Law Council
OF AUSTRALIA
Business Law Section

Financial Services Unit
Financial Services Division
Markets Group
The Treasury
Langton Crescent
PARKES ACT 2600
Via email: ProductRegulation@treasury.gov.au

20 March 2017

Dear Sir or Madam,

Design and Distribution Obligations and Product Intervention Power

I have pleasure in enclosing a submission in response to The Treasury's Proposals Paper entitled "Design and Distribution Obligations and Product Intervention Power".

The submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia.

If you have any questions regarding the Committee's submission, in the first instance please contact the Committee Chair, Rebecca Maslen-Stannage, on 02-9225 5500 or via email: rebecca.maslen-stanage@hsf.com

Yours faithfully,

Teresa Dyson, Chair
Business Law Section

Enc.

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Corporations Committee, Business Law Section of the Law Council of Australia

Submission on Design and Distribution Obligations and Product Intervention Power, Proposals Paper, December 2016

Submission dated 20 March 2017

1 Introduction

1) Submission

The Corporations Committee of the Business Law Section of the Law Council of Australia ("**Committee**") offers the following submission in relation to the Design and Distribution Obligations and Product Intervention Power, Proposals Paper, December 2016 ("**Proposals Paper**").

2) Approach to submission

The Committee is supportive of the Government's objective of enhancing the protection of vulnerable consumers from mis-selling of financial products. However, the Committee submits that this objective could be achieved in a much simpler and more cost-effective way.

In this submission, the Committee has responded to most of the questions posed in the Proposals Paper, and offers some general observations about the scope and appropriateness of the overall proposal.

Separately, the Superannuation Committee of the Legal Practice Section of the Law Council of Australia has lodged a submission dated 16 March 2017 in relation to certain superannuation-specific matters raised by the Proposals Paper (**Superannuation Committee Submission**). We have left those matters to the Superannuation Committee Submission and have not addressed or repeated them in this submission.

2 Key responses

1) Suitability – the relationship between product risk and investor groups

Ascertaining "group" characteristics

At its heart, the task of determining suitability for a target market (as opposed to an individual) should involve appropriate matching of:

- products classified into sub-groups according to their features, risks and benefits; with
- sub-groups of 'typical' retail clients classified according to factors such as their age, wealth, financial literacy, investment experience and risk appetite.

We suggest that it would be inappropriate and inefficient to place the burden of the research and analysis required to determine these classifications on each product issuer and distributor, as the Proposals Paper suggests. It is also inappropriate for these classifications to require analysis of investors at an individual level, which becomes (in effect) personal financial product advice.

Rather, for the vast majority of financial products, it should be possible for regulators and industry to cooperate in the development of a product suitability matrix as a guide to design and distribution, with only new classes of products requiring individual analysis.

The cost of market research and analysis for each product individually would ultimately be passed on to consumers in compliance and legal expenses or higher fees, and would not produce an additional regulatory benefit. Industry-wide analysis would provide greater consistency and reduced cost.

We also see the opportunity for industry-wide granular analysis to be used in developing standardised screening tools to facilitate targeting of products to appropriate groups in the growing on-line market.

There is also a potential role for a commercial panel to assist in the more difficult decisions in the categorisation of products. While our submission suggests that a panel should be established as a cross-check on ASIC interventions, it could also be used as a consultative body in the design phase for innovative products.

2) Better use of existing mechanisms – disclosure and stop order powers

Members of the Committee have expressed serious concerns about the broad discretionary nature of the intervention power.

It has been suggested that expanded stop order powers, with a basis beyond defective disclosure increased to include breach of the suitability requirements and any misleading or deceptive conduct, could be as effective in restraining mis-selling as discretionary intervention "without a demonstrated or suspected breach of the law". Simple additional disclosure requirements, such as labels on product materials showing a scaled risk level and/or target market, could support this approach.

A fully discretionary intervention power would have significant disadvantages for all concerned:

- for industry, uncertainty inhibiting innovation and potential wasted resources and damaged reputation if products are withdrawn, and increased regulatory risk for the life of a product that cannot be managed through diligence processes;
- for consumers, the moral hazard (particularly when combined with the product suitability regime) that they will expect ASIC to come to their rescue for any poor investment outcome – when this is not the intent of the regime; and that this will lead to an increase in consumers failing to exercise a sensible degree of care to consider their own interests;
- for lawyers, no sound basis on which to advise issuers or distributors whether they can proceed with a product;
- for ASIC – the challenge of effectively being a market player with the significant resources that will require, and risk of public criticism of decisions to use the power, or failures to use the power.

