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Financial Services Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: ProductRegulation@treasury.gov.au

Dear Sir/Madam

Design and Distribution Obligations and Product Intervention Power

The Insurance Council of Australia¹ (the Insurance Council) appreciates the opportunity to provide a submission in response to the Treasury proposals paper (the Proposals Paper), *Design and Distribution Obligations and Product Intervention Power*. The reforms canvassed in the Proposals Paper were important recommendations of the Financial System Inquiry (FSI) and we acknowledge the Government has since accepted these recommendations.

The general insurance industry, in accordance with prudent business practice, supports product design and distribution that is appropriately tailored to an identified target market. The Insurance Council agrees with the FSI's conclusion that such good governance practices already apply to most retail general insurance products. However, due caution must be exercised in the development and implementation of prescribed statutory obligations relating to product design and distribution to avoid unnecessary ambiguity, cost, regulatory complexity and unintended consequences. This is particularly so in respect of simple products, such as general insurance products, designed for mass retail markets that are already the subject of stringent regulation.

Sustainable underwriting and product design

For most retail general insurance products, such as home and motor insurance, policies are designed to provide coverage for assets and financial liabilities that are relevant to most consumers. Commonly, these products would enable consumers to tailor their policy by purchasing optional cover, such as hire car options for motor insurance, and nominating the coverage amount, such as the sum insured for home building and contents insurance.

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. December 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$44.6 billion per annum and has total assets of \$121.1 billion. The industry employs approximately 60,000 people and on average pays out about \$124.2 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

The nature of insurance as a risk transfer mechanism sets insurance products apart from other financial products, and this has important implications for how insurance products are designed. General insurers manage the transfer of insurable risks that are specified and pre-defined. Insurers will mitigate the risks they underwrite through pooling, by aggregating a number of individual risks into a pool thereby spreading the impact of unexpected loss from the individual insured to the group. Importantly, insurers also mitigate the risks they underwrite through pricing; by placing a cost on higher risks relative to lower risks. Effective risk mitigation is the foundation of a sustainable insurance industry.

A general insurance product's covers, exclusions and terms are all crafted to reflect the underwriting model's objective to sustainably manage risk. It is essential that any legislative product design and distribution obligation does not interfere with insurers' ability to prudently underwrite risks. Undermining underwriting integrity could have devastating and destabilising impacts on the insurance industry, the costs of which will ultimately be borne by consumers.

Balancing consumer protection and consumer choice

The Insurance Council has been concerned by commentary suggesting that the proposed product design obligation could be used to substantially alter existing product features in favour of a standard model where consumer choice is currently offered. For example, it has been suggested that home building insurers should be required to provide for settlement of total loss claims on a replacement cost basis rather than by reference to a nominated sum insured.

Currently, home building policies are mostly sum insured policies, which enable consumers to select the maximum coverage amount that they require in a total loss scenario. The Insurance Council understands that total replacement policies are offered by two insurers, where a sum insured is not specified but the insurer agrees to rebuild to the existing building condition in a total loss scenario.

The availability of total replacement policies in Australia is limited because prudently underwriting such risks typically requires a disproportionately large investment in modelling and in portfolio exposure management. These complexities, along with the capital requirements stipulated by the Australian Prudential Regulation Authority (APRA), make total replacement policies more difficult to sustainably underwrite and more expensive for consumers to purchase. It is estimated that total replacement policies are typically 15 – 20% more expensive than sum insured policies.

The industry is of the view that mandating total replacement policies could have serious implications for insurance affordability. Further, it could significantly undermine the economic viability of individual insurers, as well as having broader economic impacts if a large scale natural disaster were to occur in Australia. The suggestion that total replacement policies should be mandated is an example of how the product design obligation could be applied inappropriately.

