Consultation Questions	**AFMA Comments**
Range of products covered by the measures	
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)?	Basic banking products should be carved out on the basis they are simple and easily understood products, and everyone is in the potential target market. Regulated credit should be carved out on the basis that two regulatory regimes would make the environment very complex. Consideration should be given to carving out Tier 2 products altogether on the basis they are easily understood and potentially everyone is in the target market. In addition to ordinary shares, other products listed or quoted on licensed financial markets should also be excluded from the measures, on the basis that market operators and ASIC regulate the market and there is enhanced transparency available through the market. This includes exchange traded funds, warrants and other structured products, exchange traded options and futures. These products are already subject to a range of controls under the Corporations Act, as set out below, including additional products for products such as futures, options and warrants. These controls have been developed over a number of years through consultation between regulators, markets and the financial services industry and operate very effectively. As new types of products evolve market operators and ASIC have the ability to introduce new controls if required. Imposing any further controls on listed products would result in regulatory duplication, which may cause product offerors to prefer the unlisted market. This is not a desirable outcome as the listed market functions well to provide customers access to products within a well-regulated framework. **Product design** • Requirements relating to the design of the products are set out in the Operating Rules of the market. For example, the ASX Operating Rules set requirements for the design of ETFs, warrants and

	exchange traded options. Under the Corporations Act the rules require regulatory clearance from the Minister (or ASIC as the Minister's delegate) before they come into effect. Matters which are considered in the regulatory clearance process include: ○ The nature of the financial products ○ The participants or proposed participants of the market and whether those participants are retail or wholesale clients ○ Whether rule amendments are in the public interest (Corporations Act ss 793D, 793E and 798A). • Rules are reviewed by ASIC as part of the regulatory clearance process which has regard to the matters listed above, with a particular focus on products targeted at retail clients. • The market operator enforces the rules, and it is a condition of its licence that it has adequate arrangements to monitor and enforce the operating rules (s792A). **Product distribution** • Participants (brokers) who distribute these products are subject to the ASX Operating Rules. These rules include requirements concerning: ○ Access to the market ○ How trading can be conducted • If a participant breaches the rules ASX can take enforcement action against it. • Brokers are also subject to the ASIC Market Integrity Rules (MIRs)(Competition in Exchange Markets) and the MIRs for the particular market. These MIRs include: ○ Achieving best execution for clients (i.e. the best possible price) ○ Client relationships ○ Trading (e.g. client order priority and prohibition on manipulative trading)

	• If a participant breaches the MIRs ASIC can take action against it.
	• For certain products, such as futures, options and warrants, there are additional requirements under the MIRs that:
	  ○ Clients are given an information booklet
	  ○ Clients enter into a client agreement acknowledging the risks of the product and that the client has read the product information
	  ○ Participants giving advice on these products must have undertaken specialist accreditation.
	• Products offered on ASX's mFund managed fund settlement service are subject to additional protections to ensure that clients are aware the service provides settlement but not traded on a market. The protections include a requirement that the broker give the client a copy of the PDS and Investor Fact Sheet and advise the client or prominently display a message (for online trading) that the service does not involve trading (ASX Operating Rule 4655).
	
	Product intervention
	• ASIC has a power to direct a market licensee to suspend dealings in a financial product or class of financial products or give some other direction if ASIC is of the opinion that this is necessary or in the public interest to protect people dealing in those products. The direction is enforceable by a court (s794D).
	• ASIC has a similar power to direct any other entity to suspend dealings in a financial product or class of financial products or give some other direction if ASIC is of the opinion that this is necessary or in the public interest to protect people dealing in those products. The direction is also enforceable by a court (s798J).
	
	Once a product enters the secondary market, issuers lack the visibility and contractual links required for an issuer to monitor and or/control the conduct of distributors. Similarly, decisions about whether to hold or on-sell a product in a secondary market is at the discretion of individual

