



Australian Government

Design and Distribution Obligations and Product Intervention Power

Proposals Paper

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CONSULTATION PROCESS

Request for feedback and comments

The Government seeks your feedback on the measures outlined in this proposals paper. The information obtained through this process will inform the Government's approach to implementation and aid it in meeting the objectives of best practice regulation.

While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

All information (including name and address details) contained in submissions will be made available to the public on the Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part or all of their submission to remain in confidence should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: 15 March 2017

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MINISTER'S FOREWORD



The Turnbull Government is committed to ensuring that all Australians are treated fairly and ethically by the financial system. This is core to an effective financial system.

The *Financial System Inquiry* identified that the existing regulatory framework could do more to improve outcomes for consumers. This is why the Government is taking action on a number of fronts to promote consumer trust in our financial system.

First, the Government recognises that a well-performing regulator is essential to an effective financial system. In April this year, the Government announced a \$127 million package of reforms to bolster the role of ASIC and increase its accountability, transparency and engagement with consumers and its regulated entities.

Second, the Government is progressing reforms to better align the interests of financial firms with their consumers. This includes measures to address issues with consumers being 'churned' into life insurance products without benefit and raising the professional standards for financial advisers to ensure that consumers are provided with appropriate advice.

Finally, the Government is ensuring that consumers have access to a fast and effective dispute resolution mechanism to resolve any issues when something does go wrong. This is why the Government has commissioned an independent review into the financial system's external dispute resolution framework. This review seeks to find ways to improve and streamline consumer experience and ensure the external dispute resolution bodies are working as effectively as possible.

The measures outlined in this paper build on the work already underway. They are aimed at improving accountability for financial products in our system throughout the whole product lifecycle. Importantly, product issuers will be required to target the distribution of their products to the consumers that are most likely to have their needs addressed by the product. In addition, ASIC will be empowered to take direct action to address problems where they identify the risk of significant consumer detriment.

The Government is conscious that consumer protection outcomes need to be balanced against the potential regulatory costs and impact on innovation. The aim of the extensive consultation period is to make sure we build on existing industry best practice wherever possible and provide appropriate transitional arrangements to assist in managing the move into the new regime. Feedback is requested by 15 March 2017. I encourage all those who have an interest in the measures to comment on this proposals paper.

A handwritten signature in black ink, appearing to read 'Kelly O'Dwyer'. The signature is fluid and cursive.

Kelly O'Dwyer MP
Minister for Revenue and Financial Services

EXECUTIVE SUMMARY

Why is the Government introducing these measures?

As part of the Government’s response to the Financial System Inquiry (FSI), *Improving Australia’s Financial System 2015*, the Government accepted the FSI’s recommendations to create new accountability obligations for entities that issue or distribute financial products (recommendation 21) and to strengthen consumer protection by introducing financial product intervention powers (recommendation 22).

The FSI identified that while there have been significant reforms since the Global Financial Crisis (GFC) to raise consumer protections, more needed to be done to ensure alignment of consumer outcomes with commercial incentives throughout the whole financial product lifecycle.

The FSI outlined the limitations of relying on disclosure as the main form of consumer protection for financial consumers. Over time, disclosure has been supplemented by other forms of protections aimed at making firms more directly accountable. For example, in the *Future of Financial Advice* (FOFA) reforms, there was a shift from requiring financial advisers to disclose conflicted remuneration (such as, commissions) to banning these remuneration structures (subject to specific exemptions). Implementation of the measures proposed in this paper would extend the approach of supplementing disclosure as the main form of consumer protection more broadly throughout the financial product lifecycle. This is illustrated in Diagram 1.

Diagram 1: Evolving approach to protecting financial consumers

Empower consumers through disclosure	Supplement disclosure by making financial service providers more accountable
Examples	Examples
1) Financial advisers disclose benefits that could conflict advice (commissions).	1) Financial advisers banned from receiving benefits that could conflict advice (FOFA).
2) Consumers determine if products are suitable on basis of disclosure documents.	Proposed Measures
3) Limited ability to intervene unless defective disclosure.	2) Products targeted at consumers based on the ability of the product to meet consumers’ needs. (design and distribution obligations)
	3) ASIC can proactively intervene where it identifies significant consumer detriment. (product intervention power)

While the measures proposed in this paper are intended to reduce the risk of consumers acquiring or being mis-sold products that do not meet their needs, they will not eliminate all product failures or mis-selling. In particular, it is not proposed that the Government ‘pre-vet’ financial products before they are made available to consumers. Providers will be responsible for ensuring products are targeted based on consumer needs, while consumers will still be responsible for the ultimate outcomes of their financial decisions.

The Government agreed to undertake detailed consultations on implementing the measure to balance the need for stronger consumer protections when acquiring financial products with the potential impacts on regulatory burdens for industry. This Paper forms part of that consultation process.

In order to assist interested parties in providing feedback to the Government, this Paper provides a high-level outline of how the measures could operate in practice. This approach recognises that many of the elements of the measures are interrelated and so to provide feedback people need to be able to view the measures holistically. The proposals outlined in this paper are intended to elicit specific and focused feedback, and should not be viewed as a statement of the Government’s final policy position.

Summary of proposals

Outlined below are the proposed positions on the nine key implementation issues for the measures. Feedback on the proposals is requested by 15 March 2017. Additional specific questions are outlined in the body of the paper and at Appendix A. The responses received will inform the development of draft legislation which will be subject to public consultation.

Design and distribution obligations

Issue 1: What products will attract the design and distribution obligations?

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).

For further discussion and questions see Chapter 2 of the Paper.

Issue 2: 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 customers consumer credit insurance or a fund manager that distributes its products using a general advice model.

For further discussion and questions see section 3.1 of the Paper.

Issue 3: 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.

For further discussion and questions see section 3.2 of the Paper.

Issue 4: 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.

For further discussion and questions see section 3.3 of the Paper.

Product intervention power

Issue 5: 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 *National Consumer Credit Protection Act 2009* (the Credit Act) (credit cards, mortgages and personal loans).

For further discussion and questions see Chapter 2 of the Paper.

Issue 6: What types of interventions will the Australian Securities and Investment Commission (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.

For further discussion and questions see section 4.1 of the Paper.

Issue 7: 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.

For further discussion and questions see section 4.2 of the Paper.

Issue 8: 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.

For further discussion and questions see section 4.3 of the Paper.

Issue 9: 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.

For further discussion and questions see section 4.3 of the Paper.

CHAPTER 1: WHY IS THE GOVERNMENT INTRODUCING THESE MEASURES?

1.1 Existing regulatory framework

Currently, the regulatory system focuses protections on when consumers acquire a product through a financial adviser and on the type of information disclosed to customers. Consumer protections through financial advisers have been enhanced by recent reforms such as the FOFA laws with the framework for improving the professional standards of advisers under active consideration.

Financial firms are subject to fewer requirements in relation to the design of their products,¹ the direct distribution of their products (in contrast to the advised distribution) and the post-sale evaluation of products. In these areas, most of the consumer protections are in the form of general licencing obligations and disclosure requirements to consumers. These are outlined in Table 1.

Table 1: Regulation throughout the product lifecycle

	Current Approach	Gaps
Product Design	No specific design obligations for most products. However, there is a general obligation for licensed issuers to operate efficiently, honestly and fairly.	No obligation to ensure the product meets the needs of a target market of consumers.
Advised Product Distribution	FOFA laws Must provide consumer with a disclosure document.	Additional reforms already underway (for example, raising professional standards for financial advisers).
Direct Product Distribution (nil or general advice distribution)	General advice warning and ban on conflicted remuneration (general advice distribution only). Must provide consumer with a disclosure document. General consumer protections (for example, the ban on misleading or deceptive or unconscionable conduct).	No obligation to target distribution of the product to consumers that would benefit from the product, or to not sell products to consumers who do not need it.
Post-sale Product Evaluation	No specific obligation for most products. However, there is a general obligation for licensed issuers to operate efficiently, honestly and fairly.	No obligation to monitor products to ensure they continue to meet the needs of consumers.
Limited remedies	Where product sold under general or no advice models – only remedies are for extreme misconduct (for example, sale is unconscionable or the result of misleading or deceptive conduct).	Minimal accountability for sales to consumers who do not need the product.
Product intervention	ASIC's ability to intervene to stop the issuance of products limited to situations involving defective disclosure documents.	Limited ability to intervene in the distribution of products where there is no defective disclosure.

¹ The design of some financial product is however subject to regulation (for example, default superannuation products).

As identified by the FSI, the effectiveness of disclosure as the main source of consumer protection can be limited when consumers are disengaged, products are complex or financial literacy is low. Further, understanding around behavioural biases and the operation of the financial system in Australia has advanced since disclosure was adopted as the primary consumer protection tool as part of the Wallis Inquiry in 1997. The FSI identified that the reliance on disclosure and limitations on ASIC powers have contributed to consumer detriment from financial investment failures such as Storm Financial, Opes Prime, Westpoint, agribusiness managed investment schemes and unlisted debentures, which have affected more than 80,000 consumers with losses totalling more than \$5 billion.

1.2 Proposed measures

The Government has accepted FSI recommendations to introduce a product intervention power and issuer and distributor obligation to help establish a financial system that yields fairer outcomes for consumers and is sound and flexible ahead of any future challenges.²

Some principles used in designing the proposals include:

- consumers should receive fair treatment from financial firms and that product issuers and distributors should design, target and distribute products that meet consumer needs;
- these measures should encourage a more consumer-centric approach to the entire product lifecycle;
- consumers should ultimately remain responsible for the consequences of their financial decisions;
- these measures should apply to a broad range of product, but be implemented in a flexible and scalable manner;
- these measures should not unnecessarily inhibit product innovation and allow for consumers to access a diversity of products; and
- the measures should be implemented in a way that avoids unnecessary regulatory costs.

The design and distribution obligations are intended to make the issuers and distributors more accountable for ensuring that products are designed with consumer needs in mind and are marketed at appropriate sections of the population. Better targeting of products will make it easier for consumers to find the right product for their circumstances.

² Extracts from the FSI on these measures is at Appendix B.

Parts of the financial services industry have already taken positive steps in this direction. For example, the Australian Financial Markets Association (AFMA) has developed *Product Approval Principles* for their members that are intended to support the product development and distribution process within firms that issue retail structured financial products. Further, a number of the major product issuers have developed internal policies and procedures dealing with the product approval process. These policies and procedures are aimed at ensuring products are appropriately designed and distributed, recognising that the firm is likely to suffer reputational damage from poorly designed or distributed products. The introduction of mandatory design and distribution obligations will ensure there is a consistent, market-wide approach to these issues. To the extent that industry has already voluntarily adopted similar obligations, this will reduce the regulatory cost of the proposed reforms.

The introduction of the product intervention power proposed by the FSI is intended to work together with the design and distribution obligations to ensure that the regulatory framework delivers fairer outcomes for consumers. It will provide ASIC with a power to intervene in the market where it considers there to be a risk of significant consumer detriment.

The introduction of the design and distribution obligations, and associated changes in market practices, should reduce the likelihood of ASIC needing to intervene in the market using the product intervention power. However, the introduction of the product intervention power will ensure ASIC can respond in a timely manner to address situations not covered by the design and distribution obligations or take action to correct market-wide behaviour that cannot be effectively managed through individual enforcement action.

These measures are intended to reduce the likelihood of consumers acquiring (or being mis-sold) products without fully understanding the associated risks and that are misaligned with their financial situation, objectives and needs. This should promote greater consumer trust in the financial system. However, they will not eliminate all product failures or instances of mis-selling. In some cases, product failures involving fraud or other forms of misconduct are often extremely difficult to detect in advance.