3) Coverage of the regime

We support the anti-overlap aspects of the Proposals Paper, suggesting that the legislation would avoid duplication where duties exist under financial product advice requirements and responsible lending obligations.

We also support the regime applying to unlicensed entities as well as those holding an Australian financial services licence.

However, the scope of products to be covered is too broad for the regime to operate sensibly, and the exclusion of "ordinary shares" should be expanded to cover other functionally similar securities which are quoted for trading. There is also a case for exclusion of products which are simple and suitable for all retail clients, or at least for them to be pre-categorised as suggested above so that no further analysis by issuers or distributors is required.

4) Sanctions and the allocation of market risk

Committee members who participated in discussions objected to privately initiated remedies allowing investors to cancel contracts for investment products on the basis of alleged mis-distribution.

The principle that investors bear the risk of market fluctuations is fundamental to capital raising in our economy. The possibility of large class actions effectively transferring market losses to financial institutions could create systemic risk.

3 More detailed comments in response to the questions posed by the Proposal Paper

FINANCIAL PRODUCTS

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?

- No – the obligations and intervention power should not apply to any financial products listed on the main board of ASX:
    - Listed securities – even those, such as hybrids, that are more complex – are already subject to extensive oversight and regulation from not only ASIC but also ASX and, in some cases (eg, bank hybrids) APRA.
    - Listed securities also offer an important protection – namely, that they have liquidity and offer the potential of an exit as a solution for investors.
    - Applying the regime to all listed securities other than ordinary shares will create a significant and unnecessary regulatory overlap that will impose additional costs on issuers – which will ultimately be borne by investors. See section 2(2) above regarding how existing regulatory mechanisms could be expanded and better used to address concerns about product design and suitability.

- There are also significant complications that arise from including listed products in the regime – there is no ability for an issuer to influence who trades in listed products, which impacts upon issuer's obligations under the proposed regime, and the utility of any obligations to monitor distribution. These complications may have the (unintended) result of creating incentives for certain issuers not to list their financial product – which would reduce both transparency and liquidity, to the detriment of retail investors.

- Excluding only ordinary shares (and not other listed products) from the regime also appears to be based on a false assumption that the risk associated with a financial products is primarily a function of product design – rather than other factors, such as issuer profile and identity.

- At a minimum, there should be additional categories of broad exclusions, such as:

  - Listed managed investment schemes and stapled securities, where there is substantial equivalence to listed ordinary shares (ie, not complex or subordinated products);

  - Simple Corporate Bonds – which the Government has spent considerable effort encouraging and ensuring are appropriate for a broad retail market;

  - Basic listed warrants over listed ordinary shares;

  - CHESS depositary interests and similar depositary interests.

- Standard banking products, such as basic deposit accounts and simple term deposits, should also be excluded.

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)?

- Yes – it should be possible to exclude mass-customised products from the regime – either in a principle-based exclusion, or via class determinations (for certainty).

- The superannuation sector products referred to are examples of this (see the Superannuation Committee Submission on this specific aspect). However, this category should be capable of evolving on a principle-based assessment over time.

- It is essential that there be certainty around exclusion of mass-market products, to avoid prohibitive costs or risks that will reduce mass-market choice.

CREDIT 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.

- Yes – the distinction between retail and wholesale markets and investors should be maintained.
- The costs of extending the regime more broadly (ie, to wholesale investors) would not be justified by or proportional to any benefit of including the wholesale market.
- The extension of the regime to the wholesale market would have a profound and damaging effect on the viability, depth and competitiveness of Australia's wholesale capital markets.
- Wholesale investors are in a position to have some influence on the nature of products available to them, and are sufficiently sophisticated or have ready access to skilled advice to understand the nature of them.

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.

- Yes – the rationale for excluding design and distribution obligations, given the substantial overlap with the responsible lending regime, but including the intervention power is defensible.
- However, there is a substantial risk – as has been seen in relation to responsible lending regulation – of "regulatory creep" with these broad powers, both as they apply to credit products and more broadly. There is a possibility of unintended consequences if the scope of the power is cast too broadly.
- The intervention power requires more rigorous criteria before it is applied, and the capacity for swift, cost-effective, commercial oversight. See further our response to question 29 below, regarding the need for a commercial review panel.
- Overly-zealous use of these powers could stifle legitimate and valuable capital markets innovation, and limit funding options for Australian businesses – there must be realistic and accessible checks and balances. That need is not addressed by the current proposal.