	investors, and may result in a product coming into the hands of an investor who is not in the target market for the product. From a consumer protection perspective, the regulatory focus should be on more complex products. Alternatively if all products apart from the stated exclusions are to be included, consideration should be given to implementation of a less onerous set of requirements for the simpler, more straightforward financial products. The Consultation Paper notes that ordinary shares have been excluded "*given these products are widely understood by consumers, and it would reduce the regulatory costs associated with companies undertaking capital raisings*". On that analysis, certain investment products (such as interests in managed investment schemes) should also be excluded on the same basis. These products are also widely understood by consumers and are often used in fundraising activities (eg. for REITs holding real property). Additionally, the existing licensing, registration and disclosure obligations already contain strong retail investor protections in the context of advice and distribution of these financial products. This would be consistent with the United Kingdom's product intervention power, which is restricted to "*non-mainstream investment products*" (see Recommendation 22 in the Financial System Inquiry Final Report) and seems to be more in line with the apparent intention of the proposal as put forward by the inquiry, which appears to be largely focussed on improving conduct in relation to the issue and distribution of insurance and risk management products as opposed to mainstream investment products. A key focus of global regulators is the mis-selling of complex products, on the basis that the risk of mis-selling increases in line with the complexity of the financial product. To reduce compliance cost and regulatory burden, a risk based approach proportionate to the risks of detriment to retail clients would create a better balance between the ability of issuers to continue to

	issue well understood products in compliance with existing disclosure and other regulatory requirements, and the need to provide greater protections to investors in relation to more complex products. To that end, simple financial products should be carved out from the proposed regime. A blanket application would create an unnecessary burden on product issuers, increase compliance costs and increase the demands on ASIC enforcement resources. This approach is in line with the AFMA Guidelines for product approval of retail structured financial products, the IOSCO Principles for regulation of retail structured products and ASIC Report 384 on regulation of complex products. According to the IOSCO report issued in 2013, the following are common features of many complex products: (a) terms, features or a complex structure that are not likely to be reasonably understood by an average investor (as opposed to more traditional and simpler investment instruments); (b) difficulty in valuations (i.e. valuations requiring specific skills and/or systems); and (c) very limited or no secondary market (in which case the products are potentially illiquid). Given the very broad reach of the proposed powers and the significant compliance burden that will result, as part of the further consideration of the implementation of the reforms, financial products available in Australia should be categorised based on the factors set out by IOSCO and other relevant factors. Only the products that have particular characteristics which indicate they are more complex should be subject to the reforms.

	Other measures that should be considered include an additional level of accreditation or demonstrated competency by advisers to advise retail investors on particular classes of products. For example, there is an existing requirement for advisers to hold special qualifications in order to advise on options and futures contracts and the client is required to sign an agreement acknowledging the special considerations associated with these products. Hybrids, instruments that include non-viability provisions and have some degree of convertibility should either be subject to the regime or there should be specialist accreditation for advisers who promote hybrids and specialist agreements for clients who utilise this product.
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 obligations and power should only apply to products made available to retail clients as defined in section 761G of the Corporations Act. It would be incongruous to apply these reforms to wholesale products offered to wholesale investors when none of the other protections afforded to retail investors under the Corporations Act would apply. Where a wholesale product is the reference product for a retail product - for example an MIS wrapper around a wholesale product - the retail wrapper should be subject to the rules and the wholesale reference product should be exempted.
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.	Agree, on the basis existing consumer protections under the National Consumer Credit Protection Act and the responsible lending obligations for credit providers and intermediaries are sufficient to cover the intention of the design and distribution obligations. The product intervention power should cover regulated credit products on the basis that there is no existing equivalent power.
4. Do you consider the product intervention power should be broader than regulated credit products? For example, 'credit facilities' covered	The product intervention power should be limited to regulated credit products. Extending the product intervention power to credit products not regulated by the NCCP Act would create a disconnect in the regulatory

by the unconscionable conduct provisions in the ASIC Act. If so, please explain why with relevant examples.	framework, in that ASIC can intervene in products that are not otherwise subject to the regime (eg. not subject to responsible lending obligations). ASIC already has scope to take enforcement action in relation to products covered by the unconscionable conduct provisions in the ASIC Act, even where such products are not regulated by the NCCP Act.
Design and distribution obligations	
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?	Yes, however issuer control of distribution poses practical challenges. The definition should link directly to the entity responsible for issuing a financial product. Issuers of wholesale products, including issuers of OTC bonds in the wholesale market, should be exempted. If there is an MIS wrapper or some other retail product wrapper made available to give retail investors access to the economics of the wholesale product should not be exempted. As explained above we consider that products which are listed or quoted on a licensed financial market should be excluded from the measures. In addition, based on the language in the consultation paper, it is open to interpretation that a licensed financial market on which a product is listed and/or traded could be considered an 'issuer' or 'distributor' of those products. It should also be made clear that operators of financial markets are not issuers or distributors of products for the purposes of these reforms. Financial markets provide a platform on which products offered by issuers can be traded. The products are distributed by brokers and advisers to their clients. It would not be practical to impose either the issuer or distributor obligations on the entity that operates a licensed market.

