CS-051 Proposed remake of relief from dollar disclosure reporting and AFS licensing requirements for general advice in certain exempt documents

ASIC

Submitter:

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[redacted]

Introduction

I welcome the opportunity to comment on ASIC Simple Consultation 51, concerning the proposed remake of relief from dollar disclosure reporting and Australian financial services licensing requirements for general advice in certain exempt documents.

This submission does not oppose all regulatory relief. Relief may be justified where the ordinary law produces artificial, impractical or disproportionate outcomes. But relief should never be treated as an administrative entitlement. It must be justified by clear public purpose, clear limits and clear consumer protection.

That is especially important where a sunsetting instrument is being remade. Sunsetting should operate as a real public interest checkpoint, not as a routine rollover. ASIC should be required to ask whether the relief remains necessary, whether it has operated safely, whether the market has changed, and whether the relief has created or may create avoidable consumer risk.

The central issue in this consultation is not simply whether two 2016 instruments should be remade. The central issue is whether ASIC should remake those instruments while also extending dollar disclosure relief to certain discretionary risk products provided by discretionary mutual funds.

That extension should not be treated as a minor or merely technical change. It is a substantive policy choice.

Summary position

ASIC should not remake the instruments unchanged and should not proceed with the discretionary mutual fund extension unless it is separately justified and strengthened.

The proposed remake of the existing relief may be acceptable where ASIC can demonstrate that the relief remains necessary, confined and safe. However, the proposed extension of dollar disclosure relief to discretionary risk products raises a sharper concern.

A discretionary risk product is not ordinary insurance. It may perform a risk protection function from the consumer's perspective, but payment of a claim remains discretionary. That difference is fundamental. If the product appears to consumers as protection against loss, but payment depends on discretion rather than an enforceable entitlement, then disclosure should be stronger, not weaker.

ASIC should therefore proceed only if the final instrument and accompanying explanatory material make the limits of the relief unmistakable.

The good public purpose test

The proper test is not whether the relief is convenient for product issuers, advisers or transaction participants. The proper test is whether the relief serves a good public purpose.

The public purpose of financial disclosure is to make relevant cost, benefit, risk and legal uncertainty visible to the person being asked to rely on the product. Disclosure is not a paperwork burden in the abstract. It is part of the mechanism by which consumers, investors and markets are meant to understand what is being offered.

The public purpose of AFS licensing is similar. It is not merely to create a formal gateway into the financial services sector. It is to attach conduct, competence, accountability and disclosure obligations to financial product advice.

On that basis, relief should be granted only where ASIC is satisfied that the ordinary legal requirement is not doing useful protective work, and that the substitute disclosure or substitute regulatory setting is at least equally effective for the affected class of persons.

ASIC should state that test expressly before remaking either instrument.

ASIC should not treat sunsetting as routine

Both instruments are sunsetting. That matters.

A sunsetting review should not ask only whether the instrument has been useful to industry. It should ask whether the instrument continues to serve the public interest. It should ask whether consumers have suffered confusion, whether ASIC has received complaints, whether surveillance has identified misuse, and whether market conditions have changed since the relief was first granted.

ASIC's own consultation material describes the proposal as involving minor and technical changes to improve clarity and consistency. That framing is too narrow. The extension of dollar disclosure relief to discretionary risk products is not merely a clarity amendment. It changes the reach of the relief.

If ASIC wishes to extend relief to a new product category, it should say so plainly and justify that extension separately.

Discretionary risk products require stronger disclosure, not weaker disclosure

The most important issue is the proposed treatment of discretionary risk products.

The draft Disclosure in Dollars instrument defines discretionary risk products by reference to products provided by or through a discretionary mutual fund, where a person may make a claim on the occurrence of a specified event, and payment of the claim is at the discretion of a person or body.

That definition goes to the heart of the consumer risk. A consumer may see a product that manages financial risk and may naturally compare it with insurance. But the legal position may be very different. If payment is discretionary, the consumer may not have the same enforceable entitlement that they would expect from ordinary insurance.

That distinction must be made prominent.

ASIC should not allow dollar disclosure relief to operate in a way that makes discretionary protection look more certain than it is. The problem is not only that exact dollar figures may be difficult. The deeper problem is that the consumer may misunderstand the nature of the promise.

If ASIC proceeds, the relief should be conditional on a clear and prominent statement that the product is not general insurance or life risk insurance, that payment of claims is discretionary, and that the consumer may not have an enforceable entitlement to payment merely because the relevant event occurs.

That warning should not be buried in general disclosure language. It should be prominent, plain and unavoidable.

Dollar disclosure should not be replaced by vague explanation

There may be cases where exact Australian dollar disclosure is difficult or artificial. That does not mean the alternative can be general or vague.

Where ASIC permits relief from stating costs or benefits in Australian dollar terms, the substitute disclosure must still be decision useful. It should explain the significant factors affecting cost and benefit, the practical consequences of those factors, and the circumstances in which payment may be reduced, delayed, refused or not made.