1.3 What laws are in place internationally?

The introduction of design and distribution obligations and product intervention power in Australia is consistent with trends in comparable international jurisdictions. For example:³

- **Design and distribution obligations:** In the UK, the Financial Conduct Authority (FCA) has issued a Guidance Note on *The Responsibilities of Providers and Distributors for the Fair Treatment of Customers*. The Guidance Note indicates that issuers should identify target markets for which products are suitable, monitor the distribution of the product to ensure it is consistent with the target market and periodically review products to determine whether they continue to meet the general needs of the target audience. Broadly similar requirements are proposed in the European Union as part of MiFID II. Similar obligations are also in place in Hong Kong and the United States.

3 For further details on the requirements in other jurisdictions refer to Appendices D and E.

- **Product intervention power:** In the UK, the FCA has a broad power to make temporary product interventions where considered necessary for the FCA to achieve its objectives. The FCA also has a permanent intervention power. This reflects the UK regulatory structure where the FCA has a broader rule making role, which in Australia reside with Parliament. In the US, the Consumer Financial Protection Bureau has the power to intervene where conduct or practices are ‘unfair, deceptive or abusive’. In Hong Kong, the Securities and Futures Commission has the power to authorise or prohibit the advertising and public offering of structured products.

CHAPTER 2: PRODUCTS TO BE CAPTURED BY THESE MEASURES

SUMMARY OF PROPOSAL

The design and distribution 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).

The product intervention 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 Credit Act (credit cards, mortgages and personal loans).

Further information on credit and financial product regulatory coverage is at Appendix C.

2.1 Financial Products

For the purposes of the *Corporations Act 2001* (Corporations Act),⁴ a financial product is a facility through which, or through the acquisition of which, a person does one or more of the following:

- makes a financial investment;
- manages financial risk; and
- makes non-cash payments.

This includes products such as shares, insurance, managed investment schemes, derivatives and margin loans.

Financial products can be divided into two categories – simple and complex products. Simple products are generally simpler and better understood, and include most classes of general insurance products, basic deposit products and non-cash payment products. Complex products are all other financial products, such as life insurance, managed investment schemes and options.

The Government proposes that the obligations should apply to both simple and complex financial products made available to retail clients. Covering all financial products under the design and distribution obligation, combined with a broad exemption power to exclude specified products from the scope of the obligations, would help ensure broad coverage of products while at the same time providing flexibility to exempt certain products. One exemption would be ordinary shares given these products are widely understood by consumers, and it would reduce the regulatory costs associated with companies undertaking capital raisings. Exemptions for other products will take into consideration what consumer protections are already in place in relation to the product and whether they negate the need for the measures to apply.

⁴ See section 763A.

QUESTIONS

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)?
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.

2.2 Credit products

The Credit Act applies to credit provided wholly or predominantly for personal, domestic or household purposes, or to purchase, renovate, improve or refinance residential property for investment purposes. Products covered under the Credit Act include credit cards, mortgages and personal loans, but not loans for small businesses. See Appendix C for a summary of coverage of the Credit Act, and a comparison of financial products and credit products.

The proposal is that consumer credit products regulated by the Credit Act should be covered under the product intervention power, but not the design and distribution obligation. The reason for not applying the design and distribution obligation to credit products is because of the potential overlap with the responsible lending obligations that already apply to credit products. In addition, there is a range of targeted reviews underway directed at increasing the level of consumer protection for specified credit products such as credit cards⁵ and small amount credit contracts.⁶

The issue of regulatory duplication (where the responsible lending obligation currently requires assessment of suitability on an individual basis) does not apply in relation to extending the product intervention power to credit because a power of this nature does not currently exist within the Credit Act. Applying the product intervention power to consumer credit products would ensure ASIC have a flexible, timely mechanism to use in appropriate situations, consistent with financial products.

QUESTIONS

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.
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.

5 Refer to the review *Credit cards: improving consumer outcomes and enhancing competition*.

6 Refer to the *Review of the small amount credit contracts*.

CHAPTER 3: DESIGN AND DISTRIBUTION OBLIGATIONS

3.1 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 that are 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 customers consumer credit insurance or a fund manager that distributes its products using a general advice model.

The FSI envisaged that the design and distribution obligations would apply to both the issuer of the product and the distributor of the product. The key principles for determining who is an issuer or distributor are to use, as much as possible, existing concepts already contained within the Corporations Act to ensure consistency of application. In addition, the intention is to cover the market as comprehensively as possible to avoid any possible gaps in the market, but with the flexibility to exclude entities from the requirements where there are appropriate policy reasons (such as existing consumer protections are adequate or the need to facilitate capital raisings by companies).

The Corporations Act defines an issuer as the person responsible for the obligations owed under the terms of the facility that is a product.⁷ Under this definition, the issuer is the person responsible for the obligations owed under the product. This definition of issuer is also used for the purposes of determining who is accountable for the disclosure document associated with that product.⁸ For the purposes of the design and distribution obligations, *it is proposed that the obligations will apply to anyone that meets the definition of issuer under the Corporations Act.*

The Corporations Act does not include a definition of distributor. For the purposes of these reforms, the intention is to capture entities that are responsible for the acquisition of the product by consumers or influencing consumers to acquire the product (subject to the discussion below regarding financial advice). In this regard, the intention is to cover entities that either arrange for the issue of the product (for example, accepting the relevant application form from the consumer and organising for the consumer to obtain the product) or market the product to consumers. Marketing of the product to consumers could include, for example, TV or online advertisements that direct people to call centres to acquire the product or making brochures about the product available to

⁷ See section 761E(4).

⁸ see section 1013A.

consumers. While a product will generally only have one issuer, for a single product there can be multiple distributors (often including the issuer).

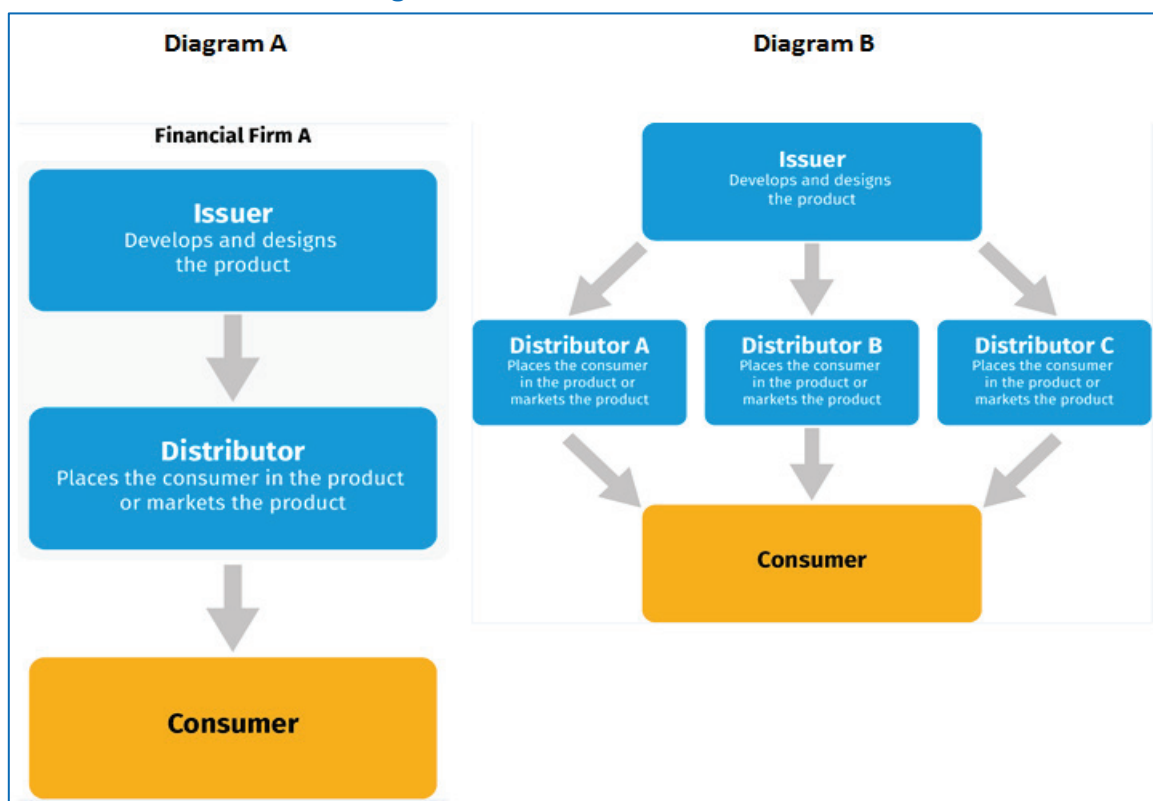
Based on this, for the purposes of the design and distribution obligations, it is proposed the distributor of the product is the entity that arranges for the issue of a product or that:

1. advertises a product, publishes a statement that is reasonably likely to induce people as retail clients to acquire the product or make available a product disclosure document for a product; and
2. receives a benefit from the issuer of the product for engaging in the conduct referred to in (1) or for the issue of the product arising from that conduct (if the entity is not the issuer).

It is envisaged that media companies engaged by the issuer to advertise the product (such as television or newspaper advertisements) would be excluded from the definition of distributor even though they receive a benefit from the issuer for running the advertisements. This is consistent with other exclusions for media companies contained in the Corporations Act.⁹

Examples of the relationship between the issuer and distributor are illustrated in Diagram 2. In Diagram A, the issuer and distributor are both part of the same organisation (Financial Firm A). In Diagram B, the issuer uses multiple distributors to distribute its product to consumers.

Diagram 2: Issuer and Distributors



9 see section 911A(2)

In relation to distribution, the intention is to capture distributors using distribution models where the product is provided to consumers directly rather than with the provision of personal financial advice. These are commonly referred to as 'direct' distribution models. Direct distribution arrangements could include the provision of general financial product advice to the consumer.

It is not envisaged that distributors that provide personal financial product advice will be captured under the proposed distribution obligations. This recognises that there are already substantial protections for people that receive personal financial advice (for example, the obligation on the adviser to act in the best interests of the client). However, personal advice providers would be expected to consider the target market of a product identified by the issuer as part of discharging their existing duties to their clients.

For financial products, issuers and distributors generally hold an Australian Financial Services Licence. However, there may be situations where the entity is operating outside of the existing licencing regime either because of an exemption or because their operations do not meet the existing definition of a financial service. Limiting the obligations to the licenced population of issuers and distributors would have the benefit of targeting the obligations recognising the very broad definition of financial product included within the Corporations Act. However, it has the potential to create gaps in the framework and still leave consumers vulnerable to certain products. For example, limiting the obligations to licenced entities would not capture unlicensed:

- companies issuing complex product such as hybrid or convertible securities to raise capital;
- companies issuing unlisted debentures; and
- distribution models based solely on factual information about the product (therefore not meeting the definition of financial product advice).

There is no data available on the extent to which financial products are marketed or sold in Australia through unlicensed entities. In order to minimise the competitive distortion between product issuers and ensure that there are no gaps in the application of the reforms it is proposed that the obligations will apply to both licensed and unlicensed issuers and distributors. However, in order to balance the potential impact of the obligations on innovation in the financial sector and ensure flexibility in the regime, this would be coupled with an exemption power to exclude specified entities or class of entities from the scope of the obligations. For example, in light of ASIC's current consideration of a 'Regulatory Sandbox' licence exemption¹⁰ consideration may be given to excluding the application of the obligations to those operating under the proposed regulatory sandbox licence waiver. This will be influenced by the final form of the Sandbox exemption and what alternative consumer protections are in place.

Case studies outlining how these proposals would operate in practice are outlined in Box 1.

¹⁰ ASIC CP260 Further measures to facilitate innovation in financial services.

QUESTIONS

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?
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).
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?
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?
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?

BOX 1: EXAMPLES OF ISSUERS AND DISTRIBUTORS

Case study 1: Investment product

ABC Fund Manager offers a range of investments to consumers. These products are marketed on its website. ABC Fund Manager also has an agreement with various external financial advice licensees under which its products are included on the licensees' approved product list.

