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Dear Ms Brown,

**Re: Consultation Paper 313 – Product intervention power**

**In brief:**

AIST is supportive of the powers which allow ASIC to step in and protect consumers' interests but continue to highlight that in order for the powers to be effective their implementation must be accompanied by addressing systemic gaps in the disclosure and reporting framework. We also advocate for a clearer delineation between the roles of APRA and ASIC to reduce the risk of regulatory overlap in relation to superannuation.

AIST welcomes the opportunity to provide a submission in respect of the Consultation Paper 313: Product intervention power.

AIST have previously supported the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (**'the Act'**) in enhancing ASIC's powers to step in and protect consumers' interests.

Our four high-level concerns regarding the proposed Regulatory Guide and Consultation Paper are:

1. Consumers and regulators need access to better information at a system and product level in order to make informed decisions. The proposed powers and responsibilities rest on a flawed disclosure and reporting regime, resulting in a lack of information both at a system and product level. This will consequently make it difficult for regulators to assess whether products are in a members' best interests and whether there is a risk of significant detriment. In addition, the current regulatory framework has introduced numerous exemptions, gaps and inconsistencies for Choice products and investment options compared with MySuper products.

The challenges facing consumers making comparative investment decisions and the importance of providing information in an accessible, simple and comprehensive

manner was highlighted in the review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements<sup>1</sup>.

2. In light of the expansion of APRA's responsibility, which often cross into the realm of conduct regulation, issues of overlap between ASIC and APRA must be addressed. In particular, it remains unclear how the new design and distribution obligations and product intervention powers will interact with the legislated annual outcomes assessment and the Business Performance Review (BPR). We note that ASIC are required to consult with APRA prior to making a product intervention order to a body that is regulated by APRA however advocate that issues regarding regulatory overlap must first be addressed.

The issue of regulatory overlap between APRA and ASIC in relation to superannuation was highlighted by both the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry and the Productivity Commission Inquiry Report into Superannuation. The Productivity Commission stated that 'conduct regulation arrangements for the superannuation system are confusing and opaque, with significant overlap and no clear delineation between the roles of APRA and ASIC<sup>2</sup>'. The Royal Commission also make recommendations regarding formalised co-ordination and co-operation between the regulators.

3. As we have previously raised, the legislation does not cover all the key entities which create and distribute products, with investment management companies and product providers, which in turn provide information to platforms, exempted from ensuring that the products they develop and sell are suitable.
4. As highlighted by the Consultation Paper, the product intervention power is expected to complement the design and distribution obligations in Pt 7.8A of the Corporations Act. Due to their complementary nature, in order to make an informed assessment of the proposed Consultation Paper, it would be helpful to also release at the same time draft Product Design and Distribution Obligation Guidance.

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<sup>1</sup> Darren McShane (2018), *Review of ASIC Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements*, Available at: <https://tinyurl.com/y4njwfm6> [Accessed 31 July 2019].

<sup>2</sup> Productivity Commission Inquiry Report, *Superannuation: Assessing Efficiency and Competitiveness (2018)*. Available at: <https://tinyurl.com/y9ylxoll> [Accessed 31 July 2019]

Our detailed responses to each of the questions in the Consultation Paper are detailed below:

**B1Q1 Are there additional factors that ASIC might take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment?**

Page | 3

We propose that the following additional factors are taken into account:

- Social context - The proposed Regulatory Guide section RG 000.50 (e) states that ASIC will consider evidence or risk of consumer confusion or misunderstanding. In addition, we propose that the social context is also considered, including whether the impacted consumers would be considered 'vulnerable' or a 'sophisticated' consumers. Cohorts such as the elderly, people with a disability are at a greater risk of financial abuse and therefore more likely to require product intervention;
- Competition - It is acknowledged that ASIC must consider the effects that the exercise of their powers will have on competition of the financial system. We also argue that conversely when considering if a product will likely result in significant consumer detriment, that the market context, including competition should be considered. Intense competition may not always be in the best interest of consumers and does not always work to protect consumers;
- Complaints history - We propose that the complaints history of a products should be considered, both internal and complaints escalated externally to the Australian Financial Complaints Authority (AFCA). It is noted that AFCA also have a role in identifying systemic issues and reporting to the appropriate regulatory body;
- Fairness - We highlighted that the example of flex commission arrangements in the Regulatory Guide notes unfair operation however this is not listed as a factor in considering consumer detriment. Elements of unfairness are likely to lead to significant consumer detriment;
- Cause of detriment - The cause of the detriment and the actions and behaviors undertaken by the entity are important considerations when determining if a product will result in significant consumer detriment. For example, if disclosure isn't meaningful then it is likely that the product may not be in a consumer's best interest. The Productivity Commission found that disclosure needs to improve as it is important for members (and their agents) identifying a product that best fits their needs whilst also data is needed for Regulators to identify practices contrary to members' best interests.
- Misaligned incentives - The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry highlighted that poor remuneration and incentive programs can lead, and have led, to poor customer outcomes<sup>3</sup>. In the context

