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Financial Services Unit  
Financial System Division  
The Treasury  
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By e-mail: [ProductRegulation@treasury.gov.au](mailto:ProductRegulation@treasury.gov.au)

**Property Funds Association of Australia: Design and Distribution Obligations and Product Intervention Power Proposals Paper**

We welcome the opportunity to make a submission in respect of the Design and Distribution Obligations and Product Intervention Power Proposals Paper released in December 2016.

By way of background, the Property Funds Association of Australia (**PFA**) is the peak body industry body representing the Australian unlisted wholesale and retail property funds sector, currently some \$125 billion in size.

We have provided our comments to each of the questions you have raised in your Proposals Paper in the following pages.

We again thank you for the opportunity to provide this submission.

Should you have any questions in respect of our submission, please do not hesitate to contact myself ([paul.healy@propertyfunds.org.au](mailto:paul.healy@propertyfunds.org.au)) as we would be happy to be part of the dialogue of the consultation process.

A handwritten signature in black ink, appearing to read 'Paul Healy', with a stylized flourish at the end.

**Paul Healy**  
**Chief Executive Officer**  
**Property Funds Association of Australia**

## PART 2: RANGE OF PRODUCTS COVERED BY THE MEASURES

### Question 1

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)?*

### Question 1: PFA Response

Arguments can be made to exclude simple or otherwise well regulated products. However, if the obligations are to apply to all products except for ordinary shares, it is preferable to have a flexible and scalable approach which recognises that the complexity of products differs and that the extent of the obligation will differ depending on the complexity of the product.

The PFA submits that interests in managed investment schemes, particularly units in unit trusts, are similar to shares in being well known to investors and are also well regulated under Chapter 5C of the Corporations Act and ASIC Act. If distributors and issuers of ordinary shares are not subject to the proposed design and distribution obligations then neither should they apply to units in investment trusts as equivalent financial products.

### Question 2

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.*

### Question 2: PFA Response

The PFA agrees with the design and distribution obligations and the product intervention power only applying to products made available to retail clients.

### Question 3

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.*

### Question 3: PFA Response

The PFA considers that credit products should not be subject to the design and distribution obligations for the reasons outlined in the paper as credit is sufficiently regulated.

#### Question 4

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.*

#### Question 4: PFA Response

The PFA does not believe that the product intervention power should be broader. It is unnecessary.

### PART 3: DESIGN AND DISTRIBUTION OBLIGATIONS

#### Question 5

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?*

#### Question 5: PFA Response

Yes, the PFA agrees with aligning the definition of issuer with the definition set out in the Corporations Act, so that issuers are the entity that is responsible for the obligations owed under the terms of the facility that is the product.

#### Question 6

6. *Do you agree with defining distributors as entity that arranges for the issue of a product or that:*
- (i) *advertise a product, publish a statement that is reasonable likely to induce people as retail clients to acquire the product or make available a product disclosure document for a product; and*
  - (ii) *receive a benefit from the issuer of the product for engaging in the conduct referred to in (i) or for the issue of the product arising from that conduct (if the entity is not the issuer).*

#### Question 6: PFA Response

This proposed definition is quite broad, particularly where the extension of obligations covers entities that are not currently licensed. The PFA considers that the definition of distributors should be limited to licensees and their authorised representatives. If obligations are imposed on issuers in relation to all distributors of their products, the PFA would welcome a due diligence defence or safe harbour for issuers who have sought to engage appropriate distributors and distribution channels on a reasonable basis.

#### Question 7

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?*

#### Question 7: PFA Response

No, the PFA does not consider that any design and distribution obligations should be extended to entities other than those currently contemplated.

### Question 8

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?*

### Question 8: PFA Response

Yes, the PFA agrees with excluding personal financial product advisers from the obligation placed on distributors.

### Question 9

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?*

### Question 9: PFA Response

No, the PFA considers that any product design and distribution obligations should only apply to licensed product issuers and distributors. If the obligations apply to unlicensed entities, we consider that the entities that are covered by the regulatory sandbox exemption should be excluded from the obligations.

The PFA envisages that ASIC would have the power to grant exemptions in appropriate circumstances.