In this situation, ABC Fund Manager is both the issuer of the product, and the distributor in relation to sales through its website. The external financial advice licensees are not distributors as long as they are providing personal financial product advice to their clients in relation to the product.

Case study 2: Private-label insurance

ABC Supermarket approaches XYZ Insurer to develop a general insurance product that ABC Supermarket could offer to its customers. The product would be marketed using ABC Supermarket's branding, but XYZ Insurer would be responsible for the management of the product.

In this situation, even though the product is marketed using ABC Supermarket's branding, XYZ Insurer would still be subject to the proposed issuer obligations. This is because XYZ Insurer has responsibility for the design of the product. ABC Supermarket would, however, be subject to the proposed distributor obligations.

BOX 1: EXAMPLES OF ISSUERS AND DISTRIBUTORS (CONTINUED)**Case study 3: General financial product advice**

A travel agency has an agreement with an insurance provider to offer their insurance. The travel agency has a number of Product Disclosure Statements on display in their store, and sells them under a general advice authorisation by mentioning to customers that they should think about taking out insurance when they have booked a holiday.

In this situation, the travel agency would be considered a distributor. The insurance product creator is the issuer.

3.2 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.

The main principles in terms of the obligations imposed on issuers is to ensure the obligations are flexible given the wide range of products that will potentially be subject to the requirements while providing sufficient certainty to industry in terms of the nature of their requirements. In addition, the consumer protection outcomes in terms of the better targeting of financial products to consumers must be balanced against the potential regulatory costs to issuers and possible impacts on innovation. As part of managing the possible impact on regulatory costs and innovation, the intention is to build as much as possible on existing industry best practice but supplemented to ensure consistency across the market and enforcement requirements.

The material below outlines what will be expected of issuers. Key proposals are identified in text boxes to draw the readers' attention to the requirements. The intention in the primary legislation will be to provide sufficient detail in order to give an ample level of certainty around their legal requirement, and then to supplement the obligations with regulatory guidance provided by ASIC. In providing feedback on the proposals, stakeholders are encouraged to consider what level of detail should be included in legislation versus regulatory guidance. Implementation of these proposals could form part of a broader governance framework put in place by financial firms that sets out their internal policies and procedures in relation to the design, distribution and review of products, including training, monitoring and operational controls to ensure business practices are compliant.

Target market identification

It is proposed that product issuers target their products at customers who would have their needs addressed by the product and also identify markets of consumers that will not benefit from the product. In effect, the obligation would operate by issuers identifying consumers who can be marketed the product, and by identifying a class of consumers who cannot be marketed the product.

The basis on which the target market is identified would need to be done in a way that is both reasonable (on the basis of objective criteria) and robust, as there may be tension between the interests of providers (in seeking to maximise sales by identifying the broadest possible market for their products) and the interests of consumers (who only want to be offered products that meet their needs).

Broadly speaking, issuers should seek to match products with target markets based on the needs the product satisfies and the target market's ability to understand the product. In considering whether a product satisfies the needs of a target market, consideration should be given to the characteristics of the target market including proximity to retirement, levels of income and wealth, level of financial literacy and access to financial information.

In addition, there are a range of factors that issuers could consider depending on the nature of the product, including factors like the risks associated with the product and the ability of consumers in the target market to derive benefit from the significant features of the product. The examples of specified factors are not exhaustive. For insurance products, whether any significant terms or conditions could prevent a consumer from benefiting from the feature will be relevant. For example, a consumer is unlikely to derive benefit from:

- insurance that overlaps with an existing right that the consumer has (for example, under a manufacturer's warranty); or
- unemployment insurance with exclusions for self-employed individuals if the consumer is self-employed.

In both cases, these factors should influence the identified target market. Consumers with rights under a manufacturer's warranty should not be included in the target market for insurance cover that overlaps with these existing rights. Similarly, it would not be appropriate to include self-employed individuals in the target market for an unemployment insurance product with exclusions for the self-employed. In the latter case, the complete ineligibility to claim suggests that self-employed individuals should be part of the non-target market.

It is not necessary that the target and non-target market be identified by reference to every term and condition governing a product. The focus will be on significant features. This would include features that consumers pay for, will be highlighted in marketing material or are unusual.

Issuers should document the information used when identifying the target and non-target market. Depending on the complexity and risk of the product, issuers may need to do testing of their selected target market to ensure they understand the key features of the product and do stress testing of the product to assess how it performs in different market conditions. This testing should also inform the choice of distribution channels and controls that are put in place.

When identifying the target market for a product, it is possible that for any particular target market, the product could be standalone or form part of a broader portfolio of products. Where it is intended for a product to be used as part of a broader portfolio of products for a particular target market, the issuer should identify how the product is intended to fit into the broader portfolio. For example, if a high-risk product could form part of a balanced portfolio for a target market with a moderate risk tolerance, the issuer should identify what the maximum percentage of the portfolio that should be invested in the product is (and this should then inform the distribution strategy).

The target market for consumers under margin loans could also be defined according to whether the consumer is approaching retirement age and therefore does not have an extended working life to recover from a significant financial loss (as illustrated by the Storm Financial case).

How broad issuers make their appropriate target markets is a matter for issuers. However, it is recognised that some products will have very broad target markets and potentially no (or very small) non-target markets (for example, basic savings or transaction accounts). Other products are likely to have more specific target markets (for example, structured or derivative products).

In terms of what already exists domestically, the AFMA principles indicate that product issuers should give consideration to the suitability of the product for the categories of investor to which it is marketed. Feedback from major product issuers indicates that they identify the target audience for any new product, and for there to be a robust approval process. As part of the product design process, the issuer identifies the customer needs that the product is intended to satisfy.

The need to identify target markets is consistent with what is in place internationally. For example, in the UK, the FCA has issued guidance that indicates issuers should identify the target market, 'namely which types of customer the product is likely to be suitable (or not suitable)'. The relevant EU directive requires products to be designed to meet the needs of an identified target market of end clients. In Hong Kong, the Securities and Futures Commission (SFC) has indicated that issuers should identify the target market for a product and consider investors' interests as part of product design.

DETAILED PROPOSAL 1

Issuers must identify appropriate target and non-target markets for their products.

When determining whether a target market is appropriate for a product, issuers must have regard to:

- Whether the product is satisfying the investment or risk management needs of the target market.
- The ability of consumers in the target market to understand the key features of the product.

Examples of factors for issuers to consider in relation to specific products include:

- For investment products, the risk and return profile of the product and how the risk and return profile of the product compares to the risk tolerance of consumers in the target market.
- For investment products, the likely performance of the product taking into account market conditions and relevant economic factors to the extent they are reasonably known.
- For insurance products, whether consumers in the target market would derive any benefit from the significant features of the product.

QUESTIONS

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?
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)?

Appropriate distribution channels and marketing

It is proposed that the issuer's selection of target market for its product should inform the selection of distribution channel and its broader approach to marketing the product to consumers. That is, product issuers should select distribution channels and market the product in a way most likely to result in the product reaching its target market.

The selection of distribution channel or marketing should be influenced by the controls that distributors put in place to ensure that the products reach the identified target market. For example, a distributor that reaches a range of consumers that is broader than the identified target market could still represent an appropriate distribution channel if the distributor has in place strong controls to restrict the sale of the products to consumers outside the desired target market (this is discussed further in section 3.3 dealing with distribution controls).

In addition to the target market, factors like product complexity and risks with a particular strategy (such as consumer engagement) should inform the selection of distribution channels. A product issuer might decide that it is appropriate for the product to have a broad target market, but because of the complexity of the product, it should only be distributed to individuals with personal advice. Where the product is complex, the issuer should also have regard to what arrangements the distributor has in place (or will be required to put in place) to ensure its representatives have sufficient knowledge and understanding of the product. Issuers should not select distribution channels where staff employed through that distribution channel are unlikely to have the skills and knowledge to inform consumers about the risks of the product. Distribution channels whereby consumers can acquire the product without active engagement are also unlikely to be appropriate regardless of the target market. This can involve situations where consumers are 'opted-in' to a product by default.

Domestically, the AFMA principles indicate that issuers should consider whether the distributor is an appropriate distributor of their product. AFMA also outlines a series of matters that the issuer should have regard to as part of this process. Feedback from major product issuers indicates that many require controls to be identified to ensure that products reach their intended recipients. This involves consideration of both customer sophistication and product complexity. In addition, product issuers have advised that the identification of a target market for a product will influence the marketing strategy for any new product.

The need to identify appropriate distribution channels is consistent with what has been introduced in international jurisdictions. For example, in the UK, the FCA has issued guidance indicating that issuers should decide whether it is wise for the product to seek advice and review whether the way the product is being distributed in practice corresponds to what was originally planned. Broadly similar requirements are in place in the EU directive. In Hong Kong, the SFC indicates that issuers should ensure that distributors are appropriate, have essential product knowledge, and provide sufficient ongoing training.

DETAILED PROPOSAL 2

Issuers must select distribution channels and marketing approaches for the product that are appropriate for the identified target market.

When determining whether a distribution channel and marketing approach is appropriate for a product, issuers must have regard to:

- The customers that the distribution channel and marketing approach will reach and whether they are consistent with the identified target market for the product.
- The risks in a distribution channel or marketing approach that may prevent or limit the product being distributed to the identified target market and the steps that will be taken by the issuer or distributor to mitigate those risks.
- The complexity of the product and whether the distribution channel or marketing approach will enable customers to understand the product.
- What arrangements the distributor has in place to ensure its representatives have sufficient knowledge and understanding of the product.
- The extent to which consumers are engaged through that distribution channel.
- How the distributor intends to market the product and whether that form of marketing is appropriate for the product.

Issuers must notify their distributors of the identified target and non-target market for the product.

QUESTIONS

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.
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?

Post-sale review

Once the product has been released to the market, it is proposed that product issuers periodically review their products with reasonable frequency to inform whether any changes are necessary to the design or distribution going forward.

In terms of what factors are taken into account in the reviews, it is proposed they take into account any consumer feedback about the product, details of any complaints, feedback from product distributors, claims outcomes (including denied claims where the reason for rejecting the claim suggests the product is not being sold to the target market) and profit margins associated with the product. These will all inform whether the product is operating as expected.

If this review identifies that a particular distribution channel is selling significant volumes of the product to people outside of the identified target, it is proposed that the issuer raise these concerns with the product distributor and depending on the outcomes, reconsider whether the particular distribution channel is appropriate for the product.

The frequency and intensity of the review will be decided by the issuer taking into consideration the nature and performance of the product. For example, it would be expected that reviews be conducted more frequently if the product is a new offering, there is an unexpected change in product demand or performance, an increase in complaints or the product is relatively complex. Accordingly, in addition to any scheduled reviews there should be identified triggers for ad-hoc reviews.

The review would be required for all products which are subject to the issuer and distributor obligations. While the review is required for all open products still accepting new customers or funds, a review would not be required for closed products which are no longer available.

Where a review identifies that a distributor is selling a product outside of the intended target market, it is proposed that the issuer raise the issue with the distributor and seek agreement with the distributors about the measures that will be taken to address the issue. The issuer should then lodge a report with ASIC detailing the issue and the steps taken to address the matter. Where appropriate, this will allow ASIC to investigate the manner and take any necessary enforcement action (see Part 5 of the Paper).

Some product issuers have expressed concerns about any expectation that they will be indirectly accountable for the conduct of external distributors under the reforms. In general, distributors will have direct responsibility for putting in place controls to ensure products are distributed in line with the issuer's expectations (see section 3.3). However, product issuers cannot be wilfully blind if distributors are acting in a manner that is inconsistent with their expectations.