The Insurance Council would also be very concerned about the introduction of a wide ranging distribution obligation that could substantially curb consumer choice. Most general insurance products distributed directly by insurers are sold through channels adopting a general advice or no advice model. Consumers are provided with general information and tools, such as sum insured calculators, to assist them to make an informed choice. Where a product or product option is clearly unsuitable for an individual, we acknowledge that insurers and distributors should through the provision of information play a role in assisting the consumer to make a more appropriate decision. However, insurers and distributors should not be required to override consumer decisions when the consumer has been informed and clearly exercised choice in the matter. Forcing an unwilling consumer to purchase flood cover is an example of this.

Principles for simple mass-designed retail general insurance

The FSI considered whether scalable obligations should apply to all retail financial products, regardless of their complexity. In making its recommendation, the FSI acknowledged that for simple products, the design and distribution obligations should operate in a relatively straightforward way. In order for this intent to be clearly reflected in the legislation, the Insurance Council submits that the following key principles must be explicitly acknowledged in the law:

- i) simple mass-designed products are appropriate for most consumers;
- ii) managing prudential risk, affordability and accessibility are key considerations in product design;
- iii) the objective of the product design and distribution obligations is not to decrease choice for consumers; and
- iv) the obligation to distribute products to a target market does not require individual assessment of suitability and must be consistent with the advice model under which the distributor is operating.

The FSI, in recommending the strengthening of issuer and distributor accountability, indicated that the reforms should not limit the kinds of products that could be developed or curb innovation. This should be explicitly acknowledged in the legislation. Consideration needs to be given to potential unintended consequences that could have an adverse impact on consumers generally or the diversity of products available in the market.

Certainty in ASIC's intervention powers

The Insurance Council acknowledges the proposed implementation of product intervention powers for ASIC, and strongly desires that any such statutory powers clearly define the circumstances in which intervention may occur. Given the significant commercial implications for financial product issuers from intervention, the threshold for intervention must be set sufficiently high. Transparency around the reasons for intervention is also paramount, to provide industry with sufficient comfort that intervention will not occur where there has been misunderstanding about the impact of conduct or a product feature on consumers.

Other measures to enhance consumer outcomes

We note that the FSI's recommendations on strengthening product issuer and distributor accountability, and ASIC's powers, were part of a package of broader measures to ensure a consumer-centric focus through each stage of the product life cycle. Another important recommendation was for the Government to facilitate innovative forms of disclosure. The Insurance Council is currently implementing a substantial work program to enhance the effectiveness of disclosure in the general insurance industry. As part of this work, we have sought law reform to facilitate electronic disclosure by insurers². We submit that priority should be given to this important reform. Focussing efforts on ensuring effective disclosure and clear consumer understanding will lead to far better outcomes for all stakeholders than will be achieved through complex and overlapping regulatory burdens.

The Insurance Council's response to the Proposals Paper questions relevant to the general insurance industry are provided in the attachment.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO

² Insurance Council of Australia (August 2010), *Facilitating electronic disclosure in the insurance sector*, submission to Treasury.

**DESIGN AND DISTRIBUTION OBLIGATIONS/PRODUCT INTERVENTION POWER
PROPOSALS PAPER QUESTIONS**

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)?

The Proposals Paper suggests that all financial products, ranging from simple to complex, should be captured by the product design and distribution obligations, and the product intervention powers. While not clear in the Proposals Paper, the Insurance Council assumes that the definition of financial product will be consistent with that currently under the *Corporations Act 2001* (Cth) (Corporations Act). The Proposals Paper also suggests that this broadly scoped reform will be accompanied by an exemption power to enable the law to respond flexibly to exclude certain products where necessary.

When considering the need for legislative obligations around product design and distribution, the FSI considered a number of options. While the FSI had considered an individual appropriateness test targeted at complex products, it concluded that broadly-based but scalable obligations could be applied more universally.

The FSI, in making its recommendation, acknowledged that simple products are likely to be suitable for most consumers. The Insurance Council submits that most general insurance products are simple and inherently suitable for a broadly-based target market; for example, motor insurance is designed for and sold to car owners and home insurance is designed and sold to homeowners. Identifying such a broad target market for the purposes of meeting the design and distribution obligations may not be a very useful exercise for these products.