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).	In relation to the definition of distributor, we do not agree with the second limb (advertise/publish statement to induce people to acquire, or make available a PDS and receive a benefit from the issuer) as it is too broad. This could conceivably extend to a range of advertising platforms who are not in the business of financial services. For example, media companies who are not AFSL holders engaged to advertise a product should be excluded. It has also been noted that the provision of a PDS should not be included as that act itself is not a "financial service". This definition may have a flaw in it. It appears to us that it does not capture distributors who are prohibited from receiving a benefit under FOFA, as such the second limb may not be met. Consideration should be given to deleting the and between limb (i) and limb (ii) and inserting "and/or" or inserting "or". The definition of distributor should be precise and clearly defined, particularly where the issuer is expected to be liable for the conduct of the distributor and should not include: • Websites - potentially any third party website can be caught if a fee is paid to website operator for flow subsequent to content being placed on the website even if the initial content was put up without initial engagement by the issuer; • Platforms - it appears potentially caught if charging issuers platform fees; or • Research providers - it appears potentially caught as would normally charge issuers fees for production of research. As per the comments at Q5, a financial market might be considered to be a distributor based on this description as markets advertise products offered for trading and provide information and education about those products. Hence, if this description is adopted it should make clear that financial markets are not distributors.

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?	This aspect of the proposed reforms is concerning and potentially problematic as an issuer will not in every case have a direct contractual relationship with all the parties who might 'distribute' a product, and is unable to set contractual limitations on the distribution of the products. This issue highlights the blurring of obligations under the reforms between an 'issuer' and a 'distributor' as they would currently be defined under the Corporations Act. For example, once a product is issued and commences to trade on a secondary market, the 'issuer' of the product has no control over an adviser who advises their client to acquire the particular product. The adviser in that case is likely to be considered a 'distributor' but will not receive a benefit from the issuer. Arguably, any entity (other than the issuer) that engages in the conduct in limb (i) but does not receive a benefit from the issuer should also be treated as a 'distributor' for the purposes of the design and distribution obligations, in the context of the additional consumer protections that the reforms provide. This is particularly the case when it is the 'distributor' who interacts with a client and not the 'issuer' of a product. There is the potential for market distortion if an entity that does not receive a benefit from the issuer but may otherwise achieve benefits from distributing a product is exempt. Further a special purpose vehicle corporate authorised representative of a related product issuer that advertises a product issued by the issuer, but does not receive a benefit for such advertising conduct would potentially not be caught by the design and distribution obligations. There needs to be greater clarity about the role and obligations of issuers and distributors, so that there is alignment with the existing obligations under Chapter 7 of the Corporations Act.

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?	Yes, we agree with excluding personal financial product advice from the distributor obligations, on the basis that there are already substantial protections provided under FOFA. Currently a proportion of the industry rely on general advice and execution only services, even when they do provide personal advice. The liability regime for personal advice is sufficient to require issuers and distributors of products to undertake similar considerations to the proposal. As noted above, the current proposal may capture other intermediaries such as research providers, platforms and websites. This proposal introduces a complex web of indirect regulation primarily executed through issuers. A more appropriate, efficient and effective approach may be to directly regulate conduct of distributors (for the small proportion of 'distributors' not already regulated as AFSL holders, this may require broadening of the regulatory net) and enable regulators to take direct action against them for any perceived issues rather than taking action against issuers in relation to the conduct of distributors. However, there does not appear to be a clear distinction between "personal advice provider" and a provider that has identified a target market having regard to the factors listed on page 18 of the proposal (eg. levels of income and wealth, level of financial literacy etc). Further guidance is needed to clarify when a provider would be providing advice that enlivens the design and distribution obligations but is not personal advice. This is particularly relevant for the innovative product platforms coming onto the market that use data from on boarding processes to assist consumer decision making.
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	AFMA is broadly against exemptions for unlicensed issuers and distributors. There should be no exemptions for issuers of products to retail and distributors of products to retail. In our members' experience, product distributors are often unlicensed entities operating under exemptions and

