



24 March 2017

Mr Stephen Powell
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The Treasury
Langton Crescent
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By email: ProductRegulation@treasury.gov.au

Dear Mr Powell

Design and Distribution Obligations and Product Intervention Power Proposals Paper

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide this submission on the *Design and Distribution Obligations and Product Intervention Power Proposals Paper* (**Proposals Paper**).

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and the community, to ensure Australia's banking consumers continue to benefit from a stable, competitive and accessible banking industry.

1. Introductory comments

The ABA supports reforms to the existing regulatory framework that protect consumer interests, increase transparency and accountability and builds trust and confidence in banks. Specifically, we support the introduction of a principles-based, flexible, and scalable product design and distribution obligation, and support in principle a targeted product intervention power to stop the distribution of products where there is a risk of significant detriment or harm to consumers.

This submission provides detailed responses to the issues and questions raised in the Proposals Paper (Attachment). The ABA notes that individual banks may engage directly with The Treasury via written submissions and consultations and may provide further information about their response to the Proposals Paper.

As part of the Treasury consultation, we suggest that the Government, industry and consumer representatives convene a roundtable to discuss the principles for designing the product distribution obligation and product intervention power and the legal, technical and practical issues that will require consideration by the Treasury.

2. Commitment to consumer protection

In April 2016, the banking industry announced a comprehensive package of reforms to protect consumer interests, promote transparency and accountability, and build trust and confidence in banks¹. This followed consultation with consumer representatives, regulators, government officials and consumers on what banks need to do to address concerns with conduct and culture.

¹ <http://www.bankers.asn.au/media/media-releases/media-release-2016/banks-act-to-strengthen-community-trust>



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Banks are making changes in important areas related to consumer protection, including improving how they handle consumer complaints. The industry is working on strengthening commitments to consumers in the Code of Banking Practice after an independent review and making sure banks have the highest standards of whistleblower protections to encourage their staff to speak up and recruitment practices to remove individuals from the industry for poor conduct. We are also awaiting the findings of an independent review into how banks pay and incentivise their staff. Banks want to ensure that the way they pay their staff promotes the right outcomes for consumers.

In January 2017, the banking industry announced further changes to deliver better products and services to consumers and create a better culture in banks². This includes being more transparent about fees on retail banking and credit products such as home loans and credit cards as well as the terms and conditions in loan contracts for small businesses, providing greater support to consumers experiencing financial difficulty and struggling to manage their debts, and improving ways for consumers to switch bank accounts.

3. Product design and distribution obligation

3.1 Policy objective

The ABA believes the design and distribution obligation should promote consumer protection by encouraging more consumer focused product design, better management of conflicts of interest, and enhanced communication and transparency between product issuers and distributors.

Having regard to this policy intent, the ABA supports a principles-based approach to the composition of the new design and distribution obligation. The new design and distribution obligation should:

- Be a clear duty in its own right and be based on a clear and defined policy intent
- Be flexible and scalable depending on the nature of the financial product, its complexity and investment risk, and the rigour of other applicable regulatory requirements, and
- Ensure further consumer protections are introduced, without adding unnecessary complexity, and costs for consumers that are not balanced with corresponding improvements in consumer outcomes.

The development of the design and distribution obligation should take into account:

- Existing legal and regulatory obligations
- Preserving prudent commercial decision making, and
- Implementation and operational factors associated with the offer of financial products.

3.1.1 Principles-based approach

The ABA supports clearly drafted, principles-based legislation to introduce the new obligation.

A principles based approach will ensure the obligation allows flexibility and scalability in operation to best suit the nature of the financial product, its complexity and investment risk, and the rigour of other applicable regulatory requirements.

It should be incumbent on each organisation to implement that legislation having regard to the law, the size, nature and complexity of its business, the nature of the products issued/distributed, the characteristics of its consumers and its governance, risk and compliance arrangements.

The new design and distribution obligation should draw upon and complement existing consumer protection and risk management requirements, and the intensity and effort to fulfil the obligation should be scalable depending on the level of existing regulation in place.

² <http://www.bankers.asn.au/media/media-releases/media-release-2016/we-hear-you-banks-announce-more-changes-to-make-banking-better>



3.1.2 Consumer responsibilities

The ABA believes it is essential that all consumers, once they have received suitable advice and appropriate disclosures from an intermediary or they have chosen not to seek advice, evaluate any information provided to them, educate themselves about the products in which they invest or acquire and ultimately, take responsibility for their decision. Product issuers, intermediaries and consumers all have responsibilities. It would be a concern if the design and distribution obligation undermined this principle and diluted the fact that there is risk, and reward, in choices about financial products.

3.2 Scope

As noted, the ABA believes that the new design and distribution obligation should be flexible and scalable having regard to the complexity and investment risk of the product, and the extent and rigour of other applicable regulatory requirements. This is particularly relevant to financial products traded on prescribed foreign and domestic markets, which are already subject to stringent regulatory and ongoing disclosure obligations.

Notwithstanding that flexibility, there are some classes of products that, by their nature, should reasonably be excluded from the scope of the new obligation. We consider it will be reasonable to exclude a class of product where:

- It would be generally suitable for most consumers
- It is not complex, and can be well understood by consumers
- It does not carry significant investment risk, and/or
- There is a specific consumer protection regime in place.

Applying those principles, the ABA believes that Basic Banking Products³ and simple FX contracts used for currency exchange should be excluded.

It will be reasonable to exclude a class of product where a specific consumer protection regime is in place. Applying this principle, the ABA believes credit products and margin loans should also be excluded from the new design and distribution obligation. We also agree with the proposal that ordinary shares are excluded.

The new design and distribution obligation should apply to both licensed and unlicensed issuers and distributors. Where a distributor is not subject to the obligations and compliance checks applicable to licensed entities, consumer outcomes would be improved if the new obligation applied to impose a minimum level of protection for consumers. It would also be inequitable to impose such obligations on licensed entities who are already subjected to existing consumer protection and compliance requirements, and not impose the same obligations on unlicensed entities.