Given the breadth of the target market, some general insurers are of the view that basic consumer general insurance products, including home and motor insurance, should be exempt from the design and distribution obligations. The Insurance Council submits that, at the very minimum, the legislation should explicitly acknowledge that mass-designed products should be suitable for most consumers. This will ensure that this intent is made clear to the regulator.

There is already comprehensive legislation regulating product features in the general insurance industry. For example, the *Insurance Contracts Act 1984* (Cth) (Insurance Contracts Act) regulates the terms in an insurance contract, as well as insurers' conduct in relation to such contracts. Further, the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) mirrors many of the consumer protections set out in the Australian Consumer Law. The product design and distribution obligations should not overlap or further

complicate the operation of the consumer protections under the Insurance Contracts Act nor the ASIC Act.

In addition, while the Proposals Paper suggests that ordinary shares should be exempt from the obligations, we note that listed hybrid securities may also be issued by insurers to retail investors from time to time. The obligations of an insurer issuing listed securities should be made clear. The ability of insurers, and their lead managers and arrangers for the issuance of listed securities, to effectively test the suitability of a retail investor will be limited by the advice model used, as well as the limited control of issuers and distributors over securities that are traded on the market.

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

The Insurance Council agrees that the design and distribution obligations, and the product intervention power, should only apply to products made available to retail clients. From a general insurance perspective, wholesale clients are often represented by qualified insurance brokers who are licensed experts acting on their clients' behalf in the negotiation of particular insurance covers, and do not require the heightened protections afforded to retail clients under the existing regulatory regime, let alone under any new provisions.

While not specified in the Proposals Paper, we assume that the definition of "retail client" will be consistent with the definitions provided in the Corporations Act. The Act defines "retail client" for the purposes of general insurance under section 761G(5) as any of the following products provided to individuals and small business:

- motor vehicle insurance;
- home building insurance;
- home contents insurance;
- sickness and accident insurance;
- consumer credit insurance;
- travel insurance; and
- personal and domestic property insurance.

Under regulation 7.1.17A, the definition of a retail general insurance product is also expanded to include medical indemnity insurance. We note that all other professional indemnity products, including those provided to other healthcare practitioners such as dentists and optometrists, are not defined similarly as retail products. Medical indemnity was included as a retail product following the numerous reforms in 2002 to stabilise the medical indemnity insurance market to assist medical practitioners to better understand the nature of their cover.

The Insurance Council submits that medical indemnity should not be considered to be a retail product for the purposes of the design and distribution obligations, and the ASIC intervention power. Imposing product design and distribution obligations would unnecessarily duplicate and complicate the mandated minimum medical indemnity product features, including a prescribed minimum cover amount, under the *Medical Indemnity (Prudential Supervision and Product Standard) Act 2003* (Cth).

We note that medical indemnity is subject to a number of government funded schemes, which oblige medical indemnity insurers to offer universal cover to any medical practitioner within agreed state-based jurisdictions. The concept of universal cover is incompatible with an obligation to design and distribute products to a defined target market.

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?

The Insurance Council agrees that, where possible, the definition of product issuer and product distributor should be consistent with existing definitions under the Corporations Act. This would help to avoid different definitions applying to different obligations under the Act.

The Proposals Paper indicates that generally, for any given product, there will only be one issuer subject to the design obligation. The Corporations Act defines the issuer as the person responsible for the obligations of the product, i.e. the insurer. We note that in some instances, arrangements between insurers, for example where a product is co-insured, could cause more than one entity to be responsible for product design. The Insurance Council's preference is for the design obligation to be required to be met by only one issuer as this will help avoid confusion.

Underwriting agencies that issue products under binder, but are not the issuer, should not be caught by the definition of issuer.

6. Do you agree with defining distributors as the entity that arranges for the issue of a product or that:
- i. advertise a product, publish 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
 - 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).

