable steps' it could take, whilst not removing the need for that issuer to make this determination based on the relevant circumstances.

Notifying ASIC of significant dealings

We assume that the requirement to notify ASIC of 'significant' dealings in a product that are not consistent with the product's TMD5 does not include any single instance of the product being sold outside the product's Target Market Determination (**TMD**). However, we would appreciate some guidance on this point.

Interaction between digital channels

In our previous submission we also noted that system changes may be required to our digital channels that operate under a 'no advice' or 'general advice' model (in particular, to meet the 'reasonable steps' of the obligations).

Further, one third of sales are now made through digital channels, and this channel is increasingly the choice of customers (33% of Westpac sales were completed digitally in 2HFY18, up from 25% in 2HFY17)⁶. Given customers are increasingly using digital channels to help provide them with greater convenience and control over their finances, the regime must support the increasing use of digital channels and not limit innovation. 'Scalability' must also encompass all channels, supporting customer choice. To that end, we suggest that the ES addresses the fact that implementation should not be so onerous as to require detailed questions about customer objectives, financial situations and needs which would add unnecessary complexity to digital channels.

3) **Avoiding poor customer outcomes**

Basic Deposit Products

Noting that the DDO will be scalable depending on the nature of the product and that it is the Government's intention to include Basic Deposit Products (**BDPs**), implementation of the regime must allow for the easy distribution of products which almost every Australian should use to manage their finances and that are commonly regarded as simple, highly standardised (often with common features and operation), easily understood and generally suitable for a wide TM.

⁵ EM paragraph 4.27

⁶ Westpac Group 2018 Full Year Results Presentation & Investor Discussion Pack, p. 52

Authorised Deposit-taking Institutions (**ADIs**) should be able to implement the regime with reference to product use case and customers' needs in determining whether they fit within the TM. Anything more complicated risks customer confusion and unnecessary friction.

Westpac has previously sought clarity on where a TM for a basic deposit product (**BDP**) (such as a transaction account) is the entire retail market and what would constitute reasonable steps to ensure dealings in that product were consistent with this TM determination. Guidance will be particularly helpful in this scenario as the TM may comprise the same customers targeted today for such products.

It would be a poor customer outcome if, in the process of signing up for a term deposit account for instance, a customer did not complete the process because too many questions were necessary to ensure that an ADI took 'reasonable steps' to ensure they met a TMD.

We recommend that Treasury consider providing direction in the ES that the requirements for ADIs to demonstrate 'reasonable steps' should not be so onerous as to dissuade customers from accessing simple products. We suggest this could be approached by specifying that, in relation to BDPs, the regime could be effectively implemented with reference to product use case and customer needs.

Superannuation

We note that MySuper products are exempt from the DDO regime, and other superannuation products are captured by the legislation. In our August 2018 submission 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. 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.

For example, in relation to the choice investment options we will likely need to ask these customers about their objectives, financial situation and needs to ensure we comply with our 'reasonable steps' obligation. Requiring additional information may be perceived by customers as onerous and may make them less likely to make a decision regarding their choice of fund (which may result in poor customer outcomes).

We recommend that the Regulations provide that, under section 994B(3)(e), the target market determination requirements do not apply to all Superannuation products.

Platforms

In our earlier Submissions, we have 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 to be distributing interests in the platform 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.

We note Treasury’s evidence to the Senate Inquiry also acknowledges this tension⁷. We submit that the scheme must be implemented in a way that minimises customer confusion at product ‘sale’. We support further guidance from ASIC, or the provision of additional guidance in the EM.

Insurance

In our earlier submission, we submitted that the design and distribution obligations should not apply upon the renewal of contracts of insurance.

However, on the basis of the Bill and the Regulations, the obligation to take reasonable steps to ensure consistency with the target market determination when engaging in “retail product distribution conduct” will apply prior to the renewal of contracts of insurance. In particular, “retail product distribution conduct” is broadly defined by proposed section 994A(1) of the *Corporations Act 2001* to include “dealing in the product in relation to a retail client”, which under section 766C(1)(b) includes “issuing a financial product”. The EM, section 1012B (being the obligation to provide a PDS prior to the issue of a financial product) relevantly notes that issuing a financial product includes “entering into a contract of insurance”, and section 11(9)(b) of the *Insurance Contracts Act 1984* then states that a reference in that Act to the entering into of a contract of insurance includes “the making of an agreement by the parties to the contract to renew... the contract.” On this basis, the insurance industry has treated the renewal of a contract of insurance as an issue of a financial product, triggering the relevant legislative obligations in relation to the issue of a financial product.

If the obligation to take reasonable steps to ensure consistency with the TMD will apply prior to the renewal of contracts of insurance, this will be particularly onerous for insurers and creates a real risk that customers may be unknowingly left uninsured upon renewal. This is because contracts of insurance are usually renewed with minimal if any interaction between insurer and insured and, as such, it will be very difficult if not impossible to determine whether the customer continues to fall within the TMD prior to offering to renew a contract, which amounts to the issue of a contract.

In particular, 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 doing nothing and simply allowing direct debit arrangements to continue in effect.

⁷ Hansard, 1 Nov. 2018: Senate Economics Legislative Committee, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*

There is a real risk that many customers will misinterpret their insurer's (new and unexpected) attempt to collect target market information in advance of a renewal offer to be the 'do nothing and you remain insured' letter they have customarily received.

We recommend that the Regulations provide that, under section 994B(3)(e), 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 2001* and the *Insurance Contracts Act 1984*, which effectively provide exemptions from certain obligations upon the renewal of insurance.

Westpac notes that ASIC has acknowledged the policy tension involved and provided evidence at the Senate Inquiry that, whilst consumers 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."⁸

In closing, Westpac thanks Treasury for the opportunity to provide comment above. We support the regime and, as outlined above, have an existing Policy to address TMDs. Our overriding concern is 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'⁹. 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.

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

Yours sincerely,



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⁸ Hansard, 1 Nov. 2018: Senate Economics Legislative Committee, *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018*

⁹ EM Paragraph 1.5