covered by the regulatory sandbox exemption)? Who should be empowered to grant exemptions and in what circumstances?	to exclude such entities from the design and distribution obligations would defeat the purpose of the reforms. It may only be appropriate to exclude entities relying on regulatory sandbox exemptions (on the basis that the purpose of such exemption is to allow entities to test a limited range of products in a relatively low-impact regulatory environment) if ASIC has satisfied itself before the issue of the products that there is not a risk of significant consumer detriment. Our members have expressed concerns about potentially gaps in the framework that may arise, particularly in the context of dealing with retail investors, if regulatory sandbox entities are excluded from the obligations. ASIC is the most appropriate body to grant exemptions to individual entities and classes of entities.
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?	AFMA members are generally comfortable with the requirement to identify a target and non-target market, however clarity and further guidance are needed on how to specifically define and document those categories. Issuers should factor in client suitability as part of the target market definition but should not be required to track and report on this at an individual level. Some of the factors in a definition might include: • Needs of the theoretical investor; • Risk management needs of the theoretical investor; • Risk appetite of the theoretical investor; • Sophistication of the theoretical investor; • Complexity of the product; • Purpose of the product; and • Risks that are managed through the product. Appropriateness or suitability in many cases will depend on how the products are used by different investor types. For example, to suggest a product target market is “high net worth” is not helpful or informative and may in fact be misleading if included in a PDS. Distributors and investors

	need to be accountable for the decisions they make (eg. where investors elect not to receive advice). To comply with this requirement there needs to be a common concept of what the identifiable "target markets" are in order to make this proposal effective. It is submitted that the following factors (based around the AFMA Guidelines) are considered more appropriate in developing a framework for product categorisation that matches to appropriate distribution channels. Some of the factors relevant to distributor characterisation and 'target markets' might include: • Products categorised on an internal scale based on aspects including complexity, sophistication, risk etc; • Distributors categorised on the basis of AFSL licence conditions, experience (of organisation and individuals), adverse media or ASIC findings related to the groups; • A process to ensure that products distributed by groups align to the overall categorisation of the group; • A requirement on distributors to ensure products are distributed to appropriate clients or classes of clients, and that it does not distribute products it is not licensed to distribute or is not sufficiently experienced to distribute. Notwithstanding the above, many AFMA members are of the view that there needs to be a mechanism in place that allows an investor who is not in a target market to acquire a product, provided they do so on a fully informed basis. See comments in Q17.
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)?	No comments.

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.	Yes, we agree in in principle that issuers should select distribution channels and marketing approaches for the product that are appropriate given the nature of that product. However, this obligation should also be imposed on distributors, who are likely to have greater control over the manner in which a product is promoted and distributed. The concept of defining a target market, however, is problematic and possibly subjective. It would be imprecise and unhelpful to attempt to define a glossary of target markets. Linking the appropriateness to the nature of the product (its complexity, risks, and features) achieves the same outcome with more consistency. See comments in Q10. Within each distribution channel and within each target market, clients have different risk tolerances. For example, they can switch from wanting cash investments to high growth shares at different times of the investment portfolio lifecycle. Requiring issuers to only utilise certain distribution channels may stifle marketing opportunities and uptake of a product, and reduce product diversity. For example, social media may not be a previously identified appropriate marketing channel for an older target market, however excluding such a channel on this basis may exclude potential consumers who use this channel. This outcome also seems to be inconsistent with ASIC's technology-neutral approach to regulation. Issuers and distributors should not be prohibited from marketing a product to the public generally, provided it is not targeted specifically to consumers outside the target market. This is particularly true for products that are widely understood. Quoted products and products with existing accreditation regimes should be exempted, excluding hybrids as there is no accreditation regime and

	there is no suitability process undertaken by ASX or Chi-X in respect of hybrids.
13. Do you agree that issuers must have regard to the customers 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?	We generally agree, but greater clarity is needed in relation to this proposal, in terms of what is meant by "have regard to". For example, an issuer should not be deemed to be responsible for the way in which a distributor that is separate legal entity operates its business or any governance failings or compliance or other breaches by that entity. In a circumstance where an issuer becomes aware that there are problems with a distribution channel that impact on the distribution of the product, "have regard to" should be limited to actions such as not dealing with that distributor until the problems are rectified, or ceasing the relationship if the situation warrants it. It is more appropriate that an issuer has regard to the likely class of customer a distribution channel is likely to reach and the risks of that distribution channel (eg. how much advice the investor is likely to receive) having regard to the nature of the product and the experience and licensing of that particular channel. We do not support a proposal which suggests a product issuer or distributor must only utilise a channel which accesses consumers in the identified target market. In our view, this restricts consumers' ability to access a product and is inconsistent with ASIC's objective of technology neutrality, which should facilitate a distributor using emerging technological platforms to distribute products (even where such channel may be accessed by consumers outside an identified target market).
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?	We agree that reviewing products to ensure they are appropriate to the theoretical investor in the target market is good business practice, and is consistent with the AFMA Guidelines. We are uncertain about the practicality of actually testing this in respect of third party distribution, as the issuer may not have sufficient information to test theoretical appropriateness against actual investors in the product.

