

MinterEllison

17 March 2017

Manager
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 Proposals Paper

We appreciate the opportunity to provide feedback on the measures outlined in the Government's Design and Distribution Obligations and Product Intervention Power Proposals Paper released on 13 December 2016 (**Paper**).

MinterEllison is a full service commercial law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, financial advice firms, stockbrokers and other financial intermediaries in Australia and overseas.

The views expressed in our submission are however ours alone and do not necessarily reflect the views of our clients.

1. Overview

- 1.1 We strongly support a the need for a strong regulatory regime to maintain and enhance trust and confidence in the financial system by consumers and market participants. This is crucial to support Australia's economic prosperity.
- 1.2 We do have reservations about potential impact of the proposals in the Paper on innovation, efficiency and competition in the financial system as we have previously expressed in our submission on the Financial System Inquiry Interim Report¹ and our Briefing Paper on the Financial System Inquiry Final Report.² However, we recognise that the debate has moved on and in this submission we have focussed on the particular measures proposed in the Paper.
- 1.3 Overall, we support a principles-based approach to the implementation of the Financial System Inquiry recommendations for a product design and distribution duty. The measures proposed by the Government are generally consistent with this approach.
- 1.4 We are more concerned about the proposals for ASIC's product intervention power. In particular, we believe that the power should only be available where there is an actual or suspected breach of the law, including the new product design and distribution duty. The proposal that it should be available to address 'significant consumer detriment' will create significant uncertainty for the sector.

¹ http://www.minterellison.com/files/uploads/Documents/Publications/Articles/Pub_A-2014-Minter-Ellison-FSI-submission-August-2014.pdf, p15-16.

² <http://fsinquiry.minterellison.com/files/Uploads/Documents/Blogs/FSI%20report%20December%202014.pdf>, p 10-11.



2. Summary

We have responded to the questions raised in the Paper in the Attachment to our submission. In summary, our key comments are:

- (a) We strongly support restricting the new duty and power to products while they are available to retail clients. The regime should not apply to closed products.
- (b) We also believe that simpler and highly regulated products do not need to be subject to the new duty and power. However, a more appropriate solution may be to exclude products generally available to consumers currently. This would reduce the impact on competition because the duty would only apply new types of products and products specifically brought within the regime.
- (c) The duty should in general only apply to licensees.
- (d) The duty should be scaleable depending on the nature, complexity and risk of the product and there should be a defence for issuers and distributors which take reasonable steps to comply with the duty.
- (e) The requirement to identify target markets for products should not mean that other consumers cannot acquire the product as issuers cannot be expected to know whether the product is in fact suitable for a particular client.
- (f) While it is reasonable to expect issuers to take some responsibility selection of distributors where this occurs, there should not be any restriction on the distribution of products by others. We believe that there should be separate duties imposed on distributors subject to the regime and product issuers and issuers.
- (g) We believe that industry will require a longer transition period than proposed by the Government. We suggest at least 2 years for new products and at least 3 years for existing products that remain open to new clients.
- (h) The requirements for ASIC to consult with affected parties before exercising the intervention power should be specified in the legislation and there should be clear appeal rights. Any urgent exercise of the power should require a court order on an ex parte interlocutory basis.
- (i) Permanent intervention should only occur under appropriate Parliamentary oversight.

3. Proposals

3.1 The proposed regime includes the following elements:

- (a) the product design and distribution duty (**PDDD**), which in turn is comprised of two different duties:
 - (i) the product issuer responsibilities for product design (**product design duty**);
 - (ii) the product issuer responsibilities for ongoing review of open products (**product review duty**);
 - (iii) the distributor responsibilities relating to distribution of the product (**distributor duty**); and
- (b) the proposed ASIC product intervention power (**intervention power**).

3.2 Many aspects of our response to the detailed proposals in the Paper are set out in our responses to the specific questions in the Attachment. We have however provided high level responses to each of the detailed proposals below.

- (a) 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.*

Our comments on identifying target markets are set out in the Attachment. We believe that the factors identified in the proposal are appropriate.