The need for product reviews is broadly consistent with practices in some Australian market and what has been introduced in other jurisdictions. Domestically, the AFMA guidelines indicate that issuers should review distribution arrangements on a periodic basis. Feedback from major product issuers in Australia has indicated that they conduct reviews of their products on a regular basis using a risk-based approach. In addition, they consistently monitor market movements and customer feedback. In the UK, the FCA guidance indicates that issuers should periodically review a product whose performance may vary materially to check whether it is continuing to meet the general needs of the target guidance. In Hong Kong, the SFC indicates that issuers should establish procedures to monitor product performance and review viability and distribution strategies.

DETAILED PROPOSAL 3

Issuers must periodically review products with reasonable frequency to ensure that the identified target market and that the selected distribution channel continues to be appropriate for their products.

Issuers must put in place procedures to monitor the performance of their products and collect relevant data to support the product reviews.

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.

Case studies outlining how these proposals would operate in practice are outlined in Box 2.

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

3.3 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.

Similar to issuers, the main principles in terms of the obligations imposed on distributors is to ensure the obligations are flexible given the wide range of products that will potentially be subject to the requirements while providing sufficient certainty to industry in terms of the nature of their requirements. The intention in the primary legislation will be to provide sufficient detail in order to give an ample level of certainty around their legal requirement, and then to supplement the obligations with regulatory guidance provided by ASIC. In providing feedback on the proposals, stakeholders are encouraged to consider what level of detail should be included in legislation versus regulatory guidance. In addition, the consumer protection outcomes in terms of ensuring products are distributed in line with the issuers expectations need to be balanced with ensuring that consumers have access to appropriate product choice.

The material below outlines what will be expected of distributors. Key proposals are identified in text boxes to draw the readers' attention to the requirements. Implementation of these proposals could form part of a broader governance framework put in place by financial firms that sets out their internal policies and procedures in relation to the design, distribution and review of products, including training, monitoring and operational controls to ensure business practices are compliant.

Distribution controls

As outlined above, it is proposed that the issuer will inform the distributor of the identified target/non-target market for their products. Following on from this, it is proposed that distributors have reasonable controls in place to act in accordance with the expectations of the product issuer.

Generally, issuers and distributors should agree the controls that will be put in place and if there is a distribution agreement, it should specify the agreed controls. Some controls may be developed by the issuer for use by the distributor. The controls that are reasonable will depend on the type of product, the distribution strategy and any other relevant circumstances. Possible examples of controls could include:

- **Targeted disclosure** - providing information about the target market having regard to the content, form and timing that is most likely to meet consumer needs (for example, short targeted warnings at key decision making points). These disclosures should be tested to ensure they are effective;
- **Ensuring information is delivered** - following scripts, requiring that pre-recorded messages or videos are played or using mandatory screens in an online application;
- **Tools to help consumers understand/decide** - providing easy access to calculators, case studies or self-assessment tools. These should also be tested;
- **Requiring choice** - requiring a positive action where a product or product feature may not be appropriate for all consumers in the target market (for example, 'opt in' distribution rather than bundling products by default). This may also require testing and/or tools to help the consumer (see above).
- **Staff competency** - ensuring staff responsible for distribution are appropriately trained, understand the product and target market and can accurately explain the product or answer questions;
- **Managing conflicts** - identifying the extent of any risk of mis-selling from remuneration practices, and adopting an appropriate mitigation strategy;
- **Supervision** – ensuring there is management oversight, audits or reviews of distribution practices to ensure staff follow relevant procedures;
- **Using customer information** - distributors are not required to conduct an individual assessment to determine whether the product is appropriate for the consumer. However, the distributor should leverage information that it can reasonably access when putting in place controls regarding the sale of the product. A situation where a distributor could reasonably access information about the consumer is where the distributor provides other services to the consumer (for example, banking or credit services); and
- **Encouraging personal advice** - by making it easy to access (for example, through robo-advice or providing numbers to call).

These examples are not intended to be exhaustive and the specific controls required in a given case will depend on the circumstances. Generally, as the potential detriment from selling a product outside the target market increases, distributors would be expected to have more robust controls in place. However, if distribution with personal advice is the only appropriate distribution channel for a product, using controls like those listed above will not be sufficient to make general or no advice channels appropriate for that product. In this way, an issuer choosing a distribution channel that uses personal advice can be viewed as the most robust control available (given the additional regulatory protections it provides).

A small number of sales outside the target market would not necessarily constitute a breach of the proposal to have reasonable controls in place. What would be necessary is evidence of systemic failure in the controls that result in a significant number of products being distributed outside of the intended target market. There is also the question around the extent to which consumers outside of the target market (or even within the non-target market) should be able to acquire the product. Consumers have a diversity of needs that need to be accommodated through a diversity of products. However, allowing consumers to 'opt-out' of the protections by agreement has the potential to compromise the integrity of the reforms because of the risk that consumers will opt-out within fully understanding the implications.

It is envisaged that ASIC will provide further guidance on what constitutes appropriate controls through guidance. Ultimately, distributors will be best placed to judge what controls operate most effectively given their circumstances.

DETAILED PROPOSAL 4

Distributors must put reasonable controls in place to ensure that products are distributed in accordance with the issuer's expectations.

QUESTIONS

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?
17. To what extent should consumer be able to access a product outside of the identified target market?
18. What protections should there be for consumers who are aware they are outside the target market but choose to access a product regardless?

Post-sale review

Once the product has been released to the market, product issuers should periodically review their products with reasonable frequency to inform whether any changes are necessary to the design or distribution going forward. In order to facilitate these reviews, it is proposed that distributors be required to comply with reasonable requests for information from the issuer in relation to the review and put in place procedures to collect the necessary data to support the review. This could be achieved, for example, by issuers specifying the necessary information through distribution agreements (where there is an agreement).

DETAILED PROPOSAL 5

Distributors must comply with reasonable requests for information from the product issuer related to the product review.

Distributors must put in place procedures to monitor the distribution of products and collect data to support the product issuer's product review.

Case studies outlining how these proposals would operate in practice are outlined in Box 2.

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

BOX 2: EXAMPLES OF ISSUER AND DISTRIBUTOR OBLIGATIONS

Case study 1: Consumer credit insurance

FACTS

XYZ Insurer develops a consumer credit insurance product. This product provides cover if the holder cannot meet the repayments on their credit contract or loan because the holder loses their job, becomes sick or injured or dies.

TARGET MARKET IDENTIFICATION

Given the nature of the product, the issuer identifies the primary target market for its product as employed individuals with dependants taking on significant debt obligations and the non-target market as unemployed individuals.

APPROPRIATE DISTRIBUTION CHANNEL

The issuer decides to distribute the product through credit providers, so that it can be offered to people at the same time as they enter into credit obligations. As part of selecting distribution channels, the issuer requests information from potential distributors about the proportion of unemployed people to whom the distributor provides credit and the level of consumer engagement involved in the distribution process.

XYZ Insurer enters into a distribution agreement with the selected distributors, a number of credit providers. The issuer advises each distributor of the desired target market for its product. Under the terms of the distribution agreement, the distributor provides information to the insurer on a periodic basis to review whether the product is reaching the desired target market.

BOX 2: EXAMPLES OF ISSUER AND DISTRIBUTOR OBLIGATIONS (CONTINUED)**Case study 1: Consumer credit insurance (continued)****DISTRIBUTOR CONTROLS**

The distributor puts in place controls to minimise the risk of the product being distributed to unemployed people. As the distributor is a credit provider, it should know the employment status of the individual as part of its responsible lending obligations. The distributor utilises this information to ensure that it is not distributing this product to unemployed people.

The distributors monitor the effectiveness of these controls and also provide requested information to the issuer to allow the issuer to determine whether the product is reaching its target market.

POST-SALE REVIEW

After 12 months, XYZ Insurer conducts a review of the distribution of the product and whether it continues to meet the needs of the target market. XYZ Insurer also decides to conduct regular annual reviews and an ad-hoc review if systems monitoring the performance of the product and distribution identify an increase in the number of complaints, claim denials or cancellations. The reviews take into account all information available to the issuer, including from the distributors as well as claims denials, product complaints from the relevant external dispute resolution scheme and other customer feedback. It identifies that all but one of the distributors are appropriately restricting sales to the non-target market. It uses the good practices of the other distributors to seek changes to the way in which this distributor is selling its product.

Case study 2: High-growth managed investment scheme**FACTS**

ABC Fund Manager develops a high-growth investment product. The product invests in a combination of listed shares and cash.

TARGET MARKET IDENTIFICATION

Given the nature of the product, the issuer identifies the primary target market for its product as people with a high-risk tolerance and a long-term investment horizon. However, the product can also form a small part of a balanced portfolio for the broader market.

TARGET MARKET IDENTIFICATION (CONTINUED)

Given the potential for the product to be distributed to a fairly broad target market, the product issuer should undertake consumer testing of its disclosure documents and other information (such as included warnings) provided to consumers to ensure consumers that are buying the product directly understand the risk characteristics of the product. Further, the issuer undertakes stress testing of the product to identify how it will perform in various market circumstances and includes this information in the disclosure documents. In the absence of this testing, it is unlikely that a broad target market will be considered appropriate for the product.

BOX 2: EXAMPLES OF ISSUER AND DISTRIBUTOR OBLIGATIONS (CONTINUED)

Case study 2: High-growth managed investment scheme (continued)

APPROPRIATE DISTRIBUTION CHANNEL

The issuer decides to distribute the product using both direct (general advice) and personal advice distribution channels. The issuer concludes that a direct (general advice) distribution channel is appropriate for the product given the controls that the distributor has in place to manage the risk of the product being distributed outside of the target market (discussed below) and the relatively simple (albeit high-risk) nature of the product.

In relation to the personal advice channel, there are no additional obligations as customers receiving the product through this channel will receive personal financial advice. Consumers acquiring products through an advised channel already have access to appropriate protections including through the *Future of Financial Advice* reforms.

DISTRIBUTOR CONTROLS

In relation to the direct (general advice) distribution channel, given the high-risk nature of the product, the distributor targets people who are likely to have a higher-risk tolerance (for example, medium-high net worth individuals with a longer investment horizon able to recover from market volatility). Where marketing is likely to reach a broader market, advertisements should make the risks of the product clear and that in most cases the product is intended to form part of a balanced portfolio and be held for a long period of time.

In addition, the online application form is changed so that the investor is required to indicate their expected investment horizon and attest that they fall within the desired target market. The application form therefore needs to have sufficient information to enable a reasonable consumer to determine whether they fall within the target market, or whether they are excluded from it. Further, if the customer indicates a short investment horizon they will not be permitted to continue with the application. Other obligations for the provision of general advice (for example, warnings, the ban on conflicted remuneration and general obligations to provide financial services honestly, efficiently and fairly or to manage conflicts of interests) already apply.

POST-SALE REVIEW

The issuer also collects information on product complaints and disputes in relation to the product to help inform this review and determine whether the product is continuing to meet the needs of the identified target market. Given the high risk nature of the product, after 12 months, ABC Fund Manager decides to conduct an initial review of the distribution of the product and whether it continues to meet the needs of the target market. The issuer also determines to conduct scheduled reviews every 2 years and an ad-hoc review if there is a significant market downturn.

3.4 Proposed commencement date

The key principle in relation to the commencement date is to provide industry with sufficient time to transition into the new regime. Ideally, the reforms should apply as consistently as possible with minimal grandfathering of existing products to avoid any regulatory cost advantages of existing products over new products.

It is proposed that the obligations will apply to new products issued 6 months after the reforms receive Royal Assent. The 6 month period is designed to provide product issuers and distributors with sufficient time to enable compliance of the obligations and to take account of the fact that there may be products under development at the time that the reforms receive Royal Assent. After this time, the obligations will apply to all new products made available to consumers, unless that product was made available to consumers prior to the commencement of the obligations.