For discretionary risk products, ASIC should require examples. Consumers are more likely to understand practical examples than abstract statements about discretion. A Product Disclosure Statement should explain, in concrete terms, when a claim might be made, when it might be paid, when it might not be paid, and what factors may affect the amount.

Without that level of clarity, the relief risks replacing difficult disclosure with weaker disclosure.

Enforcement and equality of arms

ASIC should also consider the practical enforcement environment in which this relief will operate.

Relief from dollar disclosure may appear modest when viewed as a drafting issue. It is not modest when viewed from the position of a consumer who later discovers that the product did not operate as they understood it would. By that stage, the consumer is no longer making an informed choice. They are trying to reconstruct what happened after loss has occurred.

That is where the lack of equality of arms becomes decisive. Product issuers generally hold the documents, the systems knowledge, the legal advice, the financial resources and the institutional memory. Consumers usually do not. They may not know what questions to ask. They may not know what internal material exists. They may not be able to fund litigation. They may be forced into complaint processes after the damage is done.

ASIC should therefore not rely on after the event enforcement as a substitute for clear upfront protection. Nor should it assume that a consumer can correct poor disclosure by later complaint, negotiation or legal action. In practice, the weaker party often lacks the means to test the stronger party's explanation.

This is especially important for discretionary risk products. If a product is acquired to manage financial risk, but payment of a claim remains discretionary, the consumer must understand that before they enter the product. The disclosure must not merely describe factors that may affect cost or benefit. It must state plainly that the product is not ordinary insurance, that payment is discretionary, and that the consumer may not have an enforceable entitlement to payment merely because the relevant event occurs.

The purpose of disclosure relief should not be to reduce friction for issuers. It should be to avoid artificial disclosure while preserving, and where necessary improving, consumer understanding. Where the ordinary dollar disclosure rule is relaxed, ASIC should require substitute disclosure that is prominent, practical and enforceable.

Historical warning

Australia has already seen the damage that can arise when complex financial products are sold or presented as risk management tools while the practical risk remains with the customer. The foreign currency loan experience discussed in Bankers and Bastards is a useful historical warning. Those products were presented as sophisticated financial arrangements, but many borrowers later found that the real risk, the complexity of the structure, the cost of legal action and the lack of access to internal information sat overwhelmingly against them.

The point is not to relitigate those matters or to suggest that every financial institution will act badly. The point is narrower and more important. Where a product is complex, where the customer depends heavily on the provider's explanation, and where the true risk may not become visible until loss occurs, disclosure must be strongest before the customer enters the product. Once the damage is done, the customer is usually in the weakest possible position.

That warning applies directly to discretionary risk products. A product may appear to manage financial risk, but if payment of a claim is discretionary, the consumer may not have the protection they assume they have bought. The consumer may think they are acquiring something functionally similar to insurance, when the legal position is materially different.

ASIC should therefore require clear, prominent and practical disclosure of that fact. The answer is not less disclosure because exact dollar amounts are difficult. The answer is better disclosure because the consumer's legal and practical position is uncertain.

This is not an argument against all financial innovation or all regulatory relief. It is an argument against relief that depends too heavily on consumer vigilance after the event. History shows that once loss has occurred, the ordinary consumer may lack the documents, technical knowledge, money, legal support and institutional power needed to challenge the product issuer. Proper disclosure must therefore operate before the consumer commits, not after the consumer has been harmed.

The proposed five-year remake is too long without a review condition

ASIC proposes that the remade instruments operate until 1 October 2031.

A five-year period may be acceptable for relief that is genuinely unchanged and well understood. It is less acceptable where ASIC is extending relief into a product category that raises obvious consumer understanding issues.

If ASIC proceeds with the discretionary risk product extension, it should either apply a shorter review period to that part of the relief or commit to a public review of its operation before the next sunset date.

That review should consider complaints, surveillance outcomes, consumer understanding, disclosure practices, enforcement outcomes and any evidence that the relief has contributed to misunderstanding about the nature of discretionary protection.

AFS licensing relief should remain tightly confined

The proposed Financial Product Advice Exempt Documents instrument also requires caution.

There may be a practical case for relief where general advice appears in documents that are already required under Australian law or certain foreign regulatory regimes. It may be disproportionate to require an AFS licence merely because a required transaction document contains general financial product advice.

However, the relief should remain tightly confined.

ASIC should be satisfied that the relief does not allow promotional, persuasive or advisory material to escape ordinary licensing and conduct obligations merely because it is embedded in a covered document. The boundary between required disclosure and commercial persuasion can be important. It should not be blurred.

ASIC should also make clear that the relief does not excuse misleading or deceptive conduct, does not protect selective or incomplete disclosure, and does not permit entities to use exempt documents as a substitute for properly licensed advice.