We agree that the entity responsible for meeting the distribution obligation should be defined as the entity that arranges for the issue of the insurance product to the retail client. It is logical for the entity responsible for distribution to be responsible for compliance with the distribution obligation.

Retail general insurance products are often distributed directly by insurers. In these cases, the issuer and the distributor will be the same entity.

Some products however, such as travel insurance and motor insurance products, are distributed by third parties such as travel agents and motor vehicle dealerships. Some retail general insurance products are also distributed by insurance brokers acting under a binder as defined in the Corporations Act (section 761A) and the Insurance Contracts Act (section 11). These brokers act as the agent of the insurer when acting under a binder but under their own Australian Financial Services Licence (AFSL) and, in practice, insurers generally

only authorise these brokers to provide general advice. In these cases, the issuer and distributor will be different – the issuer will be the insurer, and the distributor will be the third party agent/dealer/broker.

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

The Insurance Council is supportive of a distinction between issuers and distributors in appropriate circumstances. While it would seem that in practice it would be rare for an entity involved in the sale of an insurance product not to receive any remuneration, the question as to whether they are a distributor (for the purposes of the applicability of the distribution obligation) should be focussed on their conduct vis-à-vis the retail consumer, not on their remuneration. We note that not all referrers (see our response to question 8) receive a benefit from the insurer.

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

The Insurance Council agrees that products distributed with personal advice, such as through insurance brokers, should not be captured by the distribution obligation. However, the exclusion for personal financial product advisers should be limited to brokers who generally act as agent of the insured and provide personal advice in that capacity. The Insurance Council submits that the distribution obligation should apply to brokers acting under binders and their own AFSL, and provides general advice to retail consumers.

The Insurance Council also submits that referrers should not be caught by the distribution obligation, as they play no role in the sales transaction beyond referring a customer to the issuer. Regardless of whether a referrer is present in a particular sale, the distribution obligation will apply to the distributor closing out the transaction, either the insurer directly or a third party distributor. Including referrers within the definition of product distributor will unnecessarily duplicate the obligation, and could capture a wide range of persons who could not reasonably be expected to know the product's target market expected of a distributor. Accordingly, the definition of product issuer should specifically exempt referrers, similar to the proposed exemption for media companies.

It is also submitted that persons providing exempt general advice only not be caught by the definition of distributor; e.g. where advice was prepared by a person and passed on to the consumer by a second person with a clear message that it was not prepared or endorsed by the second person.

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

The Insurance Council does not object to the proposed approach to capture both licensed and unlicensed product issuers and distributors. Given the operation of the Corporations Act insofar as is relevant to retail general insurance products, the Insurance Council sees little practical significance of capturing unlicensed issuers and distributors. The Insurance Council is not aware of any regulatory gap that would be addressed by this proposal.

We agree that enabling exemptions to be granted would provide the regulatory regime with flexibility to exclude entities where the obligations clearly should not apply.

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?

While the Insurance Council agrees, in principle, with the requirement for issuers to identify target and non-target markets for their products, compliance needs to be practical for general insurance products that are appropriate to most consumers.

In practice, for some general insurance products, any target or non-target market may be very broadly defined. For example, for a home building insurance policy that covers most of the generic risks that consumers commonly expect to be covered, the only non-target market may be consumers who are not homeowners. An explicit recognition in the legislation that, for some simple mass-designed products, there may be limited target and non-target markets, will provide certainty to industry.

In addition, the design and distribution obligations need to apply sensibly to renewing customers. Insurers should not be required to meet additional information collection requirements, other than that already required, for the purposes of ascertaining whether a customer still falls within the target market.

The Proposals Paper suggests that issuers should match products with target markets based on the needs the product satisfies and the target market's ability to understand the product. Most general insurance products are common household purchases and consumers understand broadly the situations in which a claim could be made. This is evidenced by claims data; general insurers pay out about \$124.2 million in claims each working day.

However, incorporating a component of consumer comprehension and financial literacy into product design is unnecessary for general insurance products that are suitable for a range of consumers. The Insurance Council submits that, while financial literacy should be a key consideration in evaluating the appropriateness of the distribution of complex products (e.g. some investment products), it is less relevant for most general insurance products.