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<sup>3</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019), *Final Report, Volume 1*. Available at: <https://tinyurl.com/y93raay5> [Accessed 26 July 2019].

of superannuation, it is suggested that there is a significant difference between the wholesale delivery of a MySuper default product which is steered through a comprehensive regulatory regime designed to protect beneficiaries and ensure appropriate products are distributed; and retail superannuation products that are often sold to consumers who have an existing relationship with a financial services provider such as a bank.

In addition, we advocate that factors considered must be supported by sufficient and appropriate evidence.

**B2Q1 Are there any other considerations that we should take into account in determining how we will intervene?**

The use of the product intervention power may have significant impacts on consumers and the affected organisation. We propose that the following are also considered when determining how ASIC will intervene:

- The availability and appropriateness of other remedies must first be considered. It must be clear that the use of product intervention powers are an appropriate and effective means of addressing the consumer detriment;
- The impacts on competition, stability and integrity of system;
- Unintended consequences. The use of product intervention powers or the timing in which they are implemented may in itself create undue risk for consumers, including harm to existing customers; and
- Non-alteration of consumer rights. More information is needed regarding how the commencement of a product intervention order may affect a consumer rights to redress. This is supported by a University of New South Wales paper, which recommended that product intervention powers should not change the rights and obligations of existing product-holders.<sup>4</sup>

In addition, we argue that the use of product intervention powers needs to be subject to strong internal governance by ASIC staff with the appropriate expertise.

**C1Q1 Do you have any feedback on the information we propose to include in our consultation on a proposed product intervention order?**

We understand that the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 requires ASIC to consult persons who are reasonably likely to be affected by the order. We argue that more guidance is needed on who this is likely to

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<sup>4</sup> University of NSW, (2015). Product Intervention Powers: a Legal, Comparative & Policy Analysis. Available at: <https://tinyurl.com/zrnh8f3> [Accessed 26 July 2019].

include. For example, will this also extend to affected superannuation funds, outsourced providers and product manufacturers.

**C1Q2 Is there any other information that we should include when we consult on a proposed product intervention order?**

Page | 5

We strongly support any proposal which includes accountability for the product intervention powers. We agree that ASIC should be transparent and consistent in their decision-making processes. To facilitate this, we believe that ASIC should also publish the rationale for making a product intervention order. We note that this is a requirement in the UK for the Financial Conduct Authority when they publish temporary product intervention rules.

We note that public consultation must be communicated in a way that it is easy for a consumer to understand and that any ambiguity could lead to confusion and wider consumer detriment. We would also question whether in addition to publishing the consultation document on your website whether a campaign would be conducted by ASIC to make consumers aware of the proposed order.

To provide more certainty in how the product intervention order will operate, we argue that when consulting ASIC should also consider publishing guidance.

**C2Q1 Do you have any feedback on how we intend to describe the significant consumer detriment?**

In addition to the factors described we propose that when describing significant consumer detriment that the consumers and other parties which are affected is described.

**C3Q1 Do you agree with our proposed approach to determining whether to delay commencement of a product intervention order? If not, why not?**

Yes, we agree that the proposed approach balances the need to in some cases for an immediate commencement and, in some cases, that it will take time to implement the terms of the product intervention therefore requiring a delayed commencement. This must be considered on a case by case basis with the members interests being prioritised.

**C3Q2 Do you there agree with the examples of factors that we should consider when determining whether to delay**

We agree that the example provided is helpful in understanding when a delay in commencement will be considered however would suggest that more examples are needed to understand other circumstances a delay in commencement would be appropriate and how this will be balanced against consumer interests.

**C3Q3 Are there any other factors that we should consider when determining whether to delay commencement, or the length of any delay?**

Although it is reasonable that the delay in commencement is considered on a case by case basis, we advocate that a decision to delay the commencement of a product intervention order should be guided by a set of clear principles. Whilst we recognise the need for industry certainty, consumer interests should be paramount.

Page | 6

For further information in relation to our submission, please contact Zach Tung, Policy & Regulatory Analyst on 03 8677 3851 or at [ztung@aist.asn.au](mailto:ztung@aist.asn.au).

Yours sincerely,



Eva Scheerlinck  
**Chief Executive Officer**

*The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.*

*As the principal advocate and peak representative body for the \$1.4 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.*

*AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.*