The wider enforcement context matters

Relief is only safe if the remaining rules are meaningful, visible and likely to be enforced.

ASIC should be cautious about granting or extending relief in areas where consumer understanding depends heavily on nuanced disclosure. The more complex the product and the more discretionary the benefit, the less realistic it is to rely on consumers identifying the legal significance of fine print.

ASIC should also be required to reflect on its own regulatory performance when deciding whether to extend relief. There have been repeated examples in Australian financial services where regulatory response, enforcement timing, complaint pathways and public accountability have been less than optimal. That does not mean ASIC should never grant relief. It does mean ASIC should not grant relief on the assumption that after the event enforcement will provide an adequate substitute for strong upfront disclosure.

This is particularly important because financial harm often occurs through chains of conduct. A consumer may encounter advertising, lead generation, general advice, product documents, platform material and sales conversations before making a decision. A single exempt document may not tell the whole story. By the time harm is visible, the consumer may already face loss, delay, evidentiary difficulty and a significant lack of equality of arms.

ASIC should therefore assess the relief in its real market context, not only as a drafting exercise. It should ask how the relief will operate where disclosure is poor, where consumers misunderstand discretionary protection, where complaints emerge slowly, and where enforcement does not occur quickly enough to prevent harm. Relief should be granted only where ASIC can explain why the remaining safeguards are strong enough in practice, not merely adequate on paper.

Recommended position

ASIC should remake the existing relief only where it is satisfied, on evidence, that the relief remains necessary, proportionate, confined and safe.

ASIC should not characterise the discretionary mutual fund extension as a merely technical change. It should be treated as a substantive expansion of relief and justified separately.

ASIC should separately justify the extension of dollar disclosure relief to discretionary risk products. If ASIC cannot provide that justification, the extension should not proceed.

ASIC should require prominent disclosure that a discretionary risk product is not ordinary insurance, that payment of claims is discretionary, and that the consumer may not have an enforceable entitlement to payment merely because the relevant event occurs.

ASIC should require practical examples showing how costs, benefits, claim payment, claim reduction and claim refusal may operate.

ASIC should ensure that any substituted disclosure is decision useful, not merely descriptive.

ASIC should recognise that weak enforcement capacity and lack of equality of arms make strong upfront disclosure more important, not less important.

ASIC should review the discretionary risk product relief before the next sunset date, rather than allowing it to run until 1 October 2031 without a public evidence check.

ASIC should confirm that the AFS licensing relief for general advice in exempt documents remains narrow and cannot be used to avoid ordinary advice obligations where material goes beyond the proper scope of the covered document.

If ASIC cannot demonstrate that the existing relief remains justified, it should allow the relevant instrument, or the unjustified part of the instrument, to sunset. The purpose of sunsetting is defeated if relief is remade by default despite ASIC being unable to show that the relief still serves the public interest.

If ASIC cannot make that case, the proper course is not automatic renewal. The proper course is to allow the relief to sunset, or to remake only those parts that have been clearly justified and strengthened.

Conclusion

ASIC should not treat CS 51 as a routine remake.

The existing instruments may have served a practical purpose, and some relief may remain justified. But that is not enough. Sunsetting exists for a reason. It is a public interest checkpoint, not an administrative inconvenience. If ASIC cannot show that the relief remains necessary, proportionate, confined, enforceable and safe, the proper course is not automatic renewal. The proper course is to allow the relief to sunset, or to remake only those parts that have been clearly justified and strengthened.

The proposed extension to discretionary risk products raises a distinct public interest issue. Where a product manages financial risk but payment of claims is discretionary, the consumer protection challenge is greater, not smaller. A consumer may believe they are acquiring practical protection against loss, while the legal position may be materially weaker than ordinary insurance. That risk should not be softened by reduced disclosure. It should be confronted directly.

The purpose of disclosure is not to make product documentation more convenient for issuers. The purpose is to make cost, benefit, risk and legal uncertainty visible to the person being asked to rely on the product. That purpose matters even more where regulator enforcement is uncertain and consumers face an obvious lack of equality of arms against better resourced product issuers. If disclosure is weak at the point of entry, later rights may be theoretical. A consumer who lacks the documents, money, technical knowledge and legal support to challenge a product issuer after loss has occurred has not been meaningfully protected.

ASIC should therefore proceed only on a clear public purpose footing. It should remake relief only where the relief remains necessary and confined. It should strengthen, not weaken, disclosure around discretionary risk products. It should not rely on after the event enforcement as a substitute for clear upfront protection. It should require prominent, practical and decision useful disclosure before consumers enter these products.

If ASIC cannot justify the existing relief, it should allow the relevant instrument, or the unjustified part of the instrument, to sunset. If ASIC cannot justify the discretionary mutual fund extension separately, that extension should not proceed. A simple consultation process should not obscure the fact that one part of this proposal is a substantive expansion of relief, not merely a technical rollover.