From an insurance perspective, product affordability and accessibility are more important considerations in product design. The comprehensiveness of cover needs to be balanced with the cost of providing cover to ensure that products remain accessible to a range of consumers.

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

The Proposals Paper suggests that it is not necessary that the target and non-target market be identified by reference to every term and condition governing a product. It is suggested that the focus should be on significant features of the product. The Insurance Council agrees that focusing on every term and condition in determining suitability for a target market is unnecessary and overly complex.

While we understand the rationale for suggesting that suitability should be considered by reference to significant product features, we note that for some products, what is considered to be “significant” is open to argument and in addition would be dependent on the consumer’s individual circumstances. For example, flood coverage would be more significant to a policyholder with a higher exposure to flood risk.

We also note that most consumers purchase insurance policies without ever needing to make a claim. Indeed, for most consumers, the objective of purchasing insurance is to attain “peace of mind” that they will be covered for unforeseen circumstances causing loss of asset or financial liability.

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

The Insurance Council agrees in principle with the proposal that issuers should select distribution channels and marketing approaches for the product that are appropriate for the identified target market. However, we suggest that this proposal needs to apply sensibly to mass-designed products that are distributed through channels, for example online, that are intended to reach a wide range of consumers.

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?

The Insurance Council agrees that issuers should have regard to the customers a distribution channel will reach, the risks associated with a distribution channel, and steps to mitigate those risks. We consider that these considerations are consistent with good governance practice.

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

The Insurance Council agrees that issuers should periodically review their products to ensure the identified target market and distribution channel continues to be appropriate. In determining whether a distributor is selling within the target market, the Insurance Council submits that consideration should be given to the advice model under which the product is being sold. The level of information accessed about an individual consumer for products

sold under a general advice model will appropriately be less detailed than information accessed under a personal advice model.

While good practice will generally require distributors to obtain sufficient information about the individual consumer, this information is accessed on a best endeavours basis. It should be clarified that, in assessing whether products have been distributed appropriately, issuers (and distributors) are not required to verify the information that has been provided by the consumer. For example, if a consumer advises they are not self-employed in the context of unemployment insurance, the distributor should not be required to obtain evidence in the form of payslips in order to sell the product. In practice, insurers are often best placed to ascertain whether a consumer falls within the target market when the consumer makes a claim.

In relation to customer information collected by third party distributors, such distributors may be able to access a range of information that is not made available to the insurer. For example, a bank distributor would have access to a range of information about an individual customer, collected in the course of conducting its banking business. The obligation for the issuer to determine whether products have been distributed to consumers within the target market should not require the issuer to obtain customer information that was not collected in the course of providing the specific product. Requiring issuers to obtain this additional customer data may breach the privacy obligations of distributors.

We also note that, in some circumstances, the relationship between an issuer and distributor may not reflect the traditional role of issuers designing products and distributors selling products on behalf of the issuer. For example, a bank may approach an insurer and jointly develop a product. The general insurer will underwrite the product, and the bank will distribute the product under its own AFSL. In this instance, it seems that the distributor (the bank) is in a better position to review whether sales are conducted in accordance with the intended target market and advise ASIC if issues are identified.

Finally, how an issuer should “advise” ASIC if it identifies the distribution of products outside of the intended target market should be clearly set out in the legislation.

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

As noted elsewhere in our submission, the legislation should set out key principles surrounding the objectives of the obligations, particularly with regard to mass-designed products. This will provide issuers and distributors with sufficient comfort that the obligations will not be interpreted too broadly and inconsistent with the Government’s intent.

The key principles the Insurance Council submits should be reflected in the legislation are:

- i) simple mass-designed products are appropriate for most consumers;
- ii) managing prudential risk, affordability and accessibility are key considerations in product design;
- iii) the objective of the product design and distribution obligations is not to decrease choice for consumers; and

- iv) the obligation to distribute products to a target market does not require individual assessment of suitability and must be consistent with the advice model under which the distributor is operating within.