We believe that the PDDD should be scalable having regard to the nature, complexity and risk characteristics of the product. We also believe that there should be a 'safe harbour' defence for issuers and distributors if they take reasonable steps to comply with the PDDD.

(b) 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.

We agree that these factors are reasonable and appropriate where issuers select a distribution channel. However, we do not believe that there should be any suggestion that issuers have to select a distribution channel or particular distributors. Many products are made available to the market without issuers entering into formal arrangements with distributors. In that situation, we believe it should be a matter for the distributor to assess whether the product is generally suitable for its clients.

We also agree that it is reasonable to require for issuers to identify a target market for their products and for this to be communicated to clients and distributors. However, we question the value of identifying non-target markets.

(c) 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.

In general, we agree with the proposal for issuers to undertake regular reviews of open products. Our detailed comments on the nature of those obligations are set out in the attachment.

(d) Detailed Proposal 4

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

We disagree with this proposal for the reasons set out in the Attachment.

(e) 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.

We agree that distributors selected by the product issuer should be expected to provide information reasonably requested by the issuer to enable the issuer to comply with its product review duty. We have set out our views of what distributors should be required to do to comply with the distributor duty in the Attachment.

We would be very happy to discuss or provide further details about any aspect of our submission.

Yours faithfully
MinterEllison

A handwritten signature in black ink, appearing to read 'R. Batten', with a long, sweeping underline that extends to the right.

Richard Batten
Partner

Contact: Richard Batten T: +61 2 9921 4712
F: +61 2 9921 8036 richard.batten@minterellison.com

ATTACHMENT – RESPONSES TO QUESTIONS

Proposals Paper Questions	MinterEllison Responses
PART 2: RANGE OF PRODUCTS COVERED BY THE MEASURES	
<p>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)?</p>	<p>We agree that ordinary shares should be excluded from the proposed regime. We also submit that the following types of products should be excluded:</p> <ul style="list-style-type: none"> • Basic banking deposit products and related non-cash payment products; • Listed products and securities; • Superannuation products, including: <ul style="list-style-type: none"> ○ life insurance made available through superannuation; ○ pensions and annuities that meet Superannuation Industry (Supervision) Regulations definitions • Retirement savings accounts; • Closed products in relation to the PDDD; • Simple managed investment schemes. <p>We believe that these products should be excluded for the following reasons:</p> <ul style="list-style-type: none"> • Basic banking deposit products and related non-cash payment products are very simple and well understood by consumers and it is difficult to contemplate circumstances in which the products should not be made available to consumers. • Listed investments do not require the protection of the PDDD. They are liquid and readily disposed of, they are subject to continuous disclosure requirements and suitable to requirements of the relevant exchange. It is not feasible for issuers of listed investments to monitor whether the investments are held by any target market once traded on the secondary market. We are also concerned about the potential loss of confidence in the financial markets and the impact on the ability of Australian companies to raise capital through fund raising activities if the PDDD or the intervention power applied. • Superannuation and retirement savings products are subject to extensive and prescriptive regulation and again it is difficult to contemplate circumstances in which the products should not be made available to consumers. This is particularly the case for MySuper products and eligible rollover funds. • The product design and review duties have been developed having regard to the matters that should be considered when products are made available to new clients. By their very nature, they are not suitable for closed products. • Simple managed investment schemes are defined in the Corporations Regulations in a way that significantly limits the potential for the products to be mis-sold to or not to have value for consumers. The imposition of the PDDD would therefore add cost for little consumer benefit and we submit the power should not be required in relation to such schemes. <p>An alternative approach would be to exclude all products that are currently offered on substantially the same terms (i.e. where any difference between terms is not material or significant) by more than one unrelated issuer from the PDDD. We believe that this exclusion is appropriate because if a product is currently available to retail clients, there should not be any need to undertake a complex process to determine whether an identical product that is already available on the market should be released into the market or should continue to be</p>

