Law Council
OF AUSTRALIA
Business Law Section

5 January 2024

Financial Advice and Investment Management
Regulation & Supervision
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

By email: [redacted]

Dear Sir or Madam

Consultation Paper 374 Remaking ASIC class order on exchange traded funds: [CO 13/721] (CP 374)

This submission has been prepared by the Financial Services Committee within the Business Law Section of the Law Council of Australia (the **Committee**) in response to CP 374, which was released for consultation by the Australian Securities and Investments Commission (**ASIC**) on 24 November 2023.

The Committee thanks ASIC for the opportunity to provide feedback on CP 374 and the draft legislative instrument attached to it (the **Draft Instrument**), and has consulted with the Business Law Section's Corporations Committee in preparing this submission.

Background

ASIC Class Order [CO 13/721] *Relief to facilitate quotation of exchange traded funds on the AQUA Market* (the **Class Order**) is due to sunset on 1 April 2024 if not remade. The Class Order currently provides the following relief from the following provisions of the *Corporations Act 2001* (Cth) for the issuers of certain exchange-traded funds (**ETFs**), who may be responsible entities of registered managed investment schemes or corporate directors of corporate collective investment vehicles:

(a) relief from obligations to treat members who hold interests or shares of the same class equally, enabling ETF issuers to limit redemptions and provide certain information to authorised participants only; and
(b) modifications to the ongoing disclosure requirements.

The Class Order also provides relief from the operation of:

(a) relevant interest provisions for authorised participants in relation to their underlying holdings of shares and interests in an ETF; and
(b) substantial holding and beneficial ownership tracing provisions for relevant interests acquired through the underlying securities in an ETF.

The Class Order currently only applies to ETFs that are passively managed and track an index. ASIC is proposing to remake the Class Order and extend the current relief to all types of quoted ETFs—other than those that use internal market making.

Response to consultation questions

The questions posed by ASIC in CP 374, and the Committee's responses to those questions, are set out below.

B1Q1 Do you agree with our proposal? If not, why not?

Overall, the Committee agrees with ASIC's proposal to remake the Class Order, and to expand the relief to a broader range of ETFs.

B1Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.

Committee members are not aware of any significant issues associated with the operation of the Class Order.

The Committee notes that the Class Order has been operating for 10 years. The Committee notes that the Draft Instrument would expire after five years. The Committee is not aware of there having been any problem with the Class Order remaining in force for the past 10 years.

The Committee does not understand why ASIC would not allow the Draft Instrument to run for its maximum 10-year duration, and it is not clear to the Committee what benefit would be gained from limiting the duration of the Draft Instrument to five years.

B1Q3 Will the proposed relief need to be extended to ETFs that use internal market making? If so, please explain which form of relief is required, if any, and why.

The Committee acknowledges that, where internal market making is used for an ETF, not all of the Class Order relief would be needed. The Committee queries whether the Draft Instrument ought to also cover off the subset of relief that would still be needed for an ETF that uses internal market making. Given the lack of detail in the explanation of the Class Order relief in CP 374, how ETFs work and why they need such relief, the Committee is not in a position to comment on the specific relief that would be needed for ETFs that use internal market making.

Other observations

The Committee also notes the brevity of CP 374. The Committee considers that CP 374 does not sufficiently articulate the policy rationale for the relief that the Class Order currently provides. The Committee considers that, in order to facilitate an informed review of the proposal, ASIC ought to have better explained in CP 374:

(a) what the eligible ETF issuers and other affected parties would have needed to do to meet each respective obligation if the Class Order relief had not been given;
(b) why ASIC formed the view that it would be disproportionately burdensome for ETF issuers and other affected parties to have complied with those obligations; and

(c) to the extent that the Draft Instrument is broader in scope than the Class Order—why ASIC considers it appropriate to now broaden the scope of the relief (which may include the rationale for the individual case-by-case relief that ASIC has been provided to date).

The Committee hopes that the above matters will be addressed in a more appropriate level of detail in the Explanatory Statement accompanying the relevant legislative instrument.

The Committee also anticipates that ASIC will update Information Sheet 230 *Exchange traded products—admission guidelines* to replace references to the Class Order with references to the replacement instrument in due course.

If ASIC wishes to discuss any matters raised in this submission, please contact [redacted]

Yours sincerely

[redacted]

[redacted]

[redacted]
Business Law Section