For products already available to consumers before Royal Assent, it is proposed that these products can continue to be offered to consumers after Royal Assent without having to comply with the new obligations for a period of 2 years. This is intended to allow sufficient time for industry to work with the new regime and renegotiate any existing contracts between issuers and distributors in relation to existing products. However, as indicated by the FSI, products that are 'closed' (that is, no longer accepting new applications) will be excluded from the obligation to undertake periodic product reviews.

QUESTIONS

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.
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.

3.5 Government review

Given the significant nature of the proposed obligations, it is proposed that the Government review the proposed obligations after five years to ensure they are operating effectively.

CHAPTER 4: PRODUCT INTERVENTION POWER

The FSI recommended that the Government amend the law to provide ASIC with a product intervention power so that ASIC is equipped to take a more proactive approach in helping reduce the risk of significant detriment to consumers. This new power would allow ASIC to take a more proactive approach to regulating the market.

4.1 What types of interventions can ASIC make using the power?

SUMMARY OF PROPOSAL

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

Any new powers should be structured in a way that enables ASIC to tailor interventions for specific circumstances while also providing sufficient clarity on the types of interventions that could be undertaken. In relation to this issue, the FSI outlined the following types of interventions that ASIC could undertake using the new power. These were:

- amendments to marketing and disclosure materials for a product;
- warnings to consumers, and labelling or terminology changes in relation to a product;
- restrictions on how a product is distributed; and
- product banning.

Consistent with the examples outlined in the FSI, it is proposed that ASIC have the power to make interventions relating to:

- a product (or a type of product) or a specific feature of a product (or type of product); or
- the types of consumers to whom, or circumstances in which, a product (or type of product) is distributed.

Such an approach would enable ASIC to make interventions related to matters concerning the distribution of products, as well as the types of interventions identified by the FSI, as illustrated below.

Intervention type	How it could be used
Intervention related to a product or feature of the product (Would enable ASIC to consider matters relating to the product itself as well as documentation surrounding the product)	ASIC intervention to amend the disclosure and marketing documents of a product through, for example, the addition of a warning to consumers
Intervention related to circumstances in which, a product (or type of product) is distributed	If Distributor A is selling the product properly and Distributor B is selling the same product in a manner that creates a risk of significant consumer detriment then ASIC could use the power to address the way in which Distributor B is selling to impose restrictions

The proposed approach does not include providing ASIC with the power to make interventions that indirectly relate to a product, such as, the remuneration of distributors selling a product, because a remuneration arrangement is not a product feature. Similarly interventions could not be made to alter the training and remuneration outcomes related to the selling or distribution of a product. While these matters can lead to consumer detriment (as demonstrated by issues in the financial advice industry leading to the *Future of Financial Advice* reforms), these are issues more appropriately targeted by the legislative reforms to professional standards and life insurance remuneration.

Examples of possible interventions:

Covered	Not covered
Disclosure obligations	Training obligations
Warning statements	Remuneration
Advertising and marketing documents	Requiring an unlicensed entity to join an EDR scheme
Features of the product	
Banning the product	
Distribution restrictions	

ASIC would be able to make interventions on a market-wide (or class) basis (for example, across a class of products) or an individual basis (for example, a specific product issued by an individual issuer). Market-wide interventions are more likely to be appropriate when ASIC is seeking to address a practice that is relatively widespread. ASIC is more likely to intervene on an individual basis where there are specific characteristics about a product or the way a particular product is being distributed that have the potential to cause significant consumer detriment.

QUESTIONS

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

4.2 Use of the intervention power

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.

It is proposed that ASIC only be able to exercise the power once it identifies that there is a risk of significant detriment to consumers in their purchase of, or use of the product.

This approach is consistent with the FSI. However, the FSI indicated that the power was not intended to be used to address circumstances where a large number of consumers have incurred a small detriment. Implicit in the FSI's position is that ASIC should also focus its use of the power when the potential detriment is significant to an individual consumer rather than on a market-wide basis.

A potential difficulty with limiting ASIC's ability to intervene to situations involving a significant detriment to an individual is that it makes the test for determining when ASIC can intervene subjective based on the financial circumstances of the individuals affected. This will make it difficult for ASIC to conclusively determine whether a detriment is significant except in the cases of most egregious losses. This would also restrict ASIC's capacity to address conduct directed at large numbers of low-income consumers who may suffer small losses in dollar terms, but that have a disproportionate impact on their financial capacity.

An alternative approach to legislating how ASIC should determine whether a detriment is significant is to set out the key factors that ASIC should take into consideration when evaluating whether a detriment is sufficient to warrant intervention. These factors could include:

- ***The potential scale of the detriment in the market:*** this would involve looking at the number of customers potentially affected and the size of the potential losses.
- ***The potential scale of the detriment to individual consumers:*** this would involve looking at whether the losses are likely to have a significant impact on individual consumers.
- ***The class of consumers likely to be impacted by the detriment:*** this would involve looking at whether there are factors like hardship or vulnerability within the range of potential consumers that would increase the need for intervention.

This would enable ASIC to intervene whenever the detriment is significant either on a market-wide basis or an individual basis. Further it would allow ASIC to take into account the circumstances of the consumers likely to be affected. For example, a detriment affecting a particularly vulnerable class of consumers is more likely to warrant intervention. These factors are broadly consistent with the factors that the FCA in the UK takes into consideration when deciding whether to exercise its temporary product intervention powers.

On balance, the proposal is for ASIC to take into account key factors when determining whether a consumer detriment is significant and not specifically rule out any circumstances. This approach is more likely to meet the objective of enabling ASIC to intervene in a timely manner.

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?

Procedural steps

The procedural steps that ASIC will need to satisfy before it intervenes will be in addition to the need for ASIC to identify a risk of significant consumer detriment.

Key to effective steps are procedures that provide for adequate due process prior to the making of an intervention and that the ability to make interventions does not circumvent other powers already afforded to ASIC.

The FSI envisaged that the power would be used on an infrequent basis and would be as a 'last resort or pre-emptive measure' and that an intervention could occur without a demonstrated or suspected breach of the law. Describing the power as 'last resort' suggests that it would be expected that ASIC would consider alternative options to intervention except in situations where the power is being used in a proactive manner. The FSI indicated that ASIC should also consult with the Australian Prudential Regulation Authority (APRA) prior to using the power in a manner that could impact on an APRA-regulated entity and engage with potentially affected firms.

Rather than creating separate regimes depending on whether ASIC is using the power on a 'last resort' basis versus 'pre-emptive' basis, an alternative approach would be for the legislation to specify the steps ASIC would need to satisfy before exercising the power. These steps could include:

- **Consultation:** The nature of the engagement will depend on the nature of the intervention and the circumstances under which the power is being used. For example, for market-wide intervention, public consultation is likely to be the most appropriate whereas more targeted engagement is likely to be more appropriate for individual interventions. This is consistent with ASIC's stop-order power under which ASIC must hold a hearing and provide interested parties with the opportunity to make submissions. As part of this, affected parties may voluntarily agree to change the relevant practices. Where the risk to the consumers is imminent, the nature of this consultation is likely to be more streamlined. In these circumstances, consultation may be limited to discussions with a few of the major issuers in the market that are likely to be impacted by the intervention.

- **Consider alternative powers:** The introduction of product intervention powers should not make other powers already provided to ASIC redundant. For example, if ASIC considers a disclosure document to be misleading or deceptive, ASIC should continue to use its stop order powers to address this rather than the product intervention power. In order to achieve this, it is proposed that ASIC consider the use of alternative powers prior to any intervention. However, merely because there is an alternative power that could be used to address the issue, it will still be permissible for ASIC to use the product intervention power if ASIC considers the product intervention power to be the most effective means of addressing the issue in the circumstances. For example, in some cases while it may be possible for ASIC to address an issue through its licencing powers, the product intervention power may be the more effective means because of its ability to be applied across the whole market in a timely manner. Further, it is not envisaged that ASIC would need to attempt enforcement action or seek law reform prior to making an intervention.

In addition, there will also need to be a high degree of transparency around ASIC's use of the power. This could include ASIC making publicly available:

- details of any intervention;
- details of the risk of significant consumer detriment (including potential scale of the detriment in the market, the potential impact on consumers and the class of consumers likely to be affected); and
- details on why the product intervention power is the most effective means of addressing the issue.

On balance, it is proposed that procedural steps based around consultation, consideration of alternative powers and post-intervention transparency best meets the principle of ensuring there is sufficient due process before an intervention is made. It is noted that requiring consultation differs from the approach in the UK where the FCA is able to make a temporary intervention without any consultation. Consultation has an important role to play in ensuring that affected industry participants have notice of any intervention. This will provide industry with the opportunity to change their practices, and potentially avoid the need for any intervention.

A hypothetical case study of how the intervention power would operate in practice is outlined in Box 3 below.

QUESTIONS

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?
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?

BOX 3: CASE STUDY

This case study is intended to illustrate the steps that ASIC would go through before issuing an intervention. The range of possible interventions is not intended to be exhaustive.

ASIC steps**1. RISK OF SIGNIFICANT CONSUMER DETRIMENT**

ASIC must determine whether there is a risk of significant consumer detriment. ASIC does not need to quantify the potential consumer detriment, but must form the view that it is significant. As part of this process ASIC may consider:

- The financial impact of any harm on affected consumers.
- The scope of that harm (such as the volume of sales of the products, and whether these problems arise in relation to all consumers who buy the product, or only classes of consumers with certain characteristics or individuals on a random basis).
- Any steps taken by issuers or distributors to mitigate the identified harms and whether they have been or are likely to be effective.
- Whether the class of affected consumers have characteristics (like hardship or vulnerability) which increase the risk or significance of detriment.

2. CONSULTATION

The approach to consultation will vary based on whether the intervention is an individual intervention or market-wide intervention and any other relevant circumstances (such as the need for urgent action)

- For an individual intervention, ASIC would be required to engage directly with the individual to whom the intervention is directed and provide them with an opportunity to be heard in relation to the matter.
- For a market-wide intervention, ASIC would be expected to undertake appropriate consultation taking into consideration the relative urgency surrounding the intervention. Where there is no particular urgency (for example, because the intervention responds to an issue already affecting the market and there is no reason to think that there will be any relevant changes to the market in the meantime), public consultation is likely to be appropriate. Where there is urgency surrounding the issue, consultation could be more targeted (such as by meeting with the largest issuers of the relevant product).

3. OTHER POWERS

ASIC must decide that an intervention is the most effective means of addressing the issue that has been identified. Some factors that would be relevant here include:

- Is there a specific alternative power that could address the situation (for example, the stop-order power)?
- Could the situation be addressed through the use of licence conditions (this will be influenced by whether all the parties are licenced and how widespread is the issue)?

BOX 3: CASE STUDY (CONTINUED)

ASIC steps (continued)

3. OTHER POWERS (CONTINUED)

- Where the significant consumer detriment is caused by actions that could be addressed through enforcement action (for example, where the detriment is caused by behaviour that is misleading or deceptive or that is unconscionable under the ASIC Act), the expected outcome or benefits for consumers in taking enforcement action for this conduct relative to exercising an intervention.

4. POSSIBLE INTERVENTIONS

The range of possible interventions will depend on the nature of the product that has been identified as causing the risk of significant consumer detriment. These could include:

- requiring additional disclosure or product warnings;
- regulating the use of specified words or symbols in relation to a product;
- changing the content, form or timing of up-front disclosures to ensure consumers better understand their choices or the limitation of the product;
- requiring or changing the content, form or timing of ongoing disclosures;
- banning the bundling of a product or certain product features with another product or certain product feature;
- limiting the distribution of a product or a product with particular features to retail clients that receive personal financial product advice;
- setting minimum standards for certain products or product features (for example, mandating basic features for a product);
- banning the distribution of the product to a subset of retail clients that do not benefit from the product;
- banning the distribution of the product or feature to retail clients.