3.3 Individual suitability test

The new design and distribution obligation will not require an individual suitability test. Individual suitability issues are addressed by requirements of the Corporations Act, including the Future of Financial Advice (FOFA) obligations where personal financial product advice (“personal advice”) is provided, and there are other sources of obligations relating to superannuation, margin loans and certain complex products. These existing obligations should be taken into account to avoid duplication or conflict with any new principles based approach.

³ Basic deposit product (see section 761A of the Corporations Act 2001); facility for making non-cash payments (see section 763D of the Corporations Act 2001); facility for providing traveller’s cheques; 31 day notice period term deposits, travel money cards.



3.4 Safe harbour

The Treasury should consider the merits of the design and distribution obligation on issuers operating in conjunction with a “safe harbour”. A safe harbour may limit an issuer’s liability in the case of acts of misconduct undertaken by an engaged licensed distributor who has breached their obligations, and where the issuer has complied with their obligations. This is important to ensure the industry has sufficient certainty to continue to operate efficiently and not unduly hamper innovation.

3.5 Competition and innovation

The new design and distribution obligation should not extend to introducing default products or prohibiting distribution of certain classes of products to consumers. This would have significant adverse impacts on the offer and sale of financial products by reducing innovation and restricting consumer choice.

Importantly, product design is a commercial decision and regulatory intervention to standardise or prescribe certain product features can create other problems for competitive product offerings by increasing product costs or decreasing product offerings for consumers.

3.6 Implementation and operational impacts

The ABA notes that the implementation and operational impacts and costs of the new obligation will be significant. Implementation will likely require significant changes to policy, process, IT systems, change management and staff training. These changes will require project resourcing, internal business, IT, risk, compliance and legal resources.

Even if, as we propose, the new obligation is scalable and allows the issuer to draw on other compliance arrangements to meet the obligation, the increased compliance effort will be significant. Overseas, the introduction of a similar duty has had implications for product manufacturers where it has created unnecessary costs resulting in a reduction in economic viability for some products.

Consideration of these legal, practical and operational factors is critical to both the detailed design of the obligation and the development of transitional timeframes.⁴

Importantly, the composition of the new obligation must ensure that further consumer protections are introduced, without adding unnecessary complexity and costs for consumers that are not balanced with corresponding improvements in consumer outcomes.

3.6.1 Closed and legacy products

The ABA believes that closed and legacy products that are no longer being sold to new consumers, should be excluded from the new design and distribution obligation and the product intervention power.

In most cases it will be impracticable to change the design or features of a closed/legacy product. In many cases it is also impracticable to move consumers out of closed/legacy products without triggering unintended consequences and tax liabilities, e.g. CGT. The new obligation should clearly define closed/legacy products, giving consideration to whether a closed product can be reinvested into or whether a closed product can be converted into another product.

Separate and more complex issues arise where a consumer has sustained a loss (e.g. CGT liability or crystallisation of losses), as a result of changes to a product or selling down by the issuer if the design and distribution obligation applies. These complex issues are primarily why the ABA does not support the obligation applying to closed/legacy products.

⁴ Refer to the International Organization of Securities Commissions’ final report, *Suitability Requirements with Respect to the Distribution of Complex Financial Products* and the Australian Financial Markets Association (AFMA) guide, *Principles relating to product approval – retail structured financial products*, both outline a number of relevant principles in this regard.



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The ABA supports the Government responding to Financial Systems Inquiry (FSI) recommendation 43 to introduce a mechanism to facilitate the rationalisation of life insurance and managed investment scheme legacy products. This response should address the uncertainty regarding how to define a closed/legacy product.

3.7 Transitional period

Having regard to the significant implementation and operational impacts, the industry will need sufficient time to embed arrangements in order to comply with the new obligation.

The ABA proposes a minimum 12 month transitional period from Royal Assent for the obligation to apply to new products, and a minimum of 2 years for existing products open to new consumers. Furthermore, industry should be able to prioritise the existing products based on their level of complexity and investment risk, and allow additional time beyond 2 years for lower risk, less complex products.

The implementation of the obligation should apply prospectively, including in relation to existing products, but only if they remain open and only to new sales/consumers.

The ABA recommends a facilitative compliance approach by ASIC for 12 months following the transitional period.

3.8 Working with ASIC

The ABA supports clearly drafted, principles-based legislation to introduce the new obligation.

However, there may be some aspects of the obligation where implementation may be assisted with high level, principles-based, regulatory guidance. We encourage ASIC to consult and work closely with industry and other stakeholders to develop that guidance.

In other circumstances, it may be necessary for ASIC to grant relief or take no action positions, to assist industry to fully implement the reforms. We encourage the Treasury to consider the merits of providing ASIC with a relief making power that could be used to assist industry overcome implementation challenges, to ensure obligations are appropriately targeted, and to prevent unintended consequences.

It should be noted that the absence of relief making powers for ASIC relating to the FOFA obligations has caused legal and compliance difficulties, and evidence of the need for relief making powers to be introduced with the new obligation.

3.9 Disclosure

It is the ABA's view that the new design and distribution obligation should work in conjunction with effective, innovative and streamlined disclosures.

The ABA accepts that disclosure in isolation is not always adequate to ensure appropriate consumer protections. Once the new obligation is implemented, we support the Government reviewing existing disclosure requirements, taking into account the improved consumer protections introduced through the design and distribution obligation, with a view to removing or streamlining disclosure requirements where they have proven ineffective.

The ABA supports the Government responding to FSI recommendation 23 to remove regulatory impediments to innovative product disclosure and communication with consumers, and improve the way risk and fees are communicated to consumers. More widely, we support an increase in the innovation and use of digital materials to make disclosure easier for consumers to use and incorporating additional information by reference.



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4. Product intervention power

4.1 Policy objective

The ABA recognises that neither consumers, nor the industry, benefit when inappropriate financial products are available in the market.

In principle, the ABA supports a targeted product intervention power to stop the distribution of products where there is a risk of significant detriment or harm to consumers, particularly where products have been mis-sold in a reckless, fraudulent or negligent manner.

As recommended in the Final Report of the FSI, any new power should be exercised only as a last resort and should be based on a clear and defined policy intent.