Proposals Paper Questions	MinterEllison Responses
	<p>available to clients. Otherwise, the new regime will impose significant constraints on competition in the financial services market for no consumer benefit. ASIC should still be able to monitor existing product types through the intervention power and by exercising that power should be able to require issuers and/or distributors of such products to comply with all or appropriate elements of the PDDD if appropriate.</p> <p>It should also be possible to exclude products in the future by regulation where other products are identified which should not be subject to all or particular elements of the proposed regime, in particular the PDDD.</p> <p>There should also be an option for industry sectors to adopt a code of practice which sets out the steps that are appropriate for industry members to take to meet the PDDD. Industries should be encouraged to develop and seek approval for codes that impose requirements on industry members which address the specific issues for that industry. Where this occurs, the approved code should be able to displace the statutory regime or provide the basis for a reasonable steps defence to the statutory regime.</p>
<p>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.</p>	<p>We agree that the scope of both the PDDD and the intervention power should be limited to products issued to retail clients.</p> <p>Applying the proposed regime to products issued to wholesale clients would impose an unnecessary burden on wholesale markets, restricting innovation and efficiency in financial and capital markets.</p> <p>In the case of products offered through platforms, such as IDPS (investor directed portfolio service) and superannuation platforms, this means that the PDDD should not apply to the product issuer as the product will be issued to a wholesale client, being the IDPS custodian or the superannuation trustee. We believe that this outcome is consistent with the current treatment of products available through platforms where the issuer is treated as only having a wholesale client. We submit that in these circumstances it is appropriate for the platform operator to have the PDDD obligations and not the underlying product issuer.</p>
<p>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.</p>	<p>We agree that credit products should be exempt from the PDDD.</p>
<p>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.</p>	<p>We submit that the intervention power should only apply to regulated credit products, i.e. credit products regulated by the National Consumer Credit Protection Act and margin loans regulated by the Corporations Act. Other forms of credit are not made available to consumers and do not require the protection of the intervention power.</p>

Proposals Paper Questions	MinterEllison Responses
PART 3: DESIGN AND DISTRIBUTION OBLIGATIONS	
<p>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?</p>	<p>Yes, this is consistent with the definition in section 761E of the Corporations Act.</p> <p>However, we believe that there are circumstances where issuer obligations would be better imposed on the distributor, where the distributor is responsible for the product design and distribution strategy. We therefore suggest that the product design and review duties be imposed on the product issuer unless a licensee has agreed in writing with the issuer that it is responsible for product design and distribution of the product, in which case the licensee should be treated as the issuer for the purposes of the product design and review duties.</p> <p>Another example is products made available through a platform. As discussed above, we do not believe that the issuer of the product in these circumstances should be subject to the product design and review duties. In these circumstances, it is appropriate for the platform operator to decide whether and in what circumstances the product should be made available to retail clients.</p> <p>Similarly, where a life insurance policy is issued by to a superannuation trustee as a wholesale client and on that basis the trustee issues a superannuation interest which includes cover under the policy, the trustee should be the only party subject to the product design and review duties.</p>
<p>6. Do you agree with defining distributors as entity that arranges for the issue of a product or that:</p> <p>(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</p> <p>(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).</p>	<p>This is a very broad definition of distributor. It may include entities which do not hold an Australian financial services licence, which we do not believe is appropriate. Parliament has previously determined that only certain activities are required to hold Australian financial services (AFS) licence and therefore to comply with the obligations of licensees, including organisational obligations under section 912A of the Corporations Act, such as honesty, efficiency and fairness, competency and conflict and risk management. We do not believe that any case has been made to extend the range of organisations which are subject to financial services regulation and we do not believe it is appropriate to apply such a significant duty as the PDDD to any party which is not required to hold an AFS licence. Subject to specific exemptions, if the view is taken that the PDDD should apply to an organisation, we question why the organisation should not be required to hold or operate under an AFS licence.</p> <p>We therefore recommend that the definition reflect the circumstances in which an AFS licence would be required. A distributor of a product should be an AFS licensee who:</p> <ul style="list-style-type: none"> • deals in or arranges for dealings in the product, whether directly or through a representative of the distributor; and • receives a monetary benefit from the issuer of the product in relation to the issue of the product.
<p>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?</p>	<p>No. We believe that licensees should only be subject to the distribution duty where they receive a financial incentive from the product issuer to promote the product.</p> <p>Entities which promote the product for other reasons, e.g. because they have determined that the product is relevant to their clients without regard to any incentive, should not be subject to any obligations other than those that already apply to their conduct, i.e.:</p>