	Third party distributors may not be inclined to share this information, as it is commercially sensitive and may involve personal information within the meaning of the Privacy Act. Concerns have been expressed about the requirement on issuers to report information to ASIC in respect of distributors' activities, as this may do irreparable damage to the relationship between issuers and distributors. It may make distributors less inclined to work with issuers and will stifle innovation. In circumstances where a product issuer has a relationship with a small number of distributors, the commercial ramifications of that issuer being obliged to report a distributor to ASIC are significant. It is also unclear what the threshold for reporting to ASIC would be – for example, would a one-off sale of a product outside the target market be reportable? This would seem disproportionate to the existing reporting regime (where significant breaches are reported to ASIC) to require that issuers advise ASIC if the review identifies a distributor is selling a product outside of the intended target market. In our view, the appropriate response is for the issuer to rectify the incident with the distributor, either by revising the intended target market or implementing additional controls to ensure the product is sold to the target market only. The proposals paper suggests that issuers will not be directly accountable for the conduct of external distributors under the reforms. However, it also states that "product issuers cannot be wilfully blind if distributors are acting in a manner that is inconsistent with their expectations". It is not clear whether there is an expectation that issuers monitor and audit distributors' controls and practices in order to evidence that they are not wilfully blind to the actions of the distributor. Any such obligation would be burdensome for both issuers and distributors.

	Given that these proposals have the potential to very significantly alter the relationship between an issuer and a distributor, both at law and in a commercial sense, we suggest that this aspect of the reforms requires further detailed and careful consideration. In particular, the reforms will fail if obligations are imposed on any party that they are not practically able to perform.
15. In relation to all the proposed issuer obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?	Our preference is that the detail of substantive obligations is set out in the law. The purpose of ASIC guidance is to provide elaboration on the administration of the law. The obligations need to be clear on the face of the law, given the existing difficulty of getting products on to approved product lists and putting distribution agreements in place. If it is not enshrined in legislation it will cause significant debate between issuers and distributors and will stifle innovation. ASIC guidance will play an important role in describing expected best practice. Guidance can also facilitate an "if not, why not" approach in demonstrating compliance. ASIC guidance could also deal more efficiently and effectively with bespoke or thematic issues that are particular to classes of issuer, distributor, products and investors.
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?	That is already implied in the requirement that an adviser has a reasonable basis for the financial product recommendation. If there is any additional liability for failure to distribute products in accordance with the issuer's expectations, then liability should only sit with the distributor and not be attributed to the issuer. It is not possible for the issuer to control all channels or set detailed expectations about how each distribution channel should distribute their products. This would involve an extraordinary level of oversight and

	control over what are generally independent operating entities. Distributors should have control of their own distribution channels and be responsible for the products they give their clients access to. This should be a matter for regulation of the distributor rather than allocating liability and risk to the issuer for distributor conduct. It has been noted however, that the availability of a whole of customer view to any one financial services provider is a practical consideration which may limit the ability to achieve this obligation. This is particularly true where the customer has exposure across multiple divisions of the organisation, and across multiple systems.
17. To what extent should consumer be able to access a product outside of the identified target market?	A client that is outside the defined target market should be able to access the product as long as they are eligible. The definition of 'target market' should be broad enough to include all suitable/eligible customers. Informed consumers should not be deprived of choice – it is part of their freedom to contract. Consumers should be able to access a product if they have received comprehensive disclosure (the full PDS). Consumers should be able to access the product via the execution only route. Consumers are ultimately responsible for their own financial decision-making. Provided that disclosure material does not specifically preclude the customer from target market, then the obligations should not preclude non-target market customers from transacting in or taking up the ability to transact. Reverse enquiry by customers outside of the target market, but where suitability assessments are undertaken, should be acceptable. Inadvertent sales to consumers outside a target market should not constitute a breach, but further clarity should be provided on what thresholds would be applied by ASIC.