The power should be clearly drafted in legislation, and provide a clear explanation on how and when the power will be used, ensure the regulator is transparent and accountable in the use of the power, and ensure appropriate safeguards. The exercise of the power should be subject to administrative and judicial review.

The ABA believes that ASIC should consult with industry on the development of any regulatory guidance explaining how the regulator will use the power.

4.1.1 Purpose

Importantly, the power should be 'injunctive like' and should be used to stop the distribution and sale of the product, or allow ASIC to take other steps to manage immediate and serious risks to consumers. 'Significant detriment' should be clearly defined.

Importantly, the ABA does not see the power operating as a 'product redesign' power that is intended to require amendments to the design and distribution of products, where there is not a risk of significant detriment or harm to consumers. The power should not be used as a mechanism for ASIC to make changes to a product's design, operation or features that are not required to stop the sale of the product and manage immediate risks for consumers.

Where there is not a risk of significant detriment to consumers, and therefore the product intervention power is not invoked, the ABA supports ASIC conducting a review of current market practices and the establishment of a commonly understood language, notably for structured products, in consultation with industry and stakeholders.

The ABA also supports ASIC's market-wide surveillance programs into certain market and industry practices. The results of these reviews should be the subject of consultation with industry and stakeholders to identify any systemic issues. Where the reviews do not uncover systemic issues, these matters should continue to be addressed via targeted consultation and/or direct action between ASIC and the financial institution or regulated entity.

4.2 Legal and administration law issues

4.2.1 Consultation

The ABA encourages that sufficient consultation is undertaken prior to an intervention. In particular, ASIC should consult with affected issuers and distributors and where the intervention is specific to a prudentially regulated product, e.g. bank issued hybrid securities, ASIC should be legally required to consult with APRA.



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Before making an intervention, the ABA believes ASIC should be required to:

- Identify a risk of significant detriment or harm to consumers
- Undertake appropriate consultation, with the issuer/distributor, and in some circumstances with APRA, relevant industry bodies and consumer representatives
- Consider the use of alternative regulatory powers, tools and processes, such as undertaking market-wide surveillance. Importantly, the ABA believes that the FSI recommendation should be adopted (i.e. that it is used as a last resort measure), and
- Assess whether ASIC has the organisational capacity and expertise to determine whether the power should be exercised, and if not, engage that expertise.

4.2.2 Existing protections and requirements

The ABA proposes that in developing any product intervention power, existing legal obligations relating to advertising and marketing, terminology and labelling, regulated disclosures and other disclosures by product issuers are taken into account, and existing regulatory engagement protocols where concerns have been identified, are preserved.

4.2.3 Managing unintended consequences

Implementing product bans and distribution restrictions could have significant implications for product issuers and consumers, including existing retail consumers. For example, complex issues arise where a product intervention by ASIC, which was later withdrawn, encouraged a consumer to redeem from a product at an unfavourable price, time and/or which has disadvantageous tax consequences.

Any product intervention power should manage unintended consequences and adverse implications for consumers who are invested in the relevant product (for example, loss of confidence, interruptions to cash flow, CGT implications, etc). Additionally, implications for product issuers if compliance, risk controls and commercial decisions are disrupted should also be considered.

Importantly, the ABA believes that industry participants should be given notice about the intervention and be given the opportunity to change their practice and avoid the intervention.

4.2.4 Application

The ABA notes that the power should be applied for 18 months, with no ability for ASIC to extend. However, the ABA notes that this may be insufficient in the circumstances for establishing a permanent resolution. We support the proposal that during the initial intervention period of 18 months, the Government should consider whether the ASIC intervention should be made permanent. Following the 18 month period, the intervention will lapse where the Government has not made it permanent.

If you would like to discuss any of the matters raised in this submission, please contact Christine Cupitt, Policy Director – Retail Policy (02) 8298 0416: ccupitt@bankers.asn.au.

Yours sincerely

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Attachment: Detailed industry response

5. Design and distribution obligation

5.1 What products will attract the design and distribution obligation?

Summary of proposal: The obligations will apply to financial products made available to retail clients except ordinary shares. This would include insurance products, investment products, margin loans and derivatives. The obligations would not apply to credit products (other than margin loans).

Question 1

Do you agree with all financial products except for ordinary shares being subject to both the design and distribution obligations and the product intervention power? Are there any financial products where the existing level of consumer protections means they should be excluded from the measures (for example, default (MySuper) or mass-customised (comprehensive income products for retirement superannuation products)?

5.1.1 Financial products

The ABA agrees that the new design and distribution obligation should apply to financial products made available to retail clients⁵ with the exception of those products outlined at 5.1.2 below.

Where existing design and distribution processes and controls are in place for a financial product, these should be able to be relied upon by the issuer/distributor in meeting the new obligation.

As such, the obligation should be flexible and scalable so that the nature of the compliance processes and the intensity of the compliance effort can be flexed, depending on the:

- Nature and complexity of the product, and
- Existing legal and regulatory obligations that apply to the product.

5.1.2 Exclusions

The design and distribution obligation should exclude certain products on a principles basis, that is, where a product:

- Would be generally suitable for most consumers
- Is not complex, and can be well understood by consumers
- Does not carry significant investment risk, and/or
- There is a specific consumer protection regime in place.

Applying those principles, we believe that Basic Banking Products⁶ and simple FX contracts used for currency exchange should be excluded.

It will be reasonable to exclude a class of product where a specific consumer protection regime is in place. Applying this principle, we believe credit products and margin loans should also be excluded from the obligation. We agree with the proposal that ordinary shares are excluded.

We also agree with the proposed carve out of the new design and distribution obligation applying to consumer credit products regulated under the National Consumer Credit Protection Act 2009, (the NCCP), to avoid duplication and regulatory uncertainty.

⁵ Pursuant to s761G of the Corporations Act 2001 definition of meaning of retail client.

⁶ Basic deposit product (see section 761A of the Corporations Act 2001); facility for making non-cash payments (see section 763D of the Corporations Act 2001); facility for providing traveller's cheques; 31 day notice period term deposits, travel money cards.



The ABA believes that the same rationale applies to other regulated consumer credit,⁷ particularly, in relation to margin loans as defined under the Corporations Act 2001.⁸ The Corporations Act sets out responsible lending obligations for margin loans, making these products subject to certain consumer protections, such as requirements to make assessments of unsuitability.