Proposals Paper Questions	MinterEllison Responses
	<ul style="list-style-type: none"> • general obligations applying to licensees under section 912A of the Corporations Act, such as the duty to act efficiently, honestly and fairly; and • the best interests duty under Division 2 of Part 7.7A of the Corporations Act where personal advice is given; and • the prohibitions on misconduct, including misleading and deceptive conduct, under Part 7.10 of the Corporations Act and Division 2 of Part 2 of the ASIC Act.
<p>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?</p>	<p>We agree that financial advisers who provide personal advice should be excluded from the distributor duty as they are already subject to extensive obligations under the best interests duty under Division 2 of Part 7.7A of the Corporations Act.</p> <p>Please refer to our response to question 6 above in relation to other entities that should not be subject to the distributor duty.</p>
<p>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?</p>	<p>We believe that careful consideration needs to be given to applying the regime to unlicensed entities. As noted in our response to question 6, we believe that as a general proposition only licensees should be subject to the PDDD.</p> <p>Almost all Australian product issuers hold an AFS licence and would therefore be caught in any case. There are only limited licensing exemptions for Australian product issuers:</p> <ul style="list-style-type: none"> • Superannuation trustees may be exempt under Corporations Regulation 7.6.01(1)(a), but as noted in our response to question 1 we do not believe superannuation should be subject to the PDDD in any case. • Product issuers are exempt when products are distributed through licensed intermediaries: section 911A(1)(b) of the Corporations Act. Where the intermediary has agreed in writing that they are responsible for product design and distribution, then we believe that the product design and review duties should apply to intermediary as proposed in our response to question 5 above. However, where that is not the case, we do believe that there is a good case for unlicensed product issuers in these circumstances to be subject to the product design and review duties. • Other exemptions only apply to product issuers which only have wholesale clients: section 911A(2)(g) of the Corporations Act; Corporations Regulation 7.6.01(1)(b)-(d). <p>We also believe that once the Asia Region Funds Passport regime is implemented, issuers which are exempt from the AFS licence requirement under that regime should be subject to the product design and review duties.</p>
<p>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</p>	<p>We believe that it is reasonable for product issuers to be required to identify target markets for their products, which in our experience normally occurs today in any case. However, this should not result in product issuers being required to exclude customers from their product if they are not in the target market and for that reason we question the value of requiring issuers to identify non-target markets.</p> <p>Any obligation to identify target markets should be limited to identifying the general characteristics of investors in the target market. Issuers</p>

Proposals Paper Questions	MinterEllison Responses
markets?	<p>should not be required to assess suitability of products for individual customers or to assess whether they fall within the target market at the point of sale. Otherwise, we are concerned that it would be very difficult for issuers to avoid giving personal advice.</p> <p>It is important that the product design duty (and in fact all aspects of the PDDD) should be scaleable and based on a test of what is reasonable in the circumstances. For example, the work undertaken and the precision of the identification of target markets should be less simpler, lower risk products.</p> <p>We generally support the factors identified in the Paper, although we question the appropriateness of considering future investment performance which cannot be safely predicted. Any factors should be expressed generally and be provided as an example of the types of factors that should be considered.</p>
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)?	<p>We believe it is appropriate to expect insurance companies to consider the value of their product for their target market as proposed.</p>
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.	<p>As a general proposition, we believe that it is reasonable to expect a product issuer to:</p> <ul style="list-style-type: none"> • give reasonable consideration to whether a distribution channel is appropriate when selecting it; • for products directly distributed by the issuer, only implement marketing strategies which the issuer reasonably believes are appropriate for the identified target market; and • when selecting a distributor, take reasonable steps to consider whether the marketing strategy proposed by the distributor are appropriate for the identified target market. <p>We reiterate that the issuer's obligations should be scaleable to the nature, complexity and risk of the product and subject to a reasonable steps defence.</p> <p>However, these obligations should only apply to distribution channels selected by the product issuer. There should not be any prohibition on products being distributed by other distributors. Product issuers should be free to make their products available for distribution by a wide range of distributors without selecting particular distributors and without being required to consider whether the distributor complies with their obligations, including the distributor duty. Any other outcome would result in a significant restriction on competition in the financial sector.</p> <p>Distributors who are not selected by the product issuer should be subject to the distributor duty.</p>
13. Do you agree that issuers must have regard to the customers a	<p>We believe that these factors are reasonable where a product issuer selects a distributor. We do not believe that they are particularly relevant to selecting a target market. The target market should of</p>