4.3 Duration and review of an intervention

SUMMARY OF PROPOSAL

An intervention by ASIC should last for up to 18 months. During this time, 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 duration of an intervention should provide sufficient time for the Government to consider and undertake permanent policy change, but not so long as to operate as a substitute for permanent policy change. This is consistent with the approach adopted across all of Australia’s regulators where Government has responsibility for determining the policy and regulators are responsible for the enforcement of that policy. In addition, the framework should provide industry with certainty around the duration of any intervention and appropriate review mechanisms to ensure oversight of the arrangements.

Duration

The FSI indicated that ASIC interventions should apply for an initial period of 12 months with the Government having the power to extend the intervention if more time was necessary either by industry to change its relevant practices or for Government to make permanent policy change. An alternative approach would be to allow ASIC to make interventions for a longer duration, but remove the ability to issue extensions.

The advantage of interventions applying for a longer duration with no extensions is that it provides industry with certainty around the duration of any temporary intervention. It removes the situations where interventions could be continuously rolled over and act as a substitute for the Government making permanent policy change. Consistent with this, the FCA has indicated that it will not make changes to its temporary intervention to extend their lifespan beyond 12 months. The risk is that it removes some of the flexibility in the system that could be used to provide additional time to make permanent changes as necessary.

On balance, the proposal is an approach of allowing for interventions of a longer duration but without any extension. The precise duration must be sufficient for the Government to be able to undertake permanent policy change. For the purposes of consultation, an initial period of 18 months is proposed. The mechanism of this policy change is expected to take the form of a legislative instrument. These instruments will be subject to Parliamentary disallowance.

Review

The FSI indicated that ASIC’s use of the power should be subject to judicial review and a Government review after five years. While not mentioned by the FSI, it is also envisaged that any market-wide interventions would be subject to Parliamentary oversight (including potential disallowance) and individual interventions to be subject to merits review by the Administrative Appeals Tribunal (AAT). Assuming the positions above apply, the process for making and reviewing interventions is outlined in Table 2.

Table 2: Making and reviewing interventions

	Individual Intervention	Market Wide Intervention
Decision maker	ASIC	ASIC
Instrument	Administrative decision	Legislative instrument
Review of initial intervention	AAT and Judicial	Parliamentary
Duration	Up to 18 months	Up to 18 months
Extension	None	None

QUESTIONS

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.
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?
30. What mechanism should the Government use to make interventions permanent and should be 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?

4.4 Industry clarity

Given the potential implications on a product issuer of having an intervention made against them, there have been calls for a mechanism that would provide certainty to industry before it issues a product. The key principle in determining the level of clarity is balancing the desire for clarity without unduly restricting ASIC's ability to use the power.

The FSI indicated that the product intervention power is not intended to be used for pre-approval of products. A product pre-approval process would substantially lengthen the product development process and potentially have a negative impact on product innovation. In addition, product pre-approval will create the impression among consumers that a product is risk free because ASIC has allowed it to be issued.

It is proposed industry clarity be provided through the release of ASIC regulatory guidance on how it intends to use the power once the power has been legislated. Further, as noted earlier, ASIC would be required to engage with affected parties prior to using the power. This will reduce the incidence of product issuers being 'surprised' by an intervention and will enable product issuers to address any issues potentially negating the need for intervention. In addition, once an intervention has been issued, the parties affected by the intervention can seek a merits review of the intervention (in the case of individual interventions) or disallowance of the intervention (in the case of market wide interventions).

QUESTION

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

4.5 Proposed commencement date

The key principle in relation to the commencement date is to provide industry with sufficient time to transition into the new regime. The power itself does not impose any direct obligations on industry that would necessitate the need for an additional transition period. However, interventions issued by ASIC, when made, will impose obligations. Based on this, it is proposed that the power will apply from the day after Royal Assent. However, ASIC will need to consider whether a transitional period is necessary when making any intervention.

The intervention power will only have an impact on prospective investments. That is, if the regulator imposes a product ban, only new investors will be prevented from purchasing the product. Conversely, those that are already in the product will not be subject to the ban as the power will not be retrospective. Where the power has been utilised, consumers already in the product would only have the ability to seek redress for a breach of existing financial services laws by issuers, advisers or distributors.

QUESTION

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

4.6 Government review

Given the significant implications of the proposed power, it is proposed that the Government review the usage of the power once it has been in operation for a period of five years.

CHAPTER 5: ENFORCEMENT AND CONSUMER REDRESS

This chapter looks at the type and level of penalties (and other enforcement arrangements) as well as what avenues for consumer redress should be available in instances where there is a breach of the design and distribution obligations or the requirements of an intervention.

5.1 What regulatory tools should be used to address non-compliance

The key principle in determining the enforcement mechanisms is that a measured and flexible approach be adopted in response to non-compliance with the design and distribution obligations or the requirements in an intervention. The purpose of enforcement is to deter entities from breaching the obligations.

The FSI stated that serious breaches of the design and distribution obligation would attract 'significant' penalties. The FSI was silent on the actions and remedies that would flow from a breach of a requirement in an intervention.

The entity that would be subject to the penalties would be the entity that is responsible for the breach of the obligation or the intervention. In relation to the design and distribution obligations, this would be either the issuer or distributor of the product. In relation to the breach of an intervention, this would be the entity that is responsible for that breach.

There is a range of alternative regimes that could be applied in the event of a breach of the design and distribution obligations. These include:

- **Administrative actions:** These could include cancellation of or variation of a financial services or credit licence, but cannot extend to fines or monetary penalties.
- **Civil penalties:** Civil penalties may include a disqualification order and/or pecuniary penalty order with a maximum of \$200,000 for an individual and \$1 million for a body corporate.
- **Criminal penalties:** Criminal penalties can include fines or imprisonment. They generally apply to the most serious conduct and usually the conduct involves an extra element such as dishonesty or recklessness.
- **Injunctive actions:** Where an entity has breached or is continuing to breach, an injunction may be used to quickly restrain the entity from the conduct or require the entity to do 'any act or thing' (such as publish corrective disclosures or contact affected consumers).

In addition, the Government is currently conducting a review of ASIC's enforcement regime. This review will consider (relevantly, among other things):

- the adequacy of existing civil penalties under the Corporations Act, the Credit Act and the ASIC Act;

- the adequacy of ASIC's breach reporting regime; and
- the use of infringement notices in relation to less serious contraventions.

The Government has established a Taskforce to progress this review. The Government is seeking feedback on the range of regulatory tools that should be available in the event of non-compliance. The Government will also seek feedback from this Taskforce.

QUESTION

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

5.2 Consumer redress

In circumstances where a consumer has suffered loss or damage as a result of a breach of the design and distribution obligations or a breach of a requirement in an intervention, consumers should be able to access appropriate redress.

Consumer rights

In addition to damages for any loss, the range of redress available to consumers could include providing (where appropriate):

- that a contract entered into in breach of certain obligations or certain ASIC interventions is voidable at the option of the consumer;
- remedies enabling a consumer to seek a refund or obtain a replacement product at no additional cost; and
- the option to seek orders declaring the whole or part of a contract void, or otherwise varying the terms of the contract.

This is broadly equivalent to the rights of consumers where they have purchased a banned consumer product. As noted earlier, where the intervention power has been exercised, consumers already in the product would only have the ability to seek redress for a breach of existing laws and the intervention will not itself trigger any rights for these existing contracts.

Enforcing consumer rights

Under existing law, financial services providers are required to maintain both an internal dispute resolution procedure and be a member of an external dispute resolution scheme. Where there is a dispute, consumers must first raise the matter through the internal dispute resolution procedure. If this does not successfully resolve the issue, the consumer can take the matter to the relevant external dispute resolution scheme (such as the FOS). The Government has established a panel of eminent persons to review the role, powers and governance of all of the financial system's external dispute resolution and complaints schemes.

The consumer may also commence private civil litigation, including participating in a class action for a potential breach of the Corporations Act. Generally in these circumstances, the consumer will be seeking damages for compensation; however, the Corporations Act provides consumers with the right to rescind the contract in specified circumstances.

In situations where a consumer may be unable or unwilling to commence action, ASIC has the capacity to initiate private court proceedings on behalf of consumers to recover damages or property for the loss suffered provided ASIC attains the consumer's consent. Alternatively, where a civil penalty provision has been breached, ASIC (or any person) can apply to the court for a declaration of the breach and seek a compensation order. This approach still requires the affected consumers to be identified prior to ASIC making an application for compensation.

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?

CHAPTER 6: NEXT STEPS

Feedback on the range of proposals outlined in this paper is requested by [15 March 2017](#).

The Government will consider responses in designing legislation giving effect to the measures. Depending on the outcome of this consultation process, it is expected that there will be consultation on draft legislation by mid-2017.

APPENDIX A: QUESTIONS

Outlined below is the list of more specific questions raised in the Paper. Interested stakeholders are encouraged to provide response to these questions in addition to the key proposals.

PART 2: 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)?
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.
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.
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.

PART 3: 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?
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).
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?
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?

PART 3: DESIGN AND DISTRIBUTION OBLIGATIONS (CONTINUED)

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?
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?
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)?
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.
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?
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?
15. In relation to all the proposed issuer obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?
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?
17. To what extent should consumer be able to access a product outside of the identified target market?
18. What protections should there be for consumers who are aware they are outside the target market but choose to access a product regardless?
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?
20. In relation to all the proposed distributor obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?

PART 3: DESIGN AND DISTRIBUTION OBLIGATIONS (CONTINUED)

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.
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.

PART 4: 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.
24. Are there any other types of interventions ASIC should be able to make (for example, remuneration)?
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?
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?
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?
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.
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?
30. What mechanism should the Government use to make interventions permanent and should be 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?
31. Are there any other mechanisms that could be implemented to provide certainty around the use of the product intervention power?
32. Do you agree with the powers applying from the date of Royal Assent? If not, please explain why with relevant examples.

PART 5: ENFORCEMENT AND CONSUMER REDRESS

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

APPENDIX B: FSI EXTRACTS

Consumer Outcomes

The financial system plays a vital role in meeting the financial needs of individual Australians. To fulfil this role effectively, consumers should be treated fairly and financial products and services should perform in the way consumers are led to believe they will. Consumers have a responsibility to accept their financial decisions, including market losses, when they have been treated fairly. However, financial system participants, in dealing with consumers, should have regard to consumer behavioural biases and information imbalances. Recent consumer experiences reveal poor industry standards of conduct and areas for enhancement in the current framework.

The current regulatory framework focuses on disclosure, financial advice and financial literacy, supported by low-cost dispute resolution arrangements. Product disclosure plays an important part in establishing the contract between issuers and consumers. However, in itself, mandated disclosure is not sufficient to allow consumers to make informed financial decisions. As the Interim Report noted, affordable, quality financial advice can bring significant benefits to consumers, especially where they may not be equipped to make complex financial decisions.

The framework needs to more effectively align the governance and corporate culture of financial firms, employees and other representatives. Currently, in seeking to align commercial incentives with consumer outcomes, the regulatory framework is focused on point of sale. Recent examples of poor conduct suggest the alignment needs to start at the point of product design, and then be strengthened through distribution and advice.

This Inquiry's recommendations focusing on consumer outcomes, in this and related chapters, combine deregulatory elements, self-regulation and new regulation. They build on recent changes, such as the Future of Financial Advice (FOFA) and product disclosure reforms, accommodate and promote market discipline and aim to reduce calls for future significant changes to the regulatory framework.

A number of recommendations focus on increasing accountability of issuers and distributors. In the Inquiry's view, firms that already invest in customer-focused business practices and procedures would not be required to change their operations significantly. The Inquiry's expectation is that costs involved in changing practices should be low. In addition, the Inquiry believes that, in complying with these recommendations, firms would also be likely to benefit from long-term savings through increased customer retention and avoid further regulatory costs.