Given the broad range of products that the obligations will potentially capture, ASIC guidance will be necessary to clarify expectations with regards to product-specific considerations. We note that some product-specific guidance may also be appropriately addressed through voluntary mechanisms, such as codes of conduct.

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

The Insurance Council is, in principle, supportive of the proposal for distributors to put in place reasonable controls to ensure that products are distributed in accordance with the issuer's expectations. However, the obligation must be designed with care to ensure that distributors are not required to provide personal advice to meet the obligations.

The Insurance Council notes that there will be circumstances where consumers may fall out of the target market after they have purchased a product. Using the example of unemployment insurance cited in the Proposals Paper, a consumer may have been eligible to claim on unemployment benefits when the policy was first purchased, but subsequently became self-employed through the duration of a policy. The concept of a target market, from a consumer's perspective, is fluid and subject to change.

The design and distribution obligations should be clear that an assessment of whether a category of consumer falls within a target market is conducted at policy inception, and does not require insurers to continually monitor whether this assessment is current through the duration of a policy. In most cases, consumers do not advise their insurer when their circumstances change, so insurers would not be in a position to consider the impact of changing circumstances on the ongoing suitability of policy.

The Proposals Paper suggests that, in circumstances where part of a bundled product is not appropriate to all consumers in the target market, consideration should be given to unbundling the product. We note that for some insurance products, bundling is a cost effective way of designing and distributing products, and unbundling components of cover may actually increase the cost of the product for consumers.

The Insurance Council is supportive of commentary in the Proposals Paper suggesting that a breach of the distribution obligation would not be triggered by a small number of sales outside of the target market, but rather systemic failure.

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

From a general insurance perspective, unless a consumer is ineligible to claim under a policy, distributors should not be substantially curbing consumer choice. In some circumstances, although the information available to the distributor may suggest that an individual consumer does not fall within the target market, the consumer will be in a better position to determine the suitability of a product for them.

For example, an insurer may identify a consumer as being exposed to flood risk, given available data about a specific address. However, the consumer may have more accurate information about their exposure, for example, the building is situated on a hill and therefore may have limited exposure to flood risk. It would be inappropriate, in this instance, for the insurer to prevent a consumer from purchasing home insurance that does not cover flood.

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

Where a consumer is aware they are outside of the target market but chooses to purchase the product regardless, the Insurance Council is of the view that existing consumer protections are adequate. This includes the statutory cooling off period which entitles consumers to reverse a purchase and obtain a refund. Many general insurers also enable consumers, outside of the cooling off period, to cancel a policy and obtain a refund for the unused portion of the policy.

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

The Insurance Council agrees that distributors should 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. We note that what constitutes “reasonable request” will be dependent on the complexity of the product; we expect that for simple products, the information sought by issuers will not be as extensive as that for complex products.

The Insurance Council does not agree that an equivalent obligation should be imposed on advised distributors. Advised sales are already required to meet more stringent rules in relation to suitability, and in most instances, the distributor under an advised sale should be in a better position than the issuer to determine suitability.

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

As with our response to question 15, the legislation should provide clarity on key principles addressing the intent of the reforms. Our suggested principles in response to question 15 are also relevant to the distribution obligation.

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.

The Insurance Council submits that there should be a longer transition period, and suggests 12 months. This will enable sufficient time for systems changes, such as data systems to collect the required information from third party distributors.

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.

The Insurance Council suggests a 3 year transition period applying to existing products in the market.

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.

The Insurance Council agrees, in principle, that ASIC should be able to make interventions in relation to the product, the types of consumers that can access a product or the circumstances in which a consumer can access the product. However, for interventions that may have an impact on the capital requirements for the entity, ASIC should be required to consult with APRA and the insurer before exercising its powers.