Proposals Paper Questions	MinterEllison Responses
<p>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?</p>	<p>course be a consideration when selecting a distributor, where that occurs.</p>
<p>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?</p>	<p>We agree that it is reasonable to expect product issuers to periodically review their products. We expect that such a review would include consideration of:</p> <ul style="list-style-type: none"> • the performance of the product over appropriate timeframes (where relevant); • whether the product continues to be suitable for the previously identified target market; • whether the target market of the product should change; • whether any distributors selected by the issuer remain appropriate to distribute the product; • whether marketing strategies for the product implemented by the issuer or distributors selected by the issuer remain appropriate; • whether any changes should be made to the product to make it more suitable for the target market or achieve the purpose for which the issuer has designed the product for clients in the target market (where such changes are possible) and whether such changes should be applied to existing holders of the product (where possible); and • based on information the issuer is reasonably able to obtain from public sources or distributors selected by the issuer: <ul style="list-style-type: none"> ○ the extent to which the product is being acquired by consumers outside the target market; ○ whether the product appears to be being acquired by consumers for whom it is unlikely to be suitable; ○ the distribution channels through which the product is being acquired; ○ the marketing strategies being employed by distributors; and ○ whether there are any steps the issuer can and should take to address any issues identified as a result of this investigation. <p>However, we do not believe it is appropriate to prescribe the considerations that an issuer should have regard to when reviewing their products. The obligation should be principles-based, with ASIC guidance as appropriate.</p> <p>It should not however be the job of the product issuer to ensure that the product is or remains suitable for clients who acquire the product. It may be reasonable for an issuer to seek to communicate with product holders about any concerns the issuer may have about the ongoing suitability of the product for particular types of holders, where this is possible. However, the issuer cannot be expected to force clients out of products as issuers cannot be expected to know whether the product is in fact suitable for a particular client, unless the issuer is</p>

Proposals Paper Questions	MinterEllison Responses
	<p>also providing personal advice to the client on an ongoing basis, which would be unusual.</p> <p>Any obligation to undertake a periodic review should be limited to products which are open to new clients, be scaleable and subject to a reasonable steps defence.</p> <p>We do not agree that issuers should be required to inform ASIC if they identify a distributor has sold to clients who are not in the target market. It is the distributors responsibility to ensure that they distribute the product responsibly. Any failure to do so will be a breach of their distributor duty and reportable to ASIC if it is a significant breach. Imposing an obligation to report distributors is likely to inhibit the free flow of information between issuers and distributors and reduce the ability of issuers to undertake product reviews along the lines contemplated above. We do not therefore believe it is in the public interest to impose this obligation on issuers.</p>
<p>15. In relation to all the proposed issuer obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?</p>	<p>We believe that the statutory obligation to impose a PDDD should be principles-based and expressed in general terms. ASIC can then provide guidance on how it expects the requirement to be complied with in different contexts.</p>
<p>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?</p>	<p>No. The roles of issuer and distributor are and should remain distinct. In our responses above, we have set out our view of the nature of the obligations that should apply to product issuers. They involve identifying target markets for which the issuer has designed the product. However, it is not and should not be the issuer's role to identify all of the circumstances in which the product may be suitable for particular customers. It is not therefore appropriate to impose an obligation on distributors to ensure that the product is distributed in accordance with the issuer's expectations unless the distributor is selected by the issuer.</p> <p>It should only be where the distributor is selected by the issuer (and where the distributor is not providing personal advice) that there should be any expectation that issuers will impose controls on the distributor. In that case, the types of controls contemplated in the Paper seem generally appropriate, but should not be mandated. It should be a matter for issuers and distributors to determine the appropriate controls to apply in each case.</p> <p>In our view, licensed distributors who are not giving personal advice can be expected to undertake a similar exercise to the product issuer where not otherwise undertaken by the issuer - these steps should be undertaken by the issuer when directly distributing a product to consumers. However, it needs to be recognised that distributors will not have access to the same level of information about products as issuers and therefore a lower standard would need to apply distributors. Distributors should be able to rely on information they receive from the product issuer and any other information they could obtain on making reasonable inquiries. Subject to those qualifications, we believe it would be reasonable to expect distributors to do the following:</p> <ul style="list-style-type: none"> • when deciding to distribute the product: <ul style="list-style-type: none"> ○ identify customers of the distributor that the distributor believes the product is suitable for (distributor's target market),