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

- As a general principle, regulatory overlap and duplication of powers from different sources should be minimised.

PART 3: DESIGN AND DISTRIBUTION OBLIGATIONS

WHO WILL BE SUBJECT TO THE OBLIGATIONS

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

- Yes – as a general principle.
- There will be some anomalies – for example:
  - Issuers of "white label" products – where the roles of different parties may justify some adaptation of the regime;
  - derivatives, where there should be greater clarification;
  - CHESS depositary interests and similar depositary interests, where the issuer has no role in relation to the underlying security; and
  - warrants, where the technical issuer has no role in relation to the underlying security
- In the latter two cases, (if these products are included in the regime) an abrogated role should be considered.

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 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).

- Yes, insofar as it relates to the issuer's obligations regarding distribution.
- The position is not as clear for distributor obligations, and there is an argument that the distribution obligations are too onerous for mere marketing channels – see our comments below in response to question 8.

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 issuer should not be held responsible for the actions of entities outside the issuer's authorised distribution chain ("unsponsored entities") – so for the purposes of issuer obligations, these should not be regarded as "distributors".
- There are cases where entities independently participate in distribution of products, unsponsored by the issuer. It is not possible for the issuer to meaningfully control or regulate these entities.

- Similarly, the issuer cannot control activity in any secondary market.

- There may be a rationale for including those unsponsored entities within the definition of "distributors" for the purposes of distributor obligations – however, see our comments below (in response to question 8) regarding entities that are simply marketing channels and not sales channels.

8) Do you agree with excluding personal financial product advisers from the obligations placed on distributors? If not, please explain why with relevant examples.

- Yes – we agree that the obligations placed on providers of personal financial product advice are sufficient.

- We support the intention to minimise regulatory overlap and duplication.

Are there any other entities that you consider should be excluded from the definition of distributor?

- The proposed definition of distributor is too broad. It should arguably apply only to those actually engaged in the distribution (rather than merely marketing) of financial products – most notably, retail-facing brokers and financial advisers.

- Given the onerous nature of the obligations for both issuers and distributors – we are concerned about the obligations applying to the "second limb" of distributors (ie any that advertise products or publishes statements), which may be marketing channels but not necessarily sales channels.

- Examples include mass-marketing channels such as Facebook and newspapers.

- There is already a sufficient "misleading and deceptive conduct" regime that applies to marketing activities.

- ASX and other secondary markets/market operators should also be clearly carved-out from the distributor obligations.

9) Do you agree with the obligations applying to both licensed and unlicensed product issuers and distributors?

- Yes – although we note that some licensees will already have substantial obligations as conditions of their licence, so there is the potential for regulatory overlap and duplication.

- It should be clear that all issuers (and in particular listed entities) can draw upon skilled third party service providers – such as licensed distributors, who are already subject to ASIC supervision – to satisfy their obligations and minimise cost and infrastructure requirements.

- There should be a safe harbour for issuers where a default is due to an error by a third party provider, where selection of the third party was reasonable (which would include selection of a licensed distributor).

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)?

- No – in principle, there is no basis to exclude "sandbox" entities, although it may be appropriate to abrogate some of the obligations given the substantial costs that may be involved in implementing the regime.

Who should be empowered to grant exemptions and in what circumstances?

- ASIC should have the power to grant exemptions, having regard to the cost and impact on the relevant issuer, the scale of the issue, the proportionality of the cost to the risks and to the likely benefit, the impact upon market integrity, the impact upon competition, and the existence of other safeguards.

TARGET MARKET IDENTIFICATION

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

- The proposal is complex for issuers who are not in the principal business of issuing the relevant products, where they have previously had no business need to invest in target market research.
- This will be costly, and difficult, for limited benefit.
- In our view, it will limit the availability and range of products extended to retail investors in way that is likely to disadvantage retail investors and reduce choices available to them.
- For those issuers – they should be permitted to seek competent third party advice, and to have a safe harbour where they reasonably rely on that advice.
- For some financial institutions, we would distinguish products that are their principal business (eg insurance) from products that they issue to fund that business (eg loan notes).
- Target market definition should not become a substitute for, nor should it rise to the level of, personal financial product advice. Nor should it amount to a de facto capital guarantee, and invalidate the product disclosure regimes.
- For instance – "Detailed Proposal 1" echoes the language of personal advice. The costs of determining the actual investment and risk management needs of a target market would be substantial. It is not clear if it must be done in respect of each specific product, issuance and market, or if some more general market research into trends and "typical" broad characteristics can be drawn upon.