5.1.3 Wrap and other administration platforms

There is particular complexity in applying the new obligation to wrap and other platforms.

The ABA believes clarity is required on how to identify the issuer and distributor in the context of a wrap platform. The design of the obligation should limit any duplication of obligations between the issuer, platform operator and distributor. The application may also vary where the wrap platform is being used as part of a personal advice recommendation.

The ABA suggests that a responsible entity would not be treated as an issuer, however, in some circumstances may be considered to be a distributor, for example, where products are made available to retail consumers through platforms. In this scenario, we would expect that the product issuers whose products are on the investment menu will have met the design and distribution obligations. We note that most responsible entities have investment governance arrangements for maintaining product menus on platforms.

In particular, more clarity is required for responsible entity obligations where the platform is:

- Direct
- Advised (personal advice)
- Wholesale, or
- Contains wholesale products, available to retail consumers.

Similar issues arise for Managed Discretionary Accounts (MDAs), Separately Managed Accounts (SMAs), Investor Directed Portfolio Services (IDPSs) and IDPS-like services.

5.2 Retail clients

Question 2

Do you agree with the design and distribution obligations and the product intervention power only applying to products made available to retail clients? If not, please explain why with relevant examples.

The ABA agrees that the new design and distribution obligation and product intervention power should apply only to products made available to retail clients.⁹

5.3 Credit products

Question 3

Do you agree that regulated credit products should be subject to the product intervention power but not the design and distribution obligations? If not, please explain why with relevant examples.

⁷ For completeness, it is also noted that the product disclosure requirements of the Corporations Act (as amended by the Corporations Amendment Regulations 2010 (No. 5) ("Shorter PDS Regime")) have applied to margin loan facilities from 1 January 2011 (this includes a mandatory 4 page PDS with prescribed section headings and key content requirements such as risk disclosures).

⁸ Part 8, Division 4A, Subdivision A— "Responsible lending conduct for margin lending facilities" (as introduced by the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*).

⁹ Pursuant to s761G of the Corporations Act 2001 definition of meaning of retail client.



The ABA agrees with the proposal that all regulated consumer credit products should be out of scope of the new design and distribution obligation. Other credit products not regulated through the NCCP nor the Corporations Act should also be excluded.

In principle, the ABA supports the product intervention power being extended to consumer credit products regulated under the NCCP and/or the Corporations Act as an enhancement to the regulatory toolkit.

Question 4

Do you consider the product intervention power should be broader than regulated credit products? For example, 'credit facilities' covered by the unconscionable conduct provisions in the ASIC Act. If so, please explain why with relevant examples.

The ABA does not agree that the product intervention power should be broader than regulated credit products.

5.4 Who will be subject to the obligations?

Summary of proposal: 'Issuers' and 'distributors' of financial products must comply with the obligations. 'Issuers' are the entities responsible for the obligations under the product. Examples of issuers include insurance companies and fund managers.

'Distributors' are entities that either arrange for the issue of the product to a consumer or engage in conduct likely to influence a consumer to acquire a product for benefit from the issuer (for example, through advertising or making disclosure documents available). Distributors that provide personal advice will be excluded from the distributor obligations. Examples of a distributor include a credit provider that offers its consumers consumer credit insurance or a fund manager that distributes its products using a general advice model.

5.4.1 'Issuer' definition

Question 5

Do you agree with defining issuers as the entity that is responsible for the obligations owed under the terms of the facility that is the product? If not, please explain why with relevant examples. Are there any entities that you consider should be excluded from the definition of issuer?

The ABA agrees with the definition of 'issuers' as defined by the Corporations Act, that is, issuers are the entity responsible for the obligations owed under the terms of the facility that is the product.

5.4.2 'Distributor' definition

Question 6

Do you agree with defining distributors as entity that arranges for the issue of a product or that: (i) Advertise a product, publish a statement that is reasonable, likely to induce people as retail clients to acquire the product or make available a product disclosure document for a product, and

(ii) receive a benefit from the issuer of the product for engaging in the conduct referred to in (i) or for the issue of the product arising from that conduct (if the entity is not the issuer).

The ABA supports distributors being: entities that arrange for the issue of a product or that provide general advice. The other businesses contemplated in the proposal will generally be acting on instruction or through a contract with the issuer or Australian Financial Services (AFS) licenced distributor.



The ABA does not support entities that are wholly outside the business of financial services, such as advertising companies, coming under the definition of distributor.

The ABA notes that the proposed obligation will also apply in scenarios where the issuer also acts as the distributor, for example, in the case of IDPS operators and fund managers. As such, where a fund manager also engages the services of distributors who provide personal advice, but itself only provides general advice on its website, the proposed obligation will apply.

Question 7

Are there any situations where an entity (other than the issuer) should be included in the definition of distributor if it engages in the conduct in limb (i) but does not receive a benefit from the issuer?

The ABA agrees that in principle, an entity should only be included in the distributor definition where it receives a benefit from the issuer. However, there may be circumstances where an entity would be included in the definition of a distributor where they do not receive a direct benefit from the issuer but are paid on a fee for service basis by the consumer.

5.4.3 Personal financial product advice

Question 8

Do you agree with excluding personal financial product advisers from the obligations placed on distributors? If not, please explain why with relevant examples. Are there any other entities that you consider should be excluded from the definition of distributor?

The ABA agrees that personal advice providers (relevant providers) should be excluded from the obligation as it is regulated under the FOFA obligations and the new professional standards framework. In this instance, the relevant provider must meet conduct obligations specifically intended to provide consumer protections and ensure personal advice is given in the best interests of the client.

Additionally, issuers should be excluded from the monitoring requirements over the distribution of financial products should also be excluded, where personal advice has been provided to a retail client.

However, issuers and distributors should design their arrangements to respond to retail clients who are no longer receiving personal advice. For example, *RG 148 Platforms that are managed investment schemes and nominee and custody services*¹⁰ requires platform providers to have policies in place to deal with situations in which consumers do not opt in to continue to receive financial product advice, and therefore cease to have an adviser.