Proposals Paper Questions	MinterEllison Responses
	<p>having regard to any information received from the issuer about the target market the issuer has designed the product for;</p> <ul style="list-style-type: none"> ○ identify the circumstances in which the product should be promoted or recommended to clients, which may include whether particular types of clients would be expected to need personal advice; ○ develop appropriate marketing strategies for the distribution of the product; <ul style="list-style-type: none"> ● periodically while the distributor continues to distribute the product to new clients, consider: <ul style="list-style-type: none"> ○ the performance of the product over appropriate timeframes (where relevant); ○ whether the product continues to be suitable for the previously identified distributor's target market; ○ whether the distributor's target market of the product should change; ○ whether the distributor's marketing strategies for the product remain appropriate; ○ based on information the distributor is reasonably able to obtain based on its dealings with its clients: <ul style="list-style-type: none"> ▪ the extent to which the product is being acquired by consumers outside the distributor's target market; ▪ whether the product appears to be being acquired by customers of the distributor for whom it is unlikely to be suitable; and ▪ whether there are any steps the distributor can and should take to address any issues identified as a result of this investigation. <p>However, we do not believe it is appropriate to prescribe the considerations that a distributor should have regard to when deciding whether to distribute or continue to distribute a product. The obligation should be principles-based, with ASIC guidance as appropriate.</p> <p>The distributor duty should be limited to products which are open to new clients, be scaleable and subject to a reasonable steps defence.</p>
<p>17. To what extent should consumer be able to access a product outside of the identified target market?</p>	<p>As discussed in our responses to question 10 and 16, we do not believe that there should be any restriction on the distribution of products to clients outside the targeted market. The issuer cannot be expected to identify all circumstances in which a product is suitable for clients. We believe that the distributor duty or the best interests duty (depending on whether personal advice is provided) should address any concerns regarding the distribution of products to clients outside the issuer's target market. We believe that any other outcome would have serious implications for the efficiency, innovation and competitiveness of the Australian financial system and markets.</p>
<p>18. What protections should there be for consumers who are aware they are outside the target market but choose to access a product regardless?</p>	<p>As indicated above, the appropriate protection should be the distributor duty or the best interests duty depending on whether the client has received personal advice.</p>
<p>19. Do you agree with the proposal that distributors must comply with reasonable requests from the issuer related to the</p>	<p>We certainly agree that distributors selected by issuers should provide information reasonably requested by the issuer relating to the distribution of the issuer's products.</p> <p>The position for distributors not selected by the issuer is less clear. If</p>