### Question 10

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?*

### Question 10: PFA Response

At a high level, the PFA agrees that issuers should identify appropriate target and non-target markets for their products, although the PFA queries how in a digital world issuers could be responsible for determining a target and non-target market.

The PFA is concerned to ensure that the obligations do not place too high a burden on issuers. This would be unfair and also increase compliance costs and the costs of products to clients. ASIC should provide specific guidance and examples of what this obligation entails. In particular, will consumer testing be required for any product proposed for the retail market? The PFA considers that a high level/principle-based obligation should be set out in legislation and the detail around considerations for determining target markets should be set out in ASIC guidance rather than legislation. Some relevant considerations for determining a target market would be the level of wealth and income, age, risk level and the financial literacy of target clients.

The PFA also submits that the obligations should not apply to overseas clients.

### Question 11

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)?*

### Question 11: PFA Response

No response to question 11 as this is not applicable to PFA members.

### Question 12

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.*

### Question 12: PFA Response

The PFA agrees that issuers should select distribution channels and marketing approaches for their products that are appropriate to the identified target market. However, this obligation should be subject to a reasonable steps or good faith defence. Again, the PFA considers that a high level obligation to select appropriate distribution channels should be included in legislation with further detail around relevant considerations set out in ASIC guidance.

### Question 13

13. *Do you agree that issuers must have regard to the customers a distribution channel will reach, the risks associated with a distribution channel, steps to mitigate those risks and the complexity of the product when determining an appropriate target market? Are there any other factors that issuers should have regard to when determining appropriate distribution channels and market approach?*

### Question 13: PFA Response

The PFA agrees that the factors set out above would generally be relevant considerations for determining an appropriate distribution channel. However, the PFA recommends that any obligation or guidance provided in relation to this selection would acknowledge that the appropriate considerations for determining distribution channels will depend on the particular product and that issuers must act reasonably in making any determination.

### Question 14

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?*

### Question 14: PFA Response

The PFA considers that any periodic reviews should be undertaken based on what is reasonable and appropriate having regard to the nature and class of the product as well as the selected distribution channel. The obligation should not be a blanket obligation where a set review standard and frequency applies across the board, regardless of the complexity of the product or the types of distribution channels that are in place, for example.

The PFA submits that issuers should not have to periodically review products that are no longer offered. For example, this would include funds that have terminated but also funds that have launched but are no longer open for investment. Conducting any post-offer reviews is likely to be expensive and will take up a significant amount of resource, however, we consider that conducting any such review on products that are no longer offered would be disproportionately burdensome compared to the benefits any such review could yield.

The PFA also considers that it should be clear that the review is to ensure the selected distribution channel continues to be *appropriate* for the product and that no higher standard should be imposed.

In relation to reporting to ASIC on distributors, if this requirement is to be imposed, appropriate protections for whistle-blowing and breach of confidentiality should be attached.

#### **Question 15**

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

#### **Question 15: PFA Response**

The PFA would welcome less detail to be prescribed in legislation and ASIC Regulatory Guides and would welcome the issuance of guidance by ASIC, which would give the industry some guidelines on the procedures issuers and distributors should have in this area.

#### **Question 16**

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?*

#### **Question 16: PFA Response**

Yes, the PFA agrees that distributors must put in place reasonable controls. However, the emphasis here should be on the word "reasonable", which the PFA would not see as a blanket standard to be applied across the board. Rather, the controls that a distributor should put in place should vary depending on what controls would be reasonable and appropriate having regard to the type of product and distribution channels. As discussed above, the PFA is concerned that the obligations may place too high a burden on issuers. Issuers will require specific guidance.

#### **Question 17**

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

#### **Question 17: PFA Response**

Wholesale consumers should be able to invest in any product they choose. Retail consumers outside the identified target market should be able to access a product through obtaining personal financial advice. However, the PFA considers the access of non-target-market consumers shouldn't be limited to where the consumer obtains personal advice, which presents an additional cost for the consumer. Consumers should be able to choose what they invest in, provided adequate disclosures are made. Another option could be that consumers go

through a form of self-testing before investing in a product to establish for themselves whether the product is suitable.

#### **Question 18**

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

#### **Question 18: PFA Response**

If the consumer has invested subsequent to personal advice or to a form of self-testing then no additional protections should apply.