5.4.4 Licensed and unlicensed product issuers

Question 9

Do you agree with the obligations applying to both licensed and unlicensed product issuers and distributors? If they do apply to unlicensed issuers and distributors, are there any unlicensed entities that should be excluded from the obligations (for example, entities covered by the regulatory sandbox exemption)? Who should be empowered to grant exemptions and in what circumstances?

The ABA agrees with the obligations applying to both licensed and unlicensed product issuers and distributors, given these are important consumer protections which the FSI has recommended. Regimes such as the licensing exemption for start-ups (regulatory sandbox) are rightfully careful not to dispense with adequate consumer protections.

¹⁰ <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-148-platforms-that-are-managed-investment-schemes-and-nominee-and-custody-services/>



5.5 What will be expected of issuers?

Summary of proposal: Issuers must: (i) identify appropriate target and non-target markets for their products; (ii) select distribution channels that are likely to result in products being marketed to the identified target market; and (iii) review arrangements with reasonable frequency to ensure arrangements continue to be appropriate.

5.5.1 Target market

Question 10

Do you agree with the proposal that issuers should identify appropriate target and non-target markets for their products? What factors should issuers have regard to when determining target markets?

The ABA agrees with the proposal that issuers should identify appropriate target and non-target markets for their products. In defining a target market, the issuer should have regard to who will have their needs addressed by the product, who will benefit from the product, the product complexity and level of consumer sophistication required to understand the product.

Issuers should have regard to their current product management and product lifecycle processes, in meeting the design and distribution obligation.

Furthermore, the ABA would like confirmation that the rules do not require distributors (or issuers) to seek further information to determine which consumers fall within the identified target market. Seeking individual consumer information for this purpose could lead to a blurring of lines between products being provided under general vs personal advice.

Moreover, the proposed obligation should be set out in principles-based legislation as this will provide the greatest level of precision. There is uncertainty from industry on how to identify target and non-target markets. In this regard, the ABA supports the Government in undertaking further consultations with industry when developing and drafting the legislation.

The Proposals Paper also suggests that issuers must advise ASIC if a review identifies that a distributor is selling a product outside of the intended target market and the steps that it intends to take in order to address the issue. It is the ABA's view that the issuer should have a limited role in ensuring it reports the outcomes of its own reviews of the distributor's performance.

5.5.2 Post sale review

The Proposals Paper, envisages that issuers will be obliged to periodically review products with 'reasonable frequency' to ensure that the identified target market and distribution channels remain appropriate for the products.

The ABA suggests that the focus of these reviews should be on whether a product continues to operate as intended and is fit for the intended target market. The reviews should not be focused at the individual consumer level, nor require banks to check the product continues to meet the needs of individual consumers who have already obtained the product.

5.5.3 Distribution channels

Question 11

For insurance products, do you agree the factors requiring consumers in the target market to benefit from the significant features of the product? What do you think are significant features for different product types (for example, general insurance versus life insurance)?

The ABA has not prepared a response to this question.



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Question 12

Do you agree with the proposal that issuers should select distribution channels and marketing approaches for the product that are appropriate for the identified target market? If not, please explain why with relevant examples.

The ABA supports this approach in principle. However, if issuers are required to select only a narrow range of distribution channels and marketing approaches for the identified target market, we have concerns that the restriction could hamper innovative channels for distribution, with no perceivable consumer benefit. Therefore, we suggest that the requirements should be for the issuer to take reasonable steps to select distribution channels and marketing approaches for the product, based on the product features (complexity and investment risk) and the characteristics of the target market.

Question 13

Do you agree that issuers must have regard to the consumers a distribution channel will reach, the risks associated with a distribution channel, steps to mitigate those risks and the complexity of the product when determining an appropriate target market? Are there any other factors that issuers should have regard to when determining appropriate distribution channels and market approach?

The ABA agrees that issuers must have regard to the consumers which a distribution channel will reach and the complexity and investment risk of the products when determining an appropriate distribution channel and marketing approach. Consideration should be given to issues such as how an issuer would be expected to reach a certain target market.

Close consideration should be had in relation to identifying and mitigating risks associated with a distribution channel. Specifically, it will need to be clear if these risks related to the ability of the distributor to meet its own distributor obligations, or a broader range of risks.

The ABA supports consideration of risks related to the ability of the distributor to meet its own distributor obligations.

Importantly, there should be a clear delineation between the obligations of the issuer and distributor and the issuer should not be liable for the failure of the distributor to meet its distributor obligations.

The ABA suggests that the Treasury consider the merits of the proposed issuer obligations, outlined above, operating in conjunction with a safe harbour.

Question 14

Do you agree with the proposal that issuers must periodically review their products to ensure the identified target market and distribution channel continues to be appropriate and advise ASIC if the review identifies that a distributor is selling the product outside of the intended target market?

The ABA supports a high level, ongoing obligation to issuers to periodically review their products to ensure the identified target market and distribution channels continue to be appropriate. This review should take into account changes in the external economic environment and the demographic of the target market. Importantly, the policy intent of the rules is not to focus on individual consumer suitability but rather broad target marketing, therefore the review should not require an assessment of the individual circumstances of consumers, nor a suitability review.

The Proposals Paper also suggests that issuers must advise ASIC if a review identifies that a distributor is selling a product outside of the intended target market and the steps that it intends to take in order to address the issue.

The ABA supports the reporting requirement where the conduct of the distributor indicates a significant breach. In this case, the existing breach reporting requirements under s912D of the Corporations Act will be sufficient to enable reporting of compliance failures by issuers. We do not support a requirement to monitor for and notify individual instances where a product may have been sold outside the target market.



Question 15

In relation to all the proposed issuer obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?

The ABA supports clearly drafted, principles-based legislation to introduce the new obligation. It should be incumbent on each organisation to implement the new legislation having regard to the law, the size, nature and complexity of its business, the nature of the products issued/distributed, the characteristics of its consumers and its governance, risk and compliance arrangements.

There may be some aspects of the obligation where implementation may be assisted with high level, principles-based, regulatory guidance. We encourage ASIC to consult and work closely with industry and other stakeholders to develop this guidance.