In the Inquiry's view, these recommendations should also have limited effect on incentives for product innovation. To the extent that there is a change in the design or distribution of certain products, the Inquiry considers that this is appropriate to promote consumers buying products that meet their needs.

Design and distribution obligations

Government should amend the law to introduce a principles-based product design and distribution obligation. The obligation would require product issuers and distributors to consider a range of factors when designing products and distribution strategies. In addition to commercial considerations, issuers and distributors should consider the type of consumer whose financial needs would be addressed by buying the product and the channel best suited to distributing the product. Industry should supplement this principles-based obligation with appropriate standards for different product classes.

The obligation would cover:

- **During product design**, product issuers should identify target and non-target markets, taking into account the product's intended risk/return profile and other characteristics. Where the nature of the product warrants it, issuers should stress-test the product to assess how consumers may be affected in different circumstances. They should also consumer-test products to make key features clear and easy to understand.
- **During the product distribution process**, issuers should agree with distributors on how a product should be distributed to consumers. Where applicable, distributors should have controls in place to act in accordance with the issuer's expectations for distribution to target markets.
- **After the sale of a product**, the issuer and distributor should periodically review whether the product still meets the needs of the target market and whether its risk profile is consistent with its distribution. The results of this review should inform future product design and distribution processes. This kind of review would not be required for closed products.³

These requirements would be scalable, depending on the nature of the product. Compliance with this obligation should be straightforward for simple products that are likely to be suitable for most consumers. For example, simple, low-risk products such as basic banking products would not require extensive consideration and may be treated as a class, with a standard approach to their design and distribution.

A serious breach of this obligation should be subject to a significant penalty.

Product Intervention Power

Government should amend the law to provide ASIC with a product intervention power. ASIC should be equipped to take a more proactive approach to reducing the risk of significant detriment to consumers with a new power to allow for more timely and targeted intervention. This power should be used as a last resort or pre-emptive measure where there is risk of significant detriment to a class of consumers. This power would enable intervention without a demonstrated or suspected breach of the law. Given the potential significant commercial impact of this power, the regulator should be held to a high level of accountability for its use.

This power would allow the regulator to intervene to require or impose:

- Amendments to marketing and disclosure materials.
- Warnings to consumers, and labelling or terminology changes.
- Distribution restrictions.
- Product banning.

This 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.

The power would be limited to temporary intervention for 12 months. The temporary intervention could be extended by Government if more time was needed either by industry to change its relevant practices or for Government to implement permanent reform. The power could be used against an individual firm or class of firms in relation to a product or class of products. The power would be subject to a judicial review mechanism.

ASIC would be required to consult with the Australian Prudential Regulation Authority (APRA) prior to using this power when it may affect an APRA-regulated body. Government should review the use of this power after five years.

The Inquiry's view is that providing ASIC with this new power complements the need for a proactive market-based regulator. The efficacy of this power depends on a strong, independent and accountable regulator. As part of its overall assessment of ASIC's performance against its mandate, the proposed Financial Regulator Assessment Board should assess the use of this new power. (See *Chapter 5: Regulatory system* for a range of complementary recommendations.)

APPENDIX C: CREDIT AND FINANCIAL PRODUCT REGULATORY COVERAGE

Credit products covered by the Credit Act	Financial products covers by the Corporations Act
Broadly speaking, the credit act covers where:	A financial product is a facility through which, or through the acquisition of which, a person does one or more of the following:
<ul style="list-style-type: none"> • Payment of a debt owed by one person to another is deferred; and 	<ul style="list-style-type: none"> • makes a financial investment;
<ul style="list-style-type: none"> • a charge is made for providing the credit; and 	<ul style="list-style-type: none"> • manages financial risk;
<ul style="list-style-type: none"> • the credit is provided wholly or predominantly for personal, domestic or household purposes; or to purchase or renovate residential property for investment purposes. 	<ul style="list-style-type: none"> • makes non-cash payments.
What's covered	What's covered
<ul style="list-style-type: none"> • Credit cards 	<ul style="list-style-type: none"> • Shares and other listed products (such as exchange traded funds)
<ul style="list-style-type: none"> • Mortgages 	<ul style="list-style-type: none"> • Insurance products, such as life insurance and consumer credit insurance
<ul style="list-style-type: none"> • Loans over residential investment property 	<ul style="list-style-type: none"> • Managed investment schemes, including managed funds
<ul style="list-style-type: none"> • Personal loans 	<ul style="list-style-type: none"> • Margin loans
<ul style="list-style-type: none"> • Car loans 	<ul style="list-style-type: none"> • Derivatives, including options and futures
<ul style="list-style-type: none"> • Small amount credit contracts 	<ul style="list-style-type: none"> • Deposit products
<ul style="list-style-type: none"> • Consumer leases 	<ul style="list-style-type: none"> • Superannuation
What's not covered	What's not covered
<ul style="list-style-type: none"> • Loans to small businesses 	<ul style="list-style-type: none"> • Property/real estate
<ul style="list-style-type: none"> • Investment lending except over residential property (for example, loans for commercial real estate investment) 	<ul style="list-style-type: none"> • Credit products
<ul style="list-style-type: none"> • Margin loans 	
<ul style="list-style-type: none"> • Indefinite leases (no fixed end date) 	
<ul style="list-style-type: none"> • Leases of less than 4 months duration 	
<ul style="list-style-type: none"> • Debt management/credit repair 	
<ul style="list-style-type: none"> • Financial products 	

ASIC Act coverage of financial products and credit provisions

The definition of ‘financial product’ for the purposes of Division 2 of Part 2 of the ASIC Act was made wider than that contained in Chapter 7 of the Corporations Act to ensure that ASIC rather than the Australian Competition and Consumer Commission (ACCC) has broad responsibility for consumer protection in relation to financial products. It was also intended to ensure that ASIC’s consumer protection provisions apply to financial products that may not have been subject to the licensing, disclosure and conduct framework in Chapter 7 of the Corporations Act.

For provision of credit, the definition of ‘credit’ is contained in Division 2 of Part 2 of the ASIC Act (this Part ‘Unconscionable conduct and consumer protection in relation to financial services’ includes the provisions on unfair contract terms and unconscionable conduct). This Division uses a definition of ‘financial product’ which includes credit products (unlike the definitions of ‘financial product’ used in the Corporations Act and elsewhere in the ASIC Act which do not include credit products). This broader definition of ‘credit products’ includes types of credit excluded from the Credit Act. For example, the ASIC Act definition covers leases over real or personal property and is not limited in a way to exclude credit to small businesses.

The broad definition of ‘credit’ is used only in one specific part of the ASIC Act in relation to consumer law protections only.

Credit products covered by the Credit Act	Credit products covered by the ASIC Act
<ul style="list-style-type: none"> • Credit cards 	<ul style="list-style-type: none"> • Everything covered by the Credit Act <i>plus</i>:
<ul style="list-style-type: none"> • Mortgages 	<ul style="list-style-type: none"> – Loans to small businesses
<ul style="list-style-type: none"> • Loans over residential investment property 	<ul style="list-style-type: none"> – Deferred payments (credit for no cost)
<ul style="list-style-type: none"> • Personal loans 	<ul style="list-style-type: none"> – Leases over real property
<ul style="list-style-type: none"> • Car loans 	<ul style="list-style-type: none"> – Indefinite leases
<ul style="list-style-type: none"> • Small amount credit contracts 	
<ul style="list-style-type: none"> • Consumer leases 	

APPENDIX D: INTERNATIONAL EXAMPLES OF DESIGN AND DISTRIBUTION OBLIGATIONS

Country	Manufacturer Obligations	Distributor Obligations	Range of products	Penalties
United States	<p>The Financial Industry Regulatory Authority (FINRA) requires all firms to have formal written procedures to ensure that no new product is introduced before it has been thoroughly vetted from a regulatory as well as business perspective (FINRA Rule 3110).</p> <p>In Notice to Members 05-26, FINRA provided guidance on what questions should be addressed as part of the vetting process for a new product. These questions include:</p> <ul style="list-style-type: none"> • For whom is the product intended? If the product is intended for limited distribution, how will the distribution be controlled? • What is the product's investment objective? How does the product add to or improve the firm's current offerings? • What assumptions underlie the product and how realistic are they? • What are the risks for investors? • What costs and fees for the investor are associated with the product (and how do they compare with the market)? • What are the compensation arrangements for selling the product? Do they generate conflicts of interest? If so, how will these be managed? • What is the complexity of the product in structure, function and description? Will the complexity impair investors' understanding of the product? • How will the product be marketed? 	<p>No distributor obligations identified outside of obligations placed on financial advisers or brokers.</p>	<p>Securities</p>	<p>FINRA may enforce compliance with its rules through a range of measures including limitation or modification of business activities, fines, bans, censure and suspensions.</p>

Country	Manufacturer Obligations	Distributor Obligations	Range of products	Penalties
<p>United Kingdom</p>	<p>The Financial Conduct Authority (FCA) has issued guidance on how it expects product manufacturers to meet their obligations:</p> <ul style="list-style-type: none"> • Product design <ul style="list-style-type: none"> – Identify the target market, namely which types of customers the product or service is likely to be suitable/non-suitable for. – Stress-test the product or services to identify how it might perform in a range of market environments and how the customer could be affected. – Have in place systems and controls to manage adequately the risks posed by product or service design. • Providing information to distributors <ul style="list-style-type: none"> – Ensure information provided to distributors is sufficient, appropriate and comprehensible in substance and form, including whether it will enable distributors to understand it enough to give suitable advice and to extract any relevant information and give it to the end consumer. • Providing information to customers <ul style="list-style-type: none"> – Have regard to its target market, including its level of financial capacity, when providing information to customers. – Take into account what information the customer needs to understand the product or service, its purpose and the risks, and communicate information in a way that is clear, fair and not misleading. • Selecting distribution channels <ul style="list-style-type: none"> – Decide whether this is a product where it would be wise for customers to seek advice. – Review whether how the product is being distributed in practice corresponds to what was originally planned or envisaged given the target market and make any necessary changes (including potentially ceasing to use a particular distribution channel). • Post-sale responsibility <ul style="list-style-type: none"> – Periodically review products whose performance may vary materially to check whether the product is continuing to meet the general needs of the target audience and take any necessary action. 	<p>The FCA guidance indicates that distributors should:</p> <ul style="list-style-type: none"> • Put in place systems to manage the risks posed by financial promotions and act with due skill and care when passing on information provided by the provider. • Assess whether customers are likely to understand information provided by the provider and whether any supplementary information may be necessary. • Consider whether the nature of the products or services offered by the provider and whether they fit with their customers' needs and risk appetites. • Consider what impact the selection of provider could have on the customer. 	<p>Full range of products regulated by the FCA. This includes investment products, insurance products and credit/hire-purchase contracts.</p>	<p>The guidance is not currently binding. However, non-compliance may indicate that the firm is in breach of one of the principles in the FCA Handbook. If a principle has been breached, the firm is liable to disciplinary sanction by the FCA. Breaching a principle does not give rise to actions for damages by a private person.</p>