#### **Question 19**

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

#### **Question 19: PFA Response**

The PFA agrees that reasonable requests should be complied with. The PFA does not, however, agree that distributors should have to put in place monitoring procedures. If issuers have to undertake periodic reviews to ensure the target market and distribution channel remains appropriate, there should not be an overlap with the obligations on distributors to put in place monitoring procedures. The obligation should be on the issuer to conduct the periodic review, and it should be able to delegate certain parts of that to the distributor if it makes sense to do so and make requests of the distributor to assist, for example, collection of certain data on the target market for the review. However, the PFA submits that there should not be a separate obligation on distributors to put in place monitoring procedures. Distributors should comply with reasonable requests from issuers to enable the issuers to carry out the periodic review, which could cover monitoring if the issuer so requires and should be under a general obligation to cooperate with the issuer. In many cases the issuer and the distributor will be the same entity.

#### **Question 20**

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

#### **Question 20: PFA Response**

See response to question 19 above. The PFA submits that obligations should be on the issuer who can then delegate / request the assistance of the distributor and the distributor will have a general obligation to cooperate with the issuer. The PFA therefore submits that there is no need to detail distributor obligations in legislation or ASIC guidance.

#### **Question 21**

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.*

#### **Question 21: PFA Response**

The PFA does not agree with the obligations applying 6 months after they receive Royal Assent for products not previously made available to consumers. The proposed transition period for

new products is particularly short, given the potential changes to systems and processes for both issuers and distributors which will likely need to be put in place to meet the new requirements. Accordingly, a period of at least 12 months would recognise the practical implications of implementing these reforms.

## Question 22

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.*

### Question 22: PFA Response

The PFA considers a transition period of at least 2 years is required. This is because of the many practical issues which will arise from implementing the reforms. In relation to legacy products consideration should be given to excluding them from the obligations on the basis that they are no longer being distributed.

## PART 4: PRODUCT INTERVENTION POWER

### Question 23

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.*

### Question 23: PFA Response

The PFA does not generally support the introduction of a product intervention power for ASIC, on the basis that ASIC already has an extensive regulatory toolkit and in circumstances where there has been no breach or suspected breach of the law. ASIC has issued extensive regulatory guidance on product disclosure, with specific disclosure guidance for debentures and notes, over-the-counter contracts for difference (CFDs), unlisted mortgage schemes, unlisted property schemes, infrastructure entities, agribusiness schemes and hedge funds, in addition to its advertising guidance.

ASIC also has a range of significant enforcement powers under the Corporations Act, including in relation to financial services licensing. ASIC also has the power, following a hearing, to issue a stop order where a Product Disclosure Statement is defective or is not clear, concise and effective. ASIC may also issue an interim stop order without consulting the issuer where it considers a delay would be prejudicial to the public interest. The issue of stop orders can have significant consequences for an issuer and as such ASIC may be able to have significant influence on disclosures made by an issuer facing a stop order.

A key concern seems to be to facilitate targeted early intervention by the regulator, rather than waiting for legislative intervention. This may be beneficial in some instances. However, the power has the potential to stifle innovation and create uncertainty. Accordingly, if the new power is introduced it is essential to have accountability and clear guidelines on use of the power. As suggested in the Financial System Inquiry Report, the power should only be used as a last resort or pre-emptive measure where there is risk of significant detriment to a class of consumers.

#### **Question 24**

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

#### **Question 24: PFA Response**

The PFA does not consider that there are other interventions which ASIC should be able to make. In particular, it is noted that remuneration is otherwise regulated as part of the FoFA reforms.

#### **Question 25**

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?*

#### **Question 25: PFA Response**

We consider it is appropriate to require ASIC to have regard to these factors. In determining the potential scale of detriment, we consider that it should only be based on a high degree of likelihood of a significant financial detriment occurring on a group and individual basis.

#### **Question 26**

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?*

#### **Question 26: PFA Response**

Yes, the PFA agrees that there should be a requirement both to undertake consultation and to consider the use of alternative powers prior to exercising the intervention power, given the potential consequences flowing from the use of the power.