In other circumstances, it may be necessary for ASIC to grant relief or take no action positions, to assist industry to fully implement the reforms. We encourage the Treasury to consider the merits of providing ASIC with a relief making power that could be used to assist industry to overcome implementation challenges, to ensure obligations are appropriately targeted and to prevent unintended consequences.

The ABA recommends a facilitative compliance approach by ASIC for 12 months following the transitional period.

Therefore if a consumer outside the identified target market chooses to obtain a product, these rules on issuers (in terms of reporting distributor breaches to ASIC) should not operate to restrict that consumer choice.

5.6 What will be expected of distributors?

Summary of proposal: Distributors must: (i) put in place reasonable controls to ensure products are distributed in accordance with the issuer's expectations; and (ii) comply with reasonable requests for information from the issuer related to the product review.

Question 16

Do you agree with the proposal that distributors must put in place reasonable controls to ensure that products are distributed in accordance with the issuer's expectations?

The ABA agrees with the proposal that distributors must implement reasonable controls, agreed with the issuer, to ensure that products are distributed in accordance with the issuer's expectations. This would limit the distributor's liability where there are reasonable controls which the issuer has not specified to the distributor.

The ABA proposes that the obligation should be scalable where the product will be distributed through personal advice. In that case, the distributor should be able to rely on the relevant provider meeting their conduct, competency and disclosure obligations under the Corporations Act.

Question 17

To what extent should consumers be able to access a product outside of the identified target market?

There may be circumstances where it is appropriate for a consumer outside the target market to invest in a particular product. For this reason, we do not support 'closing' products off to certain consumers. We also note that to close off certain products would, in effect, introduce an individual suitability requirement, which is not the intent of the proposed design and distribution obligations.

Consumers should still be able to access a product outside of the identified target market given these rules are not about product suitability. As suggested above, a consumer should still retain the choice to obtain a product as long as the obligations have been adhered to by issuer and distributor. Furthermore, there are existing legal and regulatory obligations that provide protection for individual consumers.



Consistent with the objective of preserving consumer choice, neither an issuer nor distributor should be penalised for a consumer's decision to obtain a product notwithstanding the new obligations were complied with. There may be circumstances where, due to the complexity and/or risk of a certain product, an individual product issuer may choose not to offer it through direct or unadvised channels.

Question 18

What protections should there be for consumers who are aware they are outside the target market but choose to access a product regardless?

The ABA believes those consumers should be provided with the regulated disclosure documents. Those consumers should also have access to the same redress and compensation mechanisms as other consumers, including access to internal complaints handling processes and an external dispute resolution (EDR) scheme.

Question 19

Do you agree with the proposal that distributors must comply with reasonable requests from the issuer related to the product review and put in place procedures to monitor the performance of products to support the review? Should an equivalent obligation also be imposed on advised distributors?

The ABA agrees with the proposal that distributors, must comply with reasonable requests for information from the issuer in order to support the issuer in conducting periodic reviews. This information may include information on compliance with requirements set by the issuer.

The information requests should not relate to the investment or other performance related issues of the product.

Question 20

In relation to all the proposed distributor obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?

As noted, the ABA supports clearly drafted, principles-based legislation to introduce the new obligation. It should be incumbent on each organisation to implement that legislation having regard to the law, the size, nature and complexity of its business, the nature of the products issued/distributed, the characteristics of its consumers and its governance, risk and compliance arrangements.

Question 21

Do you agree with the obligations applying 6 months after the reforms receive Royal Assent for products that have not previously been made available to consumers? If not, please explain why with relevant examples.

Question 22

Do you agree with the obligations applying to existing products in the market 2 years after the reforms receive Royal Assent? If not, please explain why with relevant examples and indicate what you consider to be a more appropriate transition period.

In response to questions 21 and 22, the ABA proposes a minimum of 12 month transitional period from Royal Assent for the obligation to apply to new products, and a minimum of 2 years for existing products open to new consumers. Furthermore, industry should be able to prioritise the existing products based on complexity and investment risk, and allow additional time beyond the 2 years for lower risk, less complex products.

The implementation of the obligation should apply prospectively, including in relation to existing products, but only if they remain open and only to new sales/consumers. The ABA recommends a facilitative compliance approach by ASIC for 12 months following the transitional period.



6. Product intervention power

6.1 What products will attract the product intervention power?

Summary of proposal: The power would apply to all financial products made available to retail clients (securities, insurance products, investment products and margin loans) and credit products regulated by the NCCP (credit cards, mortgages and personal loans).

6.1.1 Financial products

Question 1

Do you agree with all financial products except for ordinary shares being subject to both the design and distribution obligations and the product intervention power? Are there any financial products where the existing level of consumer protections means they should be excluded from the measures (for example, default (MySuper) or mass-customised (comprehensive income products for retirement) superannuation products)?

The ABA believes the product intervention power should apply to all financial products made available to retail clients,¹¹ except for ordinary shares. Additionally, as stated above at 3.2, the ABA supports the power applying to both licensed and unlicensed product issuers and distributors.

The ABA supports a general requirement for the power to be exercised from time to time in consultation with APRA. That is, there should be a more explicit legal obligation for ASIC to consult with APRA on product interventions for products whose features are prescribed by and are regulated by APRA, for example, MySuper products and banking capital raising products, such as hybrids. APRA should be specifically consulted with as part of developing the legislation for the power to facilitate the efficiency of the two regimes working together.

The ABA believes that closed and legacy products should be excluded, however, clarity should be provided on what is considered to be a “closed” product.

The ABA supports the Government responding to FSI recommendation 43 to introduce a mechanism to facilitate the rationalisation of life insurance and managed investment scheme legacy products.

Question 2

Do you agree with the design and distribution obligations and the product intervention power only applying to products made available to retail clients? If not, please explain why with relevant examples.

The ABA agrees that the design and distribution obligations and product intervention power should apply only to products made available to retail clients¹².

Question 3

Do you agree that regulated credit products should be subject to the product intervention power but not the design and distribution obligations? If not, please explain why with relevant examples.

The ABA agrees that regulated credit products, including margin loans, should be subject to the product intervention power but not the design and distribution obligations.