18. What protections should there be for consumers who are aware they are outside the target market but choose to access a product regardless?	There should be no additional protections, other than the provision of a warning about the suitability of the product if an adviser is providing advice. In circumstances where personal advice is provided, a provider already has an obligation to act in the best interests of the client. If there is no advice then there should be no warning and no liability. There are a number of existing protections in place, including being provided a compliant PDS, potentially a Statement of Advice, Future of Financial Advice protections from conflicts, and for ASX products potentially broker ADA requirements and/or client agreement forms. Accordingly, it is not appropriate to provide consumers with additional legislative protection where such consumers have acquired a financial product on the basis of clear, concise and effective disclosure and in accordance with all applicable offering laws. The stated objectives also suggest that consumers are to be responsible for their investment decision. It could be left open to a product issuer, for example, to choose to give non-target market consumers a longer cooling-off period or early exit options. However, this would give rise to considerations about equality and fairness of treatment of consumers who are in the target market versus those who are not in the target market, as well as issues of contract law, and would require very careful consideration.
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?	This should only be in general terms and the distributor should not be obliged to provide information about specific investors. It should be at the theoretical investor level only. To the extent that obligations are imposed on distributors it should apply to all, including those that have provided personal financial product advice. However, it is unclear who determines what a “reasonable request” is, and what the timeframes for responses to such requests should be, and so on. It is also unclear how this type of request and response process would

	work where an issuer and a distributor do not have a distribution arrangement or other relationship in place. Issuers should verify that they have mechanisms to assess product suitability for classes of clients to which their products may be distributed. However, as per our comments above, issuers should not be responsible for regulating distributors - this should be a direct obligation on distributors imposed under the relevant licensing regime, and not enforced indirectly and haphazardly via issuers.
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 above, our preference is that the detail of substantive obligations is set out in the law. The purpose of ASIC guidance is to provide elaboration on the administration of the law. This may remove the need for a detailed distribution agreement, or may enable certain obligations to be incorporated by reference into distribution agreements, rather than being duplicated in every agreement. This will assist in putting all issuers on the same footing, otherwise there may be a race to the bottom in terms of contractual arrangements between issuers and distributors. Clear obligations should be prescribed for distributors that are AFSL holders, rather than reliance on issuers to regulate and monitor the conduct of distributors.
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.	A minimum of 12 months is preferable, given how the product life cycle operates.
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	Members have suggested that a longer phase in period, starting from 2 years after Royal Assent would be preferable. Classes of products that are considered higher risk, because of the nature of the product or the nature

explain why with relevant examples and indicate what you consider to be a more appropriate transition period.	of the target market, could be subject to the earlier timeframe. The obligations could then be progressively rolled out to other products. Issuers and distributors could decide to adopt the obligations earlier if they choose to do so (as was the case in relation to FOFA compliance). New obligations should apply only to new distributions of an existing product – that is, a review of distributors should not cover investments distributed prior to the date 2 years after Royal Assent, for example.
Product intervention power	
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.	It remains unclear from the proposal paper whether the intervention power is intended to be pre-emptive, a power of last resort, or applicable at any point in a product life cycle. While it is understood that it is not appropriate to seek to restrict the use of a regulator's powers granted to it under proper legislative processes, the lack of clarity around the invocation of the power makes it difficult for industry to get any level of comfort about the administration of the power, particularly at this 'hypothetical' stage of the development of the reforms. A pre-emptive intervention power is problematic unless it is clear the intervention will prevent significant consumer detriment. ASIC already has significant powers in relation to the issue of financial products, including stop order powers. If an intervention power was also available during the period in which stop orders (or other powers) can be applied, there needs to be an articulation of the differences between and purpose of the two sets of powers. For example, what would be considered potential significant consumer detriment warranting invocation of the intervention power that could not be dealt with under the stop order power? Overlapping powers are arguably undesirable. Consideration should be given to making it clear that the intervention power is operable only after the period in which stop orders can be applied has ended. Put another

