8 August 2019

Ashley Brown
Senior Adviser
Strategic Policy
Australian Securities and Investments Commission
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Email: product.regulation@asic.gov.au

Dear Ms Brown,

SMSF ASSOCIATION SUBMISSION ON AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION CONSULTATION PAPER 313: PRODUCT INTERVENTION POWER

The SMSF Association (SMSFA) welcomes the opportunity to make a submission on the Australian Securities and Investments Commission's (ASIC) consultation paper regarding its product intervention power.

We believe that the introduction of this measure will help improve the standard of financial products as well as the culture surrounding their creation.

The introduction of broader proactive powers for ASIC will also provide an effective form of reducing significant consumer detriment. We believe the intervention power's main utility comes from its ability to influence product providers' behaviours and to be exercised swiftly when required.

Despite our support for the intervention power, we believe that this power should only be used as a last resort when a significant risk arises. This will limit any uncertainty, restrictions on innovation and costs that may be produced by excessive use of the intervention power. Additionally, the mere presence of a proactive power in ASIC's toolkit paves the way for product makers to always be 'aware' of the potential for action which will help shape beneficial behaviour.

As we detail below, we also believe ASIC should conduct private consultation to give product issuers a private right to reply before any public consultation. A public announcement from ASIC regarding a potential intervention order may cause investors to panic and sell down the product, which could lead to significant detriment to consumers, product issuers and broader investment markets.

B1 – Consumer detriment

The key determination ASIC must make is the definition and assessment of significant consumer detriment. Ensuring this is exercised reasonably is crucial to the success of the regime and ASIC's overall regulation.

We believe every effort should be taken to try and remove as much subjectivity in this determination as possible. This is because what ASIC sees as potential significant consumer detriment may not be what industry and the broader public sees as potential significant consumer detriment.

Noting that it is the purpose of public consultation to validate if ASIC has correctly identified significant consumer detriment, the mere act of undertaking public consultation regarding a financial product can incur significant reputational and financial damage to the product issuer or distributor before significant consumer detriment is fully substantiated. This is an important consideration which should highlight why ASIC should only use the intervention power as an act of last resort. Therefore, ASIC should be extremely confident that the impact of consumer detriment is likely and substantial when it releases its consultation. This high internal threshold should guide ASIC to use the power as a last resort.

A factor that should be relevant to significant consumer detriment is evidence that ASIC has tried to prohibit the actions that have or may cause detriment prior to issuing a consultation paper. This may occur via private consultation with the relevant product issuer or distributor for example. Therefore, it is clear that ASIC has notified the affected parties that their conduct is placing consumers at risk of detriment and this has not been rectified.

Furthermore, this will indicate intent on behalf of the accused party that they are continuing an action deemed unsatisfactory by ASIC.

Another factor that will help crystallise significant consumer detriment is to seek private industry expertise before public consultation. For example, we refer to ASIC Report 575 and ASIC's interpretation of significant financial detriment in advice provided to some SMSFs. Noting that ASIC stated it is difficult to assess the long-term financial impact of setting up an SMSF, ASIC made broad determinations.

In 11 SMSF files, the oldest member was aged under 55 and had borrowed money in their SMSF with a debt-to-asset ratio of 65% or more. In these cases, ASIC considered the use of gearing recommended by the advice provider was inappropriate and exposed the client to a high level of financial risk. However, this analysis ignored the member's personal assets, member's risk profile, retirement plan, expected outcomes and was based solely on the statement of advice (which may have lacked detail). We believe if ASIC consulted with industry experts, such as the SMSF Association for example, for further details on determining significant financial detriment it would allow ASIC to consider a wider range of factors. This may have provided a better understanding of the circumstances and context and helped avoid blanket rules which may incorrectly indicate that significant financial detriment is likely to occur.

The SMSF Association also believes case studies are essential to highlight potential cases of significant consumer detriment. This should be a staple in all consultations that ASIC releases.

With regards to the case study in Table 1, we believe it needs to be made clearer that significant consumer detriment is also being assessed across the market as a whole. This is because it may be arguable that while a lower term deposit interest rate is not beneficial, it may not cause significant consumer detriment to the individual.

B2 - Options

We are supportive of ASIC listing proposed options resulting from its use of the intervention power.

C1, C2, C3 – Consultation details

The SMSF Association has no issues with the matters ASIC has detailed should be in the consultation. We suggest that any added factors resulting from this consultation regarding what is significant consumer detriment should be described when ASIC consults through the product intervention power.

We have no issues with ASIC's intended use of delaying action.

If you have any questions about our submission please do not hesitate in contacting us.

Yours sincerely,

John Maroney
CEO
SMSF Association

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing SMSF sector which is comprised of over 1.1 million SMSF members who have more than $750 billion of funds under management and a diverse range of financial professionals servicing SMSFs. The SMSF Association continues to build integrity through professional and education standards for advisors and education standards for trustees. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial planners and other professionals such as tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them access to independent education materials to assist them in the running of their SMSF.