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)?

- We have no specific response to this question.

APPROPRIATE DISTRIBUTION CHANNELS AND MARKETING

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.

- Our concerns with the extent of these obligations are similar to those in relation to the identification of the target market.

- Issuers should be permitted to seek competent third party advice, and to have a safe harbour where they reasonably rely on that advice.

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?

- At most – only at a high level, and on a generic basis – for instance, having regard to competent third party advice.

- This should not become an obligation that requires detailed market research, nor become de facto personal advice.

- Where an issuer determines that a product can only be distributed through a personal financial product adviser, the issuer should be entitled to rely on the adviser to assess the suitability of the product for the customer, and should have a safe harbour in respect of that product.

- Additionally, we suggest that rather than relying on individual issuers to define distribution channels and target markets, a model be adopted under which ASIC – in cooperation with issuers and distributors:

    - defines generally applicable markets and distribution channels – which would involve ASIC undertaking relevant market research, rather than requiring individual issuers to incur the cost doing so – which would be duplicative and unnecessary; and

    - identifies "vulnerable" markets/channels that are not suitable for financial products deemed to be more complex or higher risk – and to/through which such products must not be marketed.

    See also our comments in section 2(1) above.

Are there any other factors that issuers should have regard to when determining appropriate distribution channels and market approach?

- It would be preferable that this test is reversed, so that it discourages the specific targeting of a vulnerable and unsuitable market. This is the issue that is at the heart of these reforms.

- The current proposal will have the tendency to deprive retail investors of investment opportunities and choices, and to cause others to assume a product is tailored to their needs simply because they can access it. That is a perilous path.

POST SALE REVIEW (BY ISSUERS)

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?

- This proposal may make some sense for unlisted products
- However, for listed products it causes a host of problems, with little benefit.
- The experience in Europe suggests that it is costly and unwieldy, but does not give insight into the effectiveness of distribution practices. It simply demonstrates the impact of secondary market trading, and the unsuitability of this regime to listed products.
- For listed products it would be appropriate for distribution and monitory obligations to cease upon listing – issuers cannot control or even readily monitor the characteristics of investors trading in listed securities.

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

- The legislation should adopt a principles-based approach.
- ASIC guidance has the capacity to be more flexible, and adaptable to different contexts.
- A one-size-fits-all prescriptive legislative approach is likely to result in significant costs, for variable benefit.

WHAT WILL BE EXPECTED OF DISTRIBUTORS

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?

- While this addresses issuer concerns about the effectiveness of distribution arrangements, it will be unworkable in many circumstances.
- The controls for product channels will be difficult to adapt significantly to specific or detailed requirements – a level of generality is needed for this to be workable, viable and reliable.

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

- Consumers should have freedom to choose to invest in products outside of target markets, without consequence for issuers.
- This is particularly the case for advised channels, but should not be restricted to that.
- Restrictions on consumer access would also impact on the ability to list products, which would deprive investors in those products of the benefits of liquidity and transparency.

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

- This regime should not operate as a capital guarantee.
- Consumers should be free to make their own choices, and to abide by the consequences of those choices. They have existing protections through disclosure regimes, and access to advice should they choose to use it.

POST SALE REVIEW (BY DISTRIBUTORS)

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?

- Distributors could be asked to provide information about who products are initially distributed to, but the requirement to monitor performance of products should not be mandatory.
- The cost of implementing these requirements may be significant, and disproportionate, which would impact on distribution fees.
- This may be functionality that third party service providers can develop – but it should be up to each distribution channel whether they offer that functionality.
- This obligation is impracticable for listed products which trade in secondary markets.
- It is also impracticable for unlisted products which are nonetheless actively traded through custodial accounts, with minimal visibility for issuers or distributors.

Should an equivalent obligation also be imposed on advised distributors?

- See above.

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

- See our response to question 15 above.

PROPOSED COMMENCEMENT DATE

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.