	way, the intervention power should be available only where there are no other existing avenues remaining to achieve the same outcome. Other issues that would benefit from clarification include: • how ASIC will conduct itself in relation to its use of the power. For example, to what extent will ASIC conduct its activities in private or will there be broad public consultation and/or announcements via media release; • whether the imposition of selling restrictions will be done publicly or privately; • whether an investor can opt out of being a 'type of consumer'; and • the consequences for existing investors in a product if the intervention power is invoked. This is a key issue that needs to be addressed in legislation. In relation to the administration of the power, and given its very significant consequences (including potential broader, unintended impacts of an intervention depending upon the scope and nature of a particular intervention), it should only be vested in or delegated to senior, experienced ASIC officers. AFMA also suggests that the power should be subject to a process similar to the hearing and banning process under Division 8 of Part 7.6 of the Corporations Act. More junior officers who have the ability to issuer notices etc. should not have authority to make an intervention and should not be authorised to discuss interventions. These and other issues related to rigorous procedural fairness will need to be carefully considered and articulated in the implementation of the reforms. In terms of the scope of the power and the actions that can be taken under the power, it has been noted that an outright product banning does not seem consistent with encouraging innovation and that this ought to be a power reserved for Parliament. If Parliament has not chosen to prohibit a product, or prohibit that product from being acquired by certain investors,

	a regulator should not be able to circumvent that process through the use of broad powers. In our view, if the intervention power was ever used to ban a product or class of products, this would need to be ratified by a subsequent act of Parliament. Generally, the proposed power to intervene in relation to the types of consumers that can access a product cuts across freedom for consumers to access products. Product issuers and distributors already have responsibilities to ensure significant features, risks and benefits of a product are disclosed and it is then up to clients to make a decision as to the suitability of a product. Licensing and offering laws ensure product issuers and distributors comply with this obligation. Granting ASIC a power to determine that a specific product (or class of product) is not suitable for a class of consumer is essentially merit regulation, which is not a concept that exists in financial services laws in Australia. It may be acceptable for ASIC to possess powers of temporary intervention to assess new innovations, features, risks, approaches to disclosure or distribution. However after 18 months, all involved parties should have clarified issues or been allowed to proceed knowing ASIC's concerns (including weighing the risk of regulatory action). If the issue or distribution of the product remains problematic then ASIC should be required to seek legislative or judicial action to retain any ban.
24. Are there any other types of interventions ASIC should be able to make (for example, remuneration)?	Remuneration and benefits given to providers of retail financial services are adequately regulated under FOFA. Matters related to distributor remuneration are a commercial agreement between the issuer and distributor and not a product feature.
25. Do you agree that the extent of a consumer detriment being determined by reference to the scale of the detriment in the market,	Further clarification of the meaning of the risk of "significant consumer detriment'' is needed. If it is the risk of loss as a result of the product performing as it was designed to perform then this would not be

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?	appropriate. An assessment of detriment based on performance of the product could be highly subjective and any action taken by ASIC needs to consider the potential damage to the issuer or distributer of taking action just because a group of people have lost money. It is also important that the definition of "significant" is consistent within classes of products, classes of investors and over time. Tolerances to risk and losses and potential detriment are different across different classes of products and investors and this needs to be taken into account. An additional factor to be considered should be the potential scale of the detriment of the proposed intervention (including by reference to the manner in which the intervention is imposed), such as an economic chilling effect in the relevant market. An additional factor to consider is that a ban on products may be favourable to some investors and may not be favourable to other investors. In these circumstances, the question of how investor interest is balanced will need to be carefully considered. ASIC should also be required to consider the total number of consumers affected (as a proportion of total consumers), the financial detriment suffered by consumers and whether there are any other more appropriate enforcement actions available (eg. a written direction, an enforceable undertaking, licence conditions). To provide certainty to the industry, legislation should include objective criteria for ASIC to satisfy before the powers can be used.
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?	Consultation should be mandatory, particularly where the potential intervention is market-wide or class-wide. Consultation needs to be fair and balanced. Consultations should be run separately within ASIC to identify issues and consult with the relevant parties. There is a risk that the relevant ASIC operational officers who

	identify the initial concerns become wedded to their determination that there is something wrong. There is a real risk of ASIC launching an intervention and making public pronouncements and then being forced to withdraw their concerns. AFMA members have had direct experience of this approach. The risk of significant detriment to issuers and distributors (as much as to consumers) needs to be properly considered by ASIC. The exercise of an intervention power should be a last resort. ASIC should be required to seek legislative or judicial action to impose permanent intervention or a permanent ban. We assume that in terms of the proper administration of the power, before intervening on a specific product ASIC will consult directly with the product issuer to obtain all relevant information and allow the product issuer an opportunity to address any perceived issues. Where the impacted party voluntarily makes changes, then those actions should be weighed against the need for public disclosure, enabling preservation of reputation. In undertaking specific actions against an individual financial services provider, ASIC should be required to assess the product or practice in context of the broader market/segment.
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?	We agree that ASIC should publish information about an intervention, the consumer detriment and its consideration of alternative powers, but only after full consultation has taken place and the institution has had the opportunity to contact impacted customers.