¹¹ Pursuant to s761G of the Corporations Act 2001 definition of meaning of retail client.

¹² Ibid. s761G.



Question 4

Do you consider the product intervention power should be broader than regulated credit products? For example, 'credit facilities' covered by the unconscionable conduct provisions in the ASIC Act. If so, please explain why with relevant examples.

The ABA does not agree that the product intervention power should be broader than regulated credit products.

6.2 What types of interventions will ASIC be able to make using the power?

Summary of proposal: ASIC can make interventions in relation to the product (or product feature) or the types of consumers that can access the product or the circumstances in which consumers access it. Examples of possible interventions include imposing additional disclosure obligations, mandating warning statements, requiring amendments to advertising documents, restricting or banning the distribution of the product.

Question 23

Do you agree that ASIC should be able to make interventions in relation to the product (or product feature), the types of consumers that can access a product or the circumstances in which a consumer can access the product. If not, please explain why with relevant examples.

Consistent with the principle that the intervention should only be made where there is a risk of significant detriment or harm to consumers, the ABA believes that the product intervention power should operate as an injunctive type mechanism to stop the sale of a product. It may also be appropriate, in limited circumstances, to impose additional disclosure obligations, mandate warning statements, or require amendments to advertising documents, in order to support the objective of stopping the sale of the product where there is a risk of significant detriment or harm to consumers.

Importantly, the ABA does not see the power operating as a 'product redesign' power that is intended to require amendments to the design and distribution of products, where there is not a risk of significant detriment or harm to consumers.

Where there is not a risk of significant detriment or harm to consumers, the ABA supports ASIC conducting surveillances and reviews of current market practices in order to work with industry to identify solutions to consumers' issues.

The results of these reviews should be the subject to consultation with industry and stakeholders to identify any systemic issues. Where the reviews do not uncover systemic issues, these matters should continue to be addressed via targeted consultation and/or direct action between the regulator and the regulated entity. For example, in 2014-2015, ASIC conducted an industry wide review of travel money cards. As part of this review, ASIC worked with issuers to amend the features of the product to allow consumers to reclaim leftover funds.¹³ ASIC has existing surveillance powers and sufficient relationships with industry to work with issuers on the design and distribution of products where ASIC has concerns about their operation and impact on consumers. Accordingly, the product intervention power should be reserved for circumstances where there is a risk of significant detriment or harm to consumers.

There are also practical concerns about the effect of a power that will allow more ad-hoc changes to the design and distribution of products. Such interventions in relation to product features have the potential to impact the commercial viability of the product. Removal of product features may not suit the needs of consumers already in a product and there is a significant risk that consumers' expectations of how the product functions, on the basis of which they chose to obtain the product, will not be met.

¹³ <http://asic.gov.au/about-asic/media-centre/find-a-media-release/2015-releases/15-229mr-consumers-can-reclaim-funds-on-expired-travel-money-cards-following-asic-action/>



Question 24

Are there any other types of interventions ASIC should be able to make (for example, remuneration)?

The product intervention power should be limited to actions that are required to halt the sale of a product and manage any immediate risks of significant detriment or harm to consumers.

Importantly, ASIC should not be able to make any other types of intervention. For financial products, remuneration to distributors has been adequately regulated through the FOFA obligations and the recent changes to life insurance commissions.

The ABA notes that the independent review into product sales commissions and product based payments in retail banking is underway. Furthermore, ASIC has just completed a review into the mortgage broking industry.

Other aspects, such as complaints mechanisms, training obligations for sales or advice staff are subject to adequate regulation through other laws.

6.3 When will ASIC be able to make an intervention?

Summary of proposal: In order to use the power, ASIC must identify a risk of significant consumer detriment, undertake appropriate consultation and consider the use of alternative powers. ASIC must determine whether there is a significant consumer detriment by having regard to the potential scale of the detriment in the market, the potential impact on individual consumers and the class of consumers likely to be impacted.

Question 25

Do you agree that the extent of a consumer detriment being determined by reference to the scale of the detriment in the market, the potential scale of the detriment to individual consumers and the class of consumers impacted? Are there any other factors that should be taken into consideration?

Consistent with the principle that the intervention should only be made where there is a risk of significant detriment or harm to consumers, the ABA believes that the product intervention power should respond where there is risk of significant detriment to individual consumers, or classes of individual consumers. The ABA supports ASIC taking into account the urgency of intervention, the amount of loss or potential loss, the financial situation of the consumers and other characteristics, such as financial hardship, vulnerability etc.

Importantly, we believe that Government should refer to the intention of the power, as stated in the FSI,

“(t)his power is not intended to address problems with pricing of retail financial products, where consumers might be paying more than expected for a particular product or where a large number of consumers have incurred a small detriment.”¹⁴

In circumstances where there is a risk of small detriment to a large number of consumers, we support ASIC using its other powers, surveillance activity and relationships with industry to remedy problems for consumers.

Additionally, the proposed intervention power should also be used in a way that does not create an uneven competitive playing field. If ASIC were to intervene in relation to a product offered by one institution, then a very similar product (i.e. same features) offered by another institution should be subject to similar intervention.

¹⁴ <http://fsi.gov.au/publications/final-report/chapter-4/product-intervention/>



Question 26

Do you agree with ASIC being required to undertake consultation and consider the use of alternative powers before making an intervention? Are there any other steps that should be incorporated?

The ABA believes that exercising the product intervention power, particularly without a suspected or a demonstrated breach of the law, can have significant consequences, in particular for consumers where an intervention either encouraged or required the consumer to redeem their investment, or cancel an insurance policy. The availability of the power to the regulator may also impact on innovation and consumer choice if the power is not exercised in a principled and consistent way.

Therefore, in assessing and identifying the risk of significant consumer detriment, we suggest ASIC has regard to whether there is a suspected or a demonstrated breach of laws that exist at the time the conduct occurs, in particular where products have been sold in a reckless, fraudulent or negligent manner. Furthermore, the use of the intervention power should be linked to clearly defined triggers within legislation having regard to other ASIC powers (such as a stop order) and the policy intent of the recommendation.