Proposals Paper Questions	MinterEllison Responses
<p>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?</p>	<p>there is no contractual relationship between the parties, it may not be appropriate for the issuer to be about to require a distributor to disclose potentially commercially sensitive information to product issuers. Any such obligation would need to include appropriate protections for the distributor to ensure confidential information cannot be used for any purpose other than compliance with the PDDD and even then disclosing such information to an issuer which is part of a group with a competing distribution channel would be very problematic for the distributor. There would also need to be appropriate privacy protections and carve-outs in relation to such disclosure.</p>
<p>20. In relation to all the proposed distributor obligations, what level of detail should be prescribed in legislation versus being specified in ASIC guidance?</p>	<p>Refer to our response to question 15.</p>
<p>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.</p>	<p>We do not believe that 6 months is sufficient. Product issuers and distributors will need to undertake a range of measures to be able to comply with the new regime, including:</p> <ul style="list-style-type: none"> • developing and implementing new compliance processes; • making required changes to IT systems; • training staff; • reviewing, negotiating and updating distribution agreements. <p>We therefore recommend a 2 year transition period be adopted.</p>
<p>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.</p>	<p>The obligations should only apply to existing products which are available to new clients. There should not be any requirement to review existing closed products.</p> <p>Furthermore, the obligation should only apply to clients who acquire existing products after the PDDD starts to apply to those products as it would be difficult for issuers and distributors to comply with ongoing review obligations in relation to clients who acquired the product before the regime applied.</p> <p>Given the amount of work, time and resources required to comply with the new obligations and to implement new systems and controls for new products, we are concerned that 2 years will not be sufficient to review all existing products which remain open to new clients. We therefore recommend adoption of a longer transition period for existing product, at least 3 years.</p> <p>We are concerned that if the implementation of the new regime is rushed that will create risk not only for issuers and distributors but also for consumers. It is important these obligations are bedded down correctly and that good systems are implemented in a timely manner. Rushed implementation is likely to lead to poorer outcomes for consumers in terms of weaker controls.</p>
PART 4: PRODUCT INTERVENTION POWER	
<p>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</p>	<p>We reiterate our concerns expressed in our submission on the Financial System Inquiry Interim Report about the risks of a product intervention power both to innovation in the financial system and in creating a moral hazard for ASIC.</p> <p>We are also concerned that the proposed intervention power is very broad and discretionary. We agree with FSC submissions that any</p>

Proposals Paper Questions	MinterEllison Responses
<p>circumstances in which a consumer can access the product? If not, please explain why with relevant examples.</p>	<p>such power granted to ASIC needs to have a certain and predictable basis in law.</p> <p>The proposed power is based on ASIC's assessment that there is a 'risk of significant consumer detriment'. We do not believe this is appropriate. The trigger for ASIC's power should be that ASIC reasonably believes that a breach of law has or will occur. This would include breaches of the proposed PDDD.</p> <p>We also believe that there needs to be some limitations on the power, including:</p> <ul style="list-style-type: none"> • ASIC should only be able to require changes to product features or terms and conditions in relation to newly issued products, otherwise there would be a risk for existing holders that the product would become unsuitable for them. • It would be unreasonable for an exercise of the power to require issuers to maintain 2 separate classes of products: one for existing holders and another for new holders. Consequently, issuers should be given the power to cancel and redeem products held by existing clients if ASIC exercises the power in relation to new clients. • Unless a product or feature of a product is unique to a particular issuer, ASIC should be required to consider whether intervention should be made on an industry-wide basis to ensure the intervention does not result in an uneven playing field. <p>Subject to our comments above, we believe 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.</p>
<p>24. Are there any other types of interventions ASIC should be able to make (for example, remuneration)?</p>	<p>We do not believe that there is a strong case against ASIC having the power to specify training requirements or to prevent certain forms of remuneration. We do not believe ASIC should have the power to set appropriate forms of remuneration and as we believe that the regime should only apply to licensees it would not be appropriate for ASIC to have the power to require an unlicensed entity to join an EDR scheme.</p>
<p>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?</p>	<p>As noted above, we do not believe that this is the appropriate test for the power. However, if this test is retained, we believe that ASIC should be required to have reasonable grounds for believing that a significant number of consumers will suffer significant financial detriment if the power is not exercised.</p> <p>We do not believe the impact on individual consumers is an appropriate basis for intervention. If ASIC has concerns about the impact on individual clients, it should identify whether any breaches of any law has occurred (e.g. misleading and deceptive conduct) and if so take appropriate.</p>
<p>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?</p>	<p>We strongly support ASIC being required to consult affected parties before exercising the intervention power.</p> <p>The legislation should prescribe the steps that ASIC is required to take before exercising the power, including assessing the availability and appropriateness of alternative measures. ASIC should be required to document and inform affected parties of its assessment of alternative remedies and why ASIC considers that the use of the product intervention power is appropriate in the circumstances.</p>