Country	Manufacturer Obligations	Distributor Obligations	Range of products	Penalties
<p>European Union</p>	<p>MiFID 2</p> <p>Article 24 of the MiFID 2 will require investment firms which manufacture financial instruments for sale to clients to ensure that those financial instruments:</p> <ul style="list-style-type: none"> • are designed to meet the needs of an identified target market of end clients within the relevant category of clients; • the strategy for the distribution of the financial instruments is compatible with the identified target market; and • the investment firm takes reasonable steps to ensure that the financial instrument is distributed to the identified target market. <p>Article 16 will also require an investment firm which manufactures financial instruments for sale to clients maintain, operate and review a process for the approval of each financial instrument and significant adaptations of existing financial instruments before it is marketed or distributed to clients.</p> <p>The product approval process shall specify an identified target market of end clients within the relevant category of clients for each financial instrument and shall ensure that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market.</p> <p>An investment firm shall also regularly review financial instruments it offers or markets, taking into account any event that could materially affect the potential risk to the identified target market, to assess at least whether the financial instrument remains consistent with the needs of the identified target market and whether the intended distribution strategy remains appropriate.</p> <p>An investment firm which manufactures financial instruments shall make available to any distributor all appropriate information on the financial instrument and the product approval process, including the identified target market of the financial instrument.</p> <p>There are further details in the MiFID II Delegated Directive.</p> <p>There are similar provisions in the Insurance Distribution Directive for insurance products (see Art 25).</p>	<p>MiFID 2</p> <p>Article 10 will require an investment firm that offers or recommends financial instruments which it does not manufacture to have in place adequate arrangements to obtain information from the manufacturer and to understand the characteristics and identified target market of each financial instrument.</p> <p>Article 24 will also require an investment firm to understand the financial instruments they offer or recommend, assess the compatibility of the financial instruments with the needs of the clients to whom it provides investment services, also taking account of the identified target market of end clients, and ensure that financial instruments are offered or recommended only when this is in the interest of the client.</p> <p>The MiFID II Delegated Directive also imposes separate product governance obligations on distributors when deciding the range of financial instruments they intend to offer or recommend to clients.</p> <p>There are similar provisions in the Insurance Distribution Directive for insurance products (see Art 25).</p>	<p>Broad range of financial instruments covered including securities, derivatives and units and collective investment undertakings.</p>	<p>Member states are responsible for the implementation and enforcement of MiFID 2.</p>

Country	Manufacturer Obligations	Distributor Obligations	Range of products	Penalties
<p>Hong Kong</p>	<p>The SFC is empowered under s 399 of the SFO to create codes and guidelines as it considers appropriate for providing guidance for the furtherance of any of its regulatory objectives. The <i>SFC Handbook for Unit Trusts and Mutual Funds, Investment-Linked Assurance Schemes and Unlisted Structured Investment Products</i> outlines the specific requirements that a manufacturer of a structured product must adhere to in order receive pre-authorisation and continued authorisation.</p> <p>A circular was released in April 2014 to streamline guidance on the Internal Product Approval Process that is listed in the Code.</p> <p>Summary of key requirements under the SFO Circular:</p> <p>Accountability – providers are required to put in place an internal product approval committee for all new products to ensure accountability during the product life-cycle. Existing products are subject to regular review.</p> <p>Infrastructure – new products to go through due diligence and approval, comprising of senior management covering front and back office functions. Risk and control functions should include market risks.</p> <p>Target market identification – providers should identify the target market and consider investors’ interests and design the product accordingly. Key considerations include target market profiling, objectives, risk and return.</p> <p>Product design – providers should conduct a detailed assessment of the product risks and features to be satisfied with the fairness of their products, taking into considering alternatives for achieving similar risk/return profiles. Payout must be determined in a transparent manner.</p> <p>Risk monitoring & stress testing – providers to use best efforts to assess relevant risks and be satisfied potential risks are identified/managed, extensive stress testing conducted, regular reviews of assumptions and product viability, and back-office risk functions using independent data.</p> <p>Termination/de-authorisation – providers must ensure product termination is carried out fairly and with reasonable cause. Alternatives must be fair and not prejudice investor rights. Must provide notice. Distributor selection – providers are encouraged to exert control over distribution process to target market. They should ensure that chosen distributors are appropriate, have essential product knowledge, and provide sufficient ongoing training.</p>	<p>Given that the SFC authorises all products, the criteria for distributor obligations stem from SFO requirements (left of table).</p> <p>In addition, the SFO highlights a number of obligations as to best practice in the distribution of products by intermediaries and their representatives under s168 and 169. Examples include situations involving misleading and deceptive conduct, improper transactions and prohibited use.</p>	<p>Structured products including securities, commodities, property, interest rates, futures contracts, regulated investments agreements, equity, credit notes etc.</p>	<p>Offences relate to attempting to advertise or sell a product without authorisation.</p> <p>Penalties will vary depending on severity and frequency of non-compliance.</p> <p>Summary offence Up to 6 months imprisonment and a \$10,000 fine for every day the offence continues.</p> <p>Indictable offence Up to 3 years imprisonment and a \$500,000 fine. An extra \$20,000 for every day the offence continues.</p>

Country	Manufacturer Obligations	Distributor Obligations	Range of products	Penalties
Hong Kong (continued)	<p>Investor education – providers must consider whether it is necessary to devise appropriate plans for conducting investor education programmes.</p> <p>Disclosure – must ensure disclosures relating to products comply with all application laws, regulations or guidelines.</p> <p>Post-sale obligations – providers must continue to establish procedures to monitor product performance, review viability and distribution strategies, ensure ongoing disclosure, handle investor requests/complaints and provide valuation/market-making data.</p>			
Singapore	Product governance obligations are imposed on firms that distribute products.	<p>Regulation 18B of the Financial Advisers Act requires due diligence on any new product, including type of targeted client the new product is suitable for and whether the new product matches the client base of the financial adviser.</p> <p>No adviser firm shall sell or market any new product to any targeted client unless every member of the senior management of the financial adviser has, on the basis of the result of the due diligence exercise carried out on the new product personally satisfied himself (sic) that the new product is suitable for the targeted client and personally approved the sale or marketing of the new product to the targeted client.</p>	Any investment product other than any contract or arrangement for the purpose of foreign exchange trading; any traded futures contracts or any securities quoted on an exchange.	<p>A firm that breaches the requirements can be fined.</p> <p>A senior manager that fails to satisfy the requirements will be deemed to have failed to discharge their statutory duties.</p>

Country	Manufacturer Obligations	Distributor Obligations	Range of products	Penalties
Taiwan	<p>The Regulations Governing Pre-sale procedures for Insurance Products requires that during product development an insurance enterprise must (amongst other things) must focus on insurance product design, devoting concrete attention to such matters as due professional care, due care of a good administrator, target market and safeguarding the consumer interests.</p> <p>The insurance enterprise must also convene at least half-yearly meetings to review matters such as safeguarding consumer interests, and make necessary adjustments and amendments. There is also a regulator pre-approval regime for insurance products.</p>	<p>The Financial Consumer Protection Act imposes an individual suitability obligation on financial services enterprises that distribute products and services (Art 9). This includes requiring an internal product review committee.</p>	<p>Insurance for manufacturer obligations</p> <p>Distributor obligations apply for all financial products and services.</p>	<p>The regulator can impose a fine for breaches.</p>

APPENDIX E: INTERNATIONAL EXAMPLES OF PRODUCT INTERVENTION POWERS

Country	What are the powers?	When can the powers be exercised?	Range of products	Wholesale / Retail
United States	The Consumer Financial Protection Bureau (CFPB) has power to intervene where conduct or practices are 'unfair, deceptive or abusive'. This can involve administrative action through cease and desist orders and legislative action through rule-making powers.	In order for the CFPB to exercise the rule making powers, the targeted action must be 'unfair' and 'abusive'. <ul style="list-style-type: none"> For an action to be 'unfair', there must be a reasonable basis to conclude that the act or conduct being addressed is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers. For an action to be 'abusive', the target act or practice must materially interfere with the ability of a consumer to understand the terms and conditions of a financial product or service or takes unreasonable advantage of a lack of understanding on behalf of the consumer. 	Credit, deposit products and residential mortgages.	Retail
United Kingdom	The Financial Conduct Authority (FCA) is empowered to make rules following consultation about a wide range of matters including to ban products or practices. The FCA is also empowered to make temporary product intervention rules (without consultation) that prohibit specified persons from undertaking certain actions (for example, selling the product to a class of persons). The prohibitions can be contingent on the specified person taking other actions (for example, restricting certain product features). The temporary product intervention rules are lapse after 12 months. During this period the FCA consults on and makes permanent rules.	The FCA is empowered to make rules to advance the FCA's: <ul style="list-style-type: none"> consumer objective (securing an appropriate level of protection for consumers); competition objective (promoting effective competition in the interests of consumers); or integrity objective (protecting and enhancing the integrity of the UK financial system) if directed by the Treasury. The FCA has indicated via Policy Statement that it will consider a temporary product intervention rule where it identifies a risk of consumer detriment arising from a particular product, type of product, or practices associated with a particular product or type of product (PS13/3). In addition to the risk of consumer detriment, the FCA has indicated that it will take into consideration whether the rules are: <ul style="list-style-type: none"> an appropriate and effective means of addressing actual or potential consumer detriment; 	Full range of products regulated by the FCA. This includes investment products, insurance products and credit / hire-purchase contracts.	Both wholesale and retail

<p>United Kingdom (continued)</p>	<p>By way of example, the FCA used its temporary intervention power to ban the retail distribution of contingent convertible instruments in August 2014. To date, the FCA has used its temporary product intervention rules to restrict firms from distributing contingent convertible securities (known as CoCos) and mutual society shares to retail investors.</p>	<ul style="list-style-type: none"> • a proportionate and deliverable means of addressing actual or potential detriment; • compatible with the FCA's duty to promote effective competition; • supported by sufficient and appropriate evidence; • transparent in their aim and operation; and • likely to be beneficial for consumers, when taken as a whole. 		
<p>European Union</p>	<p>The European Securities Markets Authority (ESMA) has the power to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments or a type of financial activity or practice.</p> <p>European Directives require that corresponding powers be given to national competent authorities in Member States.</p>	<p>The ESMA can intervene if there is a 'significant investor protection concern or a threat to the orderly functioning and integrity of the markets or commodity markets or to the stability of the whole or part of the EU financial system'.</p> <p>When taking action, the ESMA must ensure that the action:</p> <ul style="list-style-type: none"> • does not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to be benefits of the action; and • does not create a risk of regulatory arbitrage. 	<p>Broad range of financial instruments covered including securities, derivatives and units and collective investment undertakings.</p>	<p>Potentially both but more focused on consumer markets.</p>
<p>Hong Kong</p>	<p>The Securities and Futures Commission (SFO) has the power to authorise or prohibit the advertising and public offering of structured products.</p> <p>If the Commission has authorised a product, it may at any time through notice, amend or revoke any of the conditions imposed, or impose new conditions upon it.</p> <p>It is a condition of authorisation that there is an individual approved by the Commission for the purposes of being served by the Commission with notices and decisions for the product.</p>	<p>As set out in s 104A of the Securities & Futures Ordinance (SFO), no structured product can be marketed or offered to the public without authorisation from the SFC.</p> <p>The Commission may refuse to authorise a structured product at any time if it is not satisfied that the authorisation is in the interest of the investing public.</p> <p>Authorisation will be granted provided that the product meets with compliance codes.</p> <p>Professional investors who are not offering products to the public and overseas participants are excluded from this provision.</p>	<p>All structured products including securities, commodities, property, interest rates, futures contracts, regulated investments agreements, equity, credit notes etc.</p>	<p>Retail</p>

Hong Kong (continued)	The Commission has the power to require financiers to specify terms and conditions that must be included in client contracts, whilst providing that they are, unless the Commission directs otherwise, of the essence of the contract despite the contrary being originally intended.			
Taiwan	The Financial Supervisory Commission is empowered to ban a structured product.	<p>The FSC can exercise its power if the product:</p> <ul style="list-style-type: none"> • disrupts market order • damages the rights or interests of consumers • endangers the business and financial health of financial services firms 	Structured products	Both wholesale and retail

APPENDIX F: GLOSSARY OF ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AFMA	Australian Financial Markets Association
AFSL	Australian Financial Services Licence
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i>
Credit Act	<i>National Consumer Credit Protection Act 2009</i>
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Service
FSI	Financial System Inquiry
MiFID II	Markets in Financial Instruments Directive