The consultation process with affected issuers would be a key part of ensuring that the industry has an opportunity for all relevant issues to be considered prior to use of the power and that ASIC has all relevant information available to it. The Proposals Paper notes that for market-wide intervention, public consultation is likely to be the most appropriate. We agree that public consultation is preferred for proposed market-wide interventions, particularly in order to give both affected issuers and other stakeholders an opportunity to provide comments and information to ASIC. Any consultation process should also provide a reasonable period for consultation, although it is noted that a more streamlined process is proposed where risk to consumers is imminent which may be limited to discussions with a few major issuers likely to be affected by the intervention. Even in those circumstances, for proposed market-wide interventions, public consultation would allow other affected issuers and stakeholders an opportunity to provide relevant information to ASIC even if the process itself is more streamlined.

The consideration of the use of other powers by ASIC is appropriate, including because the purpose of the product intervention power seems to be to supplement ASIC's regulatory toolkit to provide a proactive power rather than to replace other existing powers which may be more appropriate in individual circumstances.

### **Question 27**

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?*

### **Question 27: PFA Response**

Yes, the PFA agrees with ASIC being required to publish information on intervention, the consumer detriment and its consideration of alternative powers. A high degree of transparency in relation to ASIC's exercise of the power will assist the industry to understand ASIC's approach to its exercise and assist in accountability for ASIC's use of the power.

### **Question 28**

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.*

### **Question 28: PFA Response**

The PFA considers that any period of any longer than 18 months would not be appropriate and proposes instead a period of 12 months as any longer period could adversely affect an issuer's ability to re-enter the market. The PFA considers there should be no ability for extensions of the intervention (or if there is, it should not be without the leave of a court of competent jurisdiction). While the proposed time period for the intervention should allow sufficient time for the Government to consider whether to make any permanent policy changes, if an extension is required, it is preferable for industry to have certainty about the terms and duration of any intervention.

### **Question 29**

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?*

### **Question 29: PFA Response**

If an ASIC intervention is subject to administrative or judicial appeal, then there should be a right to obtain a stay of any permanent intervention and any necessary interim orders to clarify the terms of the initial intervention if the initial intervention period will expire before the appeal has been determined. An appeal should not automatically extend the duration the Government has to make an intervention permanent.

### **Question 30**

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

### **Question 30: PFA Response**

Further consultation with affected issuers should be a prerequisite before any permanent intervention is made, the form of which may differ depending on whether the intervention is market wide or individual. Usual appeal mechanisms of administrative and judicial review should apply.

### **Question 31**

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

#### **Question 31: PFA Response**

The issuance of clear guidelines on the use of the power may assist to provide some clarity around when and how the product intervention power may be used. In addition, the consultation process will be key to ensuring that issuers have an opportunity to respond to concerns in relation to a particular before the power is exercised.

#### **Question 32**

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

#### **Question 32: PFA Response**

We consider there should also be a transitional period for introduction of the powers at least equivalent to the period applicable to the product distribution and obligation obligations. This would enable time for any relevant ASIC guidance on the use of the power to be issued and for industry to become familiar with them. The PFA recommends at least 12 months.

### **PART 5: ENFORCEMENT AND CONSUMER REDRESS**

#### **Question 33**

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

#### **Question 33: PFA Response**

Any enforcement arrangements should be proportionate to the seriousness of the offence. Administrative actions such as cancellation of a financial services licence will not be an appropriate outcome in all instances. Under section 915B(3)(c), ASIC already has the power to suspend or cancel the licence of a responsible entity of a registered scheme whose members have suffered or are likely to suffer loss or damage because of a breach of the Corporations Act and ASIC has the power under section 915C to suspend or cancel a licence, after a hearing, including where the licensee has not complied with their obligations under section 912A. We do not consider it necessary for these powers to be broadened in this context.

#### **Question 34**

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?*

#### **Question 34: PFA Response**

The potential range of redress suggested in the Proposals Paper includes remedies enabling a consumer to seek a refund or obtain a replacement product at no extra cost. Any redress such as proposed withdrawal from a management investment scheme will need take into account the liquidity of the scheme and the potential impact on other investors in that scheme. One investor should not be paid back their investment in an illiquid scheme where other investors do not have that same right and contrary to the withdrawal provisions in Part 5C.6 of the Corporations Act.