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.	We agree that there should be no extensions beyond 18 months in total. The damage to the issuer or distributor is most likely forever at that point in any event. Some AFMA members believe that an initial duration of 18 months is too lengthy. An alternative is that the initial duration could be 6 months with the ability to extend for up to two additional 6 month periods if ASIC publishes or communicates the reasons and steps taken since the initial intervention. As noted above, any permanent ban should require legislative or judicial action.
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 intervention should be stayed. If ASIC considers that the activities or issues of concern are sufficient to warrant the intervention to be ongoing while the administrative or judicial process is proceeding, then it should obtain an interlocutory order from an appropriately qualified court and that order should not be granted on an ex parte basis. An appeal should not extend the duration the Government has to make the intervention permanent on the basis the Government can continue to consider whether to make the intervention permanent during that time. As stated in the Proposals Paper, the duration of an intervention should provide sufficient time for the Government to consider and undertake permanent policy change.
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?	Legislative Instruments should be used for market wide interventions. Undertakings may be considered for individual interventions, so long as those undertakings are capable of remaining private. If any intervention is to be made permanent it should be the subject of a legislative or judicial process. The power and level of discretion at stake to make a permanent intervention should not be reserved to the executive

	branch. Measures of appeal and redress would be particularly important in the context of a market-wide intervention. If the decision were to be left to the executive, appeal mechanisms should include judicial review and merits review.
31. Are there any other mechanisms that could be implemented to provide certainty around the use of the product intervention power?	We believe objective criteria should be specified to justify the use of the proposed power. If the power is granted to ASIC, clear guidance to the market will be critical in relation to: • Circumstances in which ASIC will seek to use the power; • the form of each intervention power; • the rights and obligations of issuers and distributors to the extent these are not specified in legislation; • the circumstances in which ASIC may use the power, including any articulation of why the use of existing powers would not be appropriate; • details of the administration process that will apply within ASIC in terms of the use of the power. AFMA members have suggested that the appointment of 3rd party arbitrators or a panel of industry experts to make or ratify a decision to invoke the power (similar to the governors concept at ASX) would assist to create a greater level of industry confidence about the process.
32. Do you agree with the powers applying from the date of Royal Assent? If not, please explain why with relevant examples.	No, industry needs to have an opportunity to digest the final legislation and to consult with ASIC so that ASIC can then publish meaningful regulatory guidance. The powers should mirror the same staggered implementation as the design and distribution obligations and be applied to new issuance of products and new distribution of existing products (see response to Q22 above).

Enforcement and consumer redress	
33. What enforcement arrangements should apply in relation to a breach of the design and distribution obligations or the requirements in an intervention?	It is important to ensure that enforcement action by ASIC does not automatically create a 'regulatory put', whereby the investor is able to terminate the transaction as if they had never entered into the transaction or where the transaction is considered void ab initio. It is difficult to suggest appropriate enforcement arrangements as, with the current form of proposal, it would be extremely difficult for issuers to guarantee that all distributors conduct themselves exactly as required. Any enforcement arrangements should recognise any steps taken and the degree of control actually exercisable by any infringing party. Allocation of liability to issuers for distributor conduct represents a delegation of regulatory responsibility to issuers. Distributors should be accountable for their own conduct to regulators under their AFSL terms. The current model involves significant subjectivity. If the obligations and expectations are more clearly defined against an objective standard (eg. reasonable steps) then the appropriate enforcement arrangements will be more apparent. No case has been made out for criminal proceedings in relation to a breach of the design and distribution obligations or the requirements of an intervention. We agree with the proposal to enforce a breach of the design and distribution obligations through the entity's internal and external dispute resolution procedures, civil litigation and ASIC proceedings (ie. in the same way a consumer takes action in response to a breach of any other financial services obligation). In relation to a breach of a product intervention power, ASIC's existing protective action enforcement powers should apply and financial penalties may also be appropriate (see Information Sheet 151).

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?	Consumer rights/redress avenues already exist in other legal frameworks. The Financial System Inquiry did not recommend this. We agree with the proposal that existing consumers of a product that has been the subject of ASIC intervention should have no additional rights of redress (other than under existing laws eg. for unconscionable conduct). Orders to declare the whole or part of the contract void or otherwise varying the terms of the contract are most likely already available. In practical terms, it may be appropriate to consider measures such as replacement products at no additional cost depending on the product and the circumstances of the intervention.