- These obligations will require substantial infrastructure and investment to implement.
- 6 months is likely to be too short a period of time. The initial period will be likely to take 2 years.
- At a simple level – terms and conditions of the products will have to be adapted to obtain the necessary consents to use and sharing of information, and chains of distribution and marketing agreement will have to be revised.
- However, beyond that – the market testing that will need to be carried out can take a substantial period of time. The information may not currently be available, and the infrastructure and services needed to monitor and review distribution and performance of products may not currently exist.

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.

- This period of time will be too short for an exercise of this scale. This transition is likely to take 5 years.
- See our response to question 21 above.

PART 4: PRODUCT INTERVENTION POWER

WHAT TYPES OF INTERVENTIONS CAN ASIC MAKE USING THE 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.

- Interventions with respect to product features can impact the commercial viability of the product.
- Accordingly – if a product intervention renders a product non-viable, there may need to be statutory powers to enable an issuer to choose to unwind or cancel it, adjusting for value received by holders (i.e. not a windfall).
- Interventions should not simply be used to insulate investors from market forces, or to provide a capital guarantee.

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

- No – this should be a power used rarely, and sparingly.
- ASIC should be discouraged from engaging in regulatory creep, and there should be commercial checks and balances on ASIC's use of the power. See also our response to question 29 below.

USE OF THE INTERVENTION POWER

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?

- Consumer detriment should be highly significant to a class of consumers before an intervention power is justified.
- The examples of "significance" in the context of an individual investor, and that the individual detriment can be small, suggest that individual income testing must be conducted before a product can be offered to a retail investor, which is clearly inappropriate and disproportionate.
- The current test will simply result in investment products being withdrawn by reputable players, from retail markets.

Are there any other factors that should be taken into consideration?

- There must be additional criteria satisfied before an intervention power may be exercised. This should be a high bar, and this power should be infrequently exercised. There is a strongly held view that it should be exercised only where there is a breach (or alleged breach) of an obligation or standard.
- Additional criteria that must be satisfied before an intervention power is exercised – and considerations that should be taken into account in determining whether and how such power is exercised – should include:
  - no other suitable power to address the concern (eg, no intervention should be made if inclusion of a warning statement would be sufficient);
  - proportionality and reasonableness of the intervention, relative to both the scale and nature of the consumer detriment and the impact in the market;
  - impact upon efficiency and integrity of the relevant market;
  - impact upon competition – both within the Australian market, and the competitiveness of the Australian market in world markets; and
  - impact upon "sovereign risk".

PROCEDURAL STEPS

26) Do you agree with ASIC being required to undertake consultation and consider the use of alternative powers before making an intervention?

- Yes – consultation is essential.
- This power should only be used when other powers are inadequate or unavailable, and where key criteria can be demonstrated to be satisfied.
- The basis for exercise of the power should be transparent – reasons and evidence should be publicly available.
- In truly exceptional circumstances, use of an emergency intervention power on an interim basis may be justified. This should only apply for a period of weeks, until industry consultation can be completed.

Are there any other steps that should be incorporated?

- ASIC should conduct market testing and gather empirical evidence to demonstrate the risk and impact on consumers, to address the market impact of the proposed intervention and demonstrate proportionality.

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?

- Yes – see above.

DURATION AND REVIEW OF AN INTERVENTION

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.

- A 12 month time frame would be more appropriate, with the potential for extension of 6 months to cover a transitional period if legislative measures are proposed to be adopted.
- 18 months gives too much de facto permanence to the intervention. If the intervention is justified, parliamentary support should be sought.
- Flexibility should also be provided for ASIC to modify, or put an early end to, its intervention where there the issuer and/or relevant distributors have responded in a manner that reasonably addresses ASIC's concerns – eg, by improving disclosure regarding product risks and potentially unsuitable investors.

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?

- Administrative and judicial appeals are inappropriate, costly, slow and unwieldy review mechanisms. They also do not enable the substance of

the intervention to be considered or reviewed, and the delays involved render the purpose of the challenge useless.

- It is essential that there be a nimble, cost-effective, commercial review panel established to serve as a check and balance on the use of this power, to avoid substantial market detriment. The effectiveness of this mechanism has been demonstrated by the Takeovers Panel, and there may be some opportunity to leverage existing frameworks with an expanded role for greater efficiency.

- Challenges should be able to be resolved within a matter of weeks – rather than the many months or years that may be involved in judicial or administrative processes (with attendant costs).