Proposals Paper Questions	MinterEllison Responses
	<p>ASIC should give affected industry participants adequate notice of any proposal to exercise the power and affected industry participants should be given the opportunity to object to the proposed exercise of the power. We recommend 60 days' notice should ordinarily be given to affected industry participants. They should receive a further 60 days' notice of any significant change to the proposed exercise of the power following consultation with a further opportunity to object to the revised proposal.</p> <p>If, following consultation, ASIC decides to make the intervention order, the order should not commence immediately. The order should specify a commencement date which should not be less than 30 days' after the order is made, giving affected industry participants the opportunity to appeal to the AAT for a review of ASIC's decision. If an appeal is lodged, the order should ordinarily not take effect until the appeal is finalised.</p> <p>Where ASIC needs to exercise the power on an urgent basis, this should be done by applying to court for an interim order on an ex parte basis. ASIC should then engage in the consultation required to make the order 'permanent', i.e. for up to 18 months.</p>
<p>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?</p>	<p>The order itself would need to be a public document. However, ASIC should ensure that any other information it publishes about the exercise of the power has due regard to protection of commercially sensitive information and the promotion of open dialogue and consultation with ASIC by industry members.</p>
<p>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.</p>	<p>We agree with the proposed maximum period of 18 months. In our view, any extension beyond this period should be a matter for the Government in conjunction with Parliament.</p>
<p>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?</p>	<p>If the intervention is subject to appeal, it should not have any effect until the appeal is decided, subject to any interim court or tribunal order to the contrary if the court or tribunal is satisfied that the risk of harm is so great that the order should continue in effect during the appeal process.</p> <p>We do not however believe that an appeal should extend the length of time that the ASIC order can last. The purpose of the 18 month limit is to give the Government enough time to decide whether to make the intervention permanent. An appeal does not affect the ability of the Government to decide this question.</p>
<p>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</p>	<p>If the intervention is market-wide, it should only be able to be made permanent by the passage of an Act of Parliament. If the intervention is limited to a specific product issued by a specific issuer, then we believe it would be reasonable for the intervention to be made permanent by regulation, subject to appropriate consultation with the affected parties.</p>

Proposals Paper Questions	MinterEllison Responses
<p>wide intervention? What (if any) appeal mechanisms should apply to a Government decision to make an intervention permanent?</p>	
<p>31. Are there any other mechanisms that could be implemented to provide certainty around the use of the product intervention power?</p>	<p>Apart from the matters discussed above, the most important aspect of the power should be the requirement to consult fully with affected parties.</p>
<p>32. Do you agree with the powers applying from the date of Royal Assent? If not, please explain why with relevant examples.</p>	<p>We see the power and the PDDD as being closely connected. It is also important to ensure that ASIC has sufficient time to develop and consult on its policy regarding the exercise of the power otherwise considerable uncertainty will arise in the market which will have a significant impact on innovation to the detriment of consumers until the market understands how the power will be exercised. We therefore recommend that commencement of the power should be linked to commencement of the PDDD. In any case, we believe that ASIC should be given at least 12 months to develop and consult on its policy before the power commences.</p>
PART 5: ENFORCEMENT AND CONSUMER REDRESS	
<p>33. What enforcement arrangement should apply in relation to a breach of the design and distribution obligations or the requirements in an intervention?</p>	<p>We submit that the remedies for breach of the PDDD or an intervention order should be consistent with the remedies for equivalent obligations under the Corporations Act, which are generally currently criminal offences. The introduction of the PDDD and the power should not pre-empt the work of the Taskforce established by the Government to review ASIC's enforcement regime.</p>
<p>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?</p>	<p>We support FSC's submission on this point.</p>