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

The Insurance Council sees merit in expanding the interventions ASIC should be able to make to include remuneration of third party distributors. The Insurance Council and its members have worked with ASIC over the past year to improve consumer outcomes for add-on insurance products sold through motor dealerships. As part of this process, ASIC indicated its preference for industry to voluntarily cap commissions to reduce the risk of inappropriate sales.

In order to voluntarily cap commissions, the industry has had to seek authorisation from the Australian Consumer and Competition Commission (ACCC). The ACCC has indicated it will decline the authorisation application. This exercise has demonstrated the difficulty of industry unilaterally addressing remuneration concerns through a voluntary undertaking, notwithstanding agreement between industry and ASIC on the need for reform.

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?

The Insurance Council considers that it is appropriate to implement different triggers for ASIC's intervention powers based on the type of intervention proposed.

We agree with the FSI's position that the powers should not be used in circumstances where a large group of consumers have incurred a small detriment. Providing ASIC with expansive powers to intervene outside of circumstances where there is significant market-wide detriment is unnecessary and may have a chilling effect on innovation.

Nevertheless, we acknowledge the rationale in the Proposals Paper for “significant harm” to be defined in such a way as to reflect the proportionality of the harm on individuals’ circumstances. We agree that, particularly for vulnerable consumers, what may be considered to be insignificant harm for most consumers could have a larger proportionate impact.

The Insurance Council suggests that, for interventions that could have a significant commercial impact, such as interventions in relation to the product, the trigger should be no less than significant harm on a market-wide basis. For other types of intervention, such as disclosure obligations, warning statements, and advertising and marketing documents, the threshold for intervention could take into account the scale of the detriment to individual consumers and the class of consumers likely to be impacted.

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

The Insurance Council strongly agrees that ASIC should be required to undertake consultation and consider the use of alternative powers before making an intervention. Transparency in ASIC’s assessment of “significant harm” is essential to ensure that any intervention is based on accurate information.

Before intervening, ASIC should also be required to balance the impact of its intervention on competition and the prudential strength of an entity. An intervention that has serious impacts on the competitive landscape for a particular product or on the capital position of an insurer could result in overall greater adverse consumer outcomes than if the intervention had not occurred.

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

The Insurance Council agrees that ASIC should be required to publish information on intervention, the consumer detriment and its consideration of alternative powers. ASIC should also make available to impacted entities the assumptions and information used to support its assessment of significant harm. This will provide impacted entities the opportunity to correct any factual errors or misguided assumptions.

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

The Insurance Council has not identified any issues with the proposed 18 month duration of temporary intervention by ASIC.

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

The proposed duration of individual and market-wide intervention should be consistent, and the Insurance Council is not supportive of extending the duration that the Government has to make an intervention permanent.

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

The Insurance Council does not have a view with regard to the mechanism the Government should use to make interventions permanent; however, we suggest there should be broad parliamentary oversight and scrutiny of any decision to make interventions permanent. Comprehensive industry consultation should be part of any Government decision-making process.

The Insurance Council notes that there should be processes in place to enable impacted entities to appeal a Government decision to make an intervention permanent. The Administrative Appeals Tribunal (AAT) may provide an appropriate appeal mechanism, however given the length of AAT appeal hearings, a streamlined and faster process should be considered.

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

The Insurance Council has not identified any additional mechanisms, other than those already identified in the Proposals Paper and this submission, 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.

Given the intent is for the product intervention powers to complement the design and distribution obligations, the Insurance Council suggests that the transition period should be aligned.

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?

As noted in the Proposals Paper, the Government is currently conducting a review of ASIC's enforcement regime, including the adequacy of existing civil penalties. The enforcement arrangements in relation to a breach of the design and distribution obligations should be proportionate to the penalties applying to other breaches.

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?

While the Insurance Council is in principle supportive of effective consumer remedies, such as a refund, we note that the Insurance Contracts Act contains provisions relating to an

insurer's obligations in the performance of insurance contracts. Any remedies provided to consumers should not be inconsistent with an insurer's obligations under that Act or any other remedies available to the consumer.