- The commercial, merits-based review to be undertaken by this panel should have regard to:

    - the perceived consumer detriment associated with the relevant financial product's design or distribution; and

    - the commercial impact (both on the individual issuer in question and more broadly) of ASIC's exercise of its intervention power.

- The existence of a Panel would also simplify the framing of the intervention power – which otherwise would need to build checks and balances into the legislative framework.

- If thought appropriate, it could be that the review panel would not make final orders but rather, where necessary, send the matter back to ASIC for review – and determination of appropriate actions – having regard to the matters considered by the panel.

- Where there are numerous challenges to use of the power, a Senate Inquiry should be able to be convened to consider whether the power is being used consistently with the vision of Government and the FSI.

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?

- Government should use the legislative process to introduce regulations where an intervention is to become permanent, with parliamentary disallowance processes available and with a referral to a Standing Committee for consideration before regulations are put in place.

- Regulations should not be introduced without a broad consultation process, and substantial empirical evidence to substantiate the intervention.

- Government should have regard to the same criteria as ASIC, together with any Commercial Panel challenges to the introduction of the measures by ASIC.

31) What (if any) appeal mechanisms should apply to a Government decision to make an intervention permanent?

- Regulations should be reviewed every 2 years to consider whether the intervention should remain in place, addressing the same criteria.
- Administrative and judicial review should be available.

INDUSTRY CLARITY

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

- Interventions should not be able to be retrospective, nor should they expose issuers to damages or compensation claims where there has been no breach of law.
- Interventions should not be able to change features of existing products.
- Interventions should not impose requirements that are inconsistent with the requirements of other Australian regulators – there should be regulatory consistency across agencies.
- Interventions should not be funded by affected issuers or distributors.
- Interventions should not cut across disclosure laws (and defences) and create new risks or exposures for issuers.
- An up-front safe harbour for issuers, to reduce the risk of later disruption, is essential.
- It should be possible, for the development of new products or in the review of existing products, to seek pre-vetting from ASIC with a safe harbour. The investment in product review and new product design is substantial – and regulatory certainty should be able to be obtained at an early stage.
- See our response to question 23 above.

PROPOSED COMMENCEMENT DATE

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

- No – there should be a period for consultation and development of appropriate policy frameworks, and establishment of a Commercial Panel for oversight of use of the power.

PART 5: ENFORCEMENT AND CONSUMER REDRESS

WHAT REGULATORY TOOLS SHOULD BE USED TO ADDRESS NON-COMPLIANCE

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

- The regulatory enforcement tools proposed by the Paper, being administrative actions, civil penalties, criminal penalties and injunctive actions, are appropriate (subject to the proposed safe harbours and defences identified above).
- Powers should focus on restraining the relevant conduct, or remarketing the relevant product, but should not include compensation – except perhaps only in extreme cases involving intentional or reckless wrongdoing. In all but these cases, intervention (rather than damages or compensation) will be an appropriate and sufficient remedy.
- Intervention powers can more broadly require specific disclosures or warnings, and changes in advertising.
- Prescribed statements or warnings should not be crafted so as to cause confusion (for example – the prescribed warning statements for product disclosure statements are sometimes inappropriate to the context, and can be actively misleading).

CONSUMER REDRESS

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

- The introduction of direct private causes of action for consumer redress proposed by the Paper are inappropriate. They go far beyond comparable reforms overseas and would create a significant litigation risk for issuers and distributors, including new avenues for opportunistic class actions.
- Private causes of action risk operating as capital guarantees and promoting moral hazard in consumers.
- The proposed product suitability and distribution obligations on issuers and distributors does not and should not create a positive duty to individual consumers to ensure the suitability of a product. On that basis, it does not lend itself to private consumer remedies which have as their core feature a duty of care owed by the relevant financial services provider to individual consumers (such as the civil liability regime for defective PDSs (see s 1022B of the Corporations Act), misleading or deceptive conduct (see s 12DA of the ASIC Act) and the law of negligence.

- As consumers should be free to make a choice to invest in a product which is not targeted for them, there should be no sanctions for issuers or distributors should a consumer choose to do so.

The Committee would be willing to consult further with Treasury in relation to formulation of measures to implement the approach which we suggest above. If Treasury wishes to discuss this submission, please contact any of the following: Shannon Finch (King & Wood Mallesons - 02 9296 2497), Stuart Byrne (Clayton Utz – 02 9353 4722).