The ABA agrees that sufficient consultation should be undertaken prior to intervention. In particular, ASIC must consult with affected issuers and distributors and where the intervention is specific to a prudentially regulated product, e.g. bank issued hybrid securities, ASIC should be legally required to consult with APRA.

Before making an intervention, the ABA believes ASIC should be required to:

- Identify a risk of significant consumer detriment
- Undertake appropriate consultation, with the issuer/distributor, and in some circumstances with APRA, relevant industry bodies and consumer representatives
- Consider the use of alternative powers and processes, such as undertaking market-wide surveillance. Importantly, the ABA believes that the FSI recommendation should be adopted (i.e. that it is used as a last resort measure), and
- Assess whether ASIC has the organisational capacity and expertise to determine whether the power should be exercised, and if not, engage that expertise.

Question 27

Do you agree with ASIC being required to publish information on intervention, the consumer detriment and its consideration of alternative powers? Is there any other information that should be made available?

The ABA agrees that ASIC can publish information regarding the intervention, outlining how consideration has been given to the four requirements outlined above at question 26.

6.4 What will be the duration and review arrangements for an ASIC intervention?

Summary of proposal: An intervention by ASIC can last for up to 18 months. During this time, the Government will consider whether the intervention should be permanent. The intervention will lapse after 18 months (if the Government has not made it permanent). ASIC interventions cannot be extended beyond 18 months. ASIC market wide interventions are subject to Parliamentary disallowance. ASIC individual interventions are subject to administrative review.

The ABA agrees that interventions made by ASIC in relation to an individual product or how a specific entity distributes a product will be subject to administrative and judicial review. The ABA supports market-wide interventions subject to Parliamentary oversight including a 15-day Parliamentary disallowance period.



The ABA does not agree that the Government should review ASIC's use of the power after it has been in operation for five years, however, we support a review of ASIC's use of the power after it has been in operation for three years on the basis that the obligations are principles-based, whilst also considering the need for flexibility in the case of more complex products.

Question 28

Do you agree with interventions applying for an initial duration of up to 18 months with no ability for extensions? Would a different time frame be more appropriate? Please explain why.

The ABA agrees that interventions by ASIC should apply for an initial period of up to 18 months, with no ability for ASIC to extend. However, the ABA notes that this may be insufficient in the circumstances for establishing a permanent resolution. During the initial intervention period of 18 months, the Government should consider whether the ASIC intervention should be made permanent. Following the 18 month period, the intervention will lapse where the Government has not made it permanent.

Question 29

What arrangements should apply if an ASIC intervention is subject to administrative or judicial appeal? Should an appeal extend the duration that the Government has to make an intervention permanent?

The ABA considers that an 18 month cut-off period would be sufficient in the case of an administrative or judicial appeal. An extension beyond the 18 month period could significantly increase the risk of consumer detriment.

Question 30

What mechanism should the Government use to make interventions permanent and should the mechanism differ depending on whether it is an individual or market wide intervention? What (if any) appeal mechanisms should apply to a Government decision to make an intervention permanent?

As noted, the ABA considers that the intervention power should only be exercised where there is a risk of significant consumer detriment, including having regard to whether there is a breach or suspected breach of laws. For an individual intervention, the use of the power should be subject to merits review by the Administrative Appeals Tribunal (**AAT**) and judicial review. For a market-wide intervention, the use of the power should be subject to Parliamentary oversight.

Question 31

Are there any other mechanisms that could be implemented to provide certainty around the use of the product intervention power?

For ASIC to retain accountability in the event of an intervention, mechanisms must be established that enable amendments to be made within published regulatory guidance on when and on what grounds the intervention power may be exercised.

Question 32

Do you agree with the powers applying from the date of Royal Assent? If not, please explain why with relevant examples.

The ABA considers that the powers should apply 12 months after the reforms receive Royal Assent, to provide time for the development of relevant regulatory guidance on the use of the power, in consultation with industry.



6.6 What oversight will apply to ASIC's use of the power?

Summary of proposal: Interventions made by ASIC in relation to an individual product or how a specific entity is distributing a product will be subject to administrative and judicial review. Market-wide interventions subject to Parliamentary oversight including a 15-day Parliamentary disallowance period. The Government will review ASIC's use of the power after it has been in operation for five years.

Question 33

What enforcement arrangement should apply in relation to a breach of the design and distribution obligations or the requirements in an intervention?

The enforcement arrangements should be consistent with current enforcement arrangements for other breaches of the financial services or NCCP laws. We support enforcement of the new obligation and power being specifically considered as part of the Government's ASIC Enforcement Review.

Question 34

What consumer rights and redress avenues should apply in relation to a breach of the design and distributions obligations or the requirements of an intervention?

The consumer rights and redress avenues should be consistent with any other breaches of the financial services or NCCP laws. Consumers should be able to complain through the issuer or distributor's complaints handling process and take their dispute to an EDR scheme.

Any compensation should be assessed and calculated based on existing principles having regard to the loss incurred by the consumer.

The ABA agrees that it is reasonable for a consumer to exercise their right to redress where the financial impact suffered by the consumer can be connected to the reasons declared by ASIC for the intervention. Where a consumer has elected to rescind from the product, a fair test of causation should be undertaken to determine the extent to which the financial loss incurred, or is expected to be incurred, relates to the reasons given by ASIC for the intervention. Where a loss is incurred or a future loss expected to be incurred is not connected to the intervention order exercised by ASIC, the right to consumer redress would be voided.

Additionally, the ABA recognises that it is of critical importance, that the rights of the consumer do not amount to the underwriting of the performance of the product as this would transfer the market risk to the issuer whereby the product effectively becomes performance guaranteed. The laws which govern collective investment schemes cannot protect consumers from unfavourable movements in the market values of their investments as the cost of doing so would be too great and would hamper innovation. As such consumers will continue to bear the market risk of their investments.

Separate and more complex issues arise where a consumer has sustained a loss (e.g. CGT liability or crystallisation of losses), as a result of ASIC requiring changes to a product or selling down by the issuer. These complex issues are primarily why the ABA does not support the power applying to closed or legacy products. However, if the power does apply, special arrangements will need to be developed for affected consumers.