



ASIC

Australian Securities & Investments Commission

Design and distribution obligations and product intervention power: Revised exposure draft legislation

Submission by the Australian Securities and Investments Commission

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Overview

- 1 The Australian Securities and Investments Commission (ASIC) welcomes the Australian Government’s release in July 2018 of the revised exposure draft of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (revised exposure draft legislation). We support the Government’s commitment to:
 - (a) creating new design and distribution obligations in relation to financial products; and
 - (b) strengthening consumer protection by introducing a product intervention power for ASIC.
- 2 Both reforms represent a fundamental shift away from relying predominantly on disclosure to drive good consumer outcomes, and are central to realising the vision of the Financial System Inquiry (FSI) of promoting consumer trust in the system and fair treatment of consumers.
- 3 We support the following clarifications to the design and distribution obligations under the revised exposure draft legislation:
 - (a) an explicit requirement that the target market determination be made publicly available, to mitigate evidential difficulties with substantiating non-compliance. We also think this will promote consumer engagement because consumers will be able to more easily compare products and better understand who they were intended for;
 - (b) that a target market determination must be made before the provision of a disclosure document to retail clients;
 - (c) that personal advisers will continue to be required to keep records to ensure the effective operation of the design and distribution obligations;
 - (d) that consumers will be able to commence a civil action for losses resulting from an issuer’s failure to notify, or a distributor’s failure to follow, instructions to stop distributing, in the event of a review being triggered;
 - (e) the alignment of criminal penalties with penalties for similar provisions across the *Corporations Act 2001* (Corporations Act) for failing to:
 - (i) cease distribution where a distributor knows that an issuer has taken steps to inform distributors that distribution should cease;
 - (ii) notify an issuer of a significant dealing outside the target market;
 - (iii) notify ASIC of a significant dealing outside the target market; and
 - (iv) provide ASIC with information on request.
- 4 We strongly support the extension of the product intervention power under the revised exposure draft legislation to funeral expenses insurance, certain extended warranties that are functionally equivalent to add-on insurance,

and short-term credit that is currently not regulated under the *National Consumer Credit Protection Act 2009* (National Credit Act).

- 5 While we welcome these changes, we consider that coverage of both the new design and distribution obligations and the product intervention power should be expanded:
- (a) for the design and distribution obligations, to cover:
 - (i) credit products;
 - (ii) products that are only regulated by the ASIC Act; and
 - (iii) the establishment of a self-managed superannuation fund (SMSF);
 - (b) for the product intervention power, to:
 - (i) cover all products that are only regulated by the ASIC Act; and
 - (ii) permit ASIC to make an intervention in relation to training.

Extending the reforms to products that are only regulated by the ASIC Act

- 6 Whilst most consumer financial products are regulated in detail under Ch 7 of the Corporations Act and most consumer credit products are regulated in detail under the National Credit Act, there are a number of products sold to consumers which are financial in nature, but which are not covered by or are exempted from those two pieces of legislation. They are only covered by the ASIC Act, which provides broad general consumer protection through, for example, prohibitions on misleading or deceptive conduct and unconscionable conduct.
- 7 Nevertheless, these “ASIC Act only” products are often functionally equivalent to and directly substitutable for products that are regulated in detail (for example, funeral expenses policies, extended warranties and certain buy now pay later arrangements). In ASIC’s experience, these ASIC Act only products can at times be a source of significant consumer detriment. With changes in technology, it is likely that further substitute products will develop.
- 8 We are supportive of the Government’s proposal to include some ASIC Act only products¹ (including funeral expenses products) within the scope of the product intervention power. However, we think the product intervention power should apply to all ASIC Act products, so that we are armed with an effective tool to reduce harm arising from all products within our broader remit. An example of an emerging sector that would not fall within the current scope of the product intervention power, depending on the structure of the arrangement, is buy now pay later arrangements.

¹ Revised Exposure Draft Explanatory Memorandum, p. 45, paragraph 2.24. These products are funeral expenses insurance, certain extended warranties that are functionally equivalent to add-on insurance, and short-term credit that is currently not regulated under the National Credit Act.

- 9 We also think that the design and distribution obligations should apply to all ASIC Act products, rather than only Corporations Act products (as currently proposed). We think this would provide a foundational framework that sets universal standards for these products. In turn, we think this would help address some instances of consumer detriment that we have seen in this area.
- 10 Finally, we consider that the product intervention power should include an ability for ASIC to require improvement to the training of staff selling the product when we identify harm arising from a product being distributed by staff who do not have adequate knowledge of the risks, features and benefits of that product. The power, as proposed, would not allow ASIC to intervene in relation to training.

Design and distribution obligations

- 11 We support and are committed to implementing the new design and distribution obligations under the revised exposure draft legislation. We welcome their broad coverage across financial products that are both relatively simple and more complex.
- 12 The design and distribution obligations will overcome gaps in the current regulatory regime across the lifecycle of financial products and promote better, fairer outcomes for consumers by encouraging:
- (a) the development of financial products that are appropriately designed for the consumers for whom they are intended;
 - (b) distribution processes and controls that reduce the chance that products will be issued to consumers for whose objectives, financial situations and needs they are not appropriate; and
 - (c) a dynamic and responsive process where product design and distribution is reviewed and improved in response to feedback and experience.
- 13 We expect that the obligations would formalise what consumers currently expect a well-run financial services business, focused on treating its customers well, would already do, such as:
- (a) having in place appropriate processes and controls around product approval and development;
 - (b) thinking about the distribution channels it develops or selects to ensure that products are directed at the appropriate target market, and avoid significant sales outside of that target market;
 - (c) ensuring that there are clear communications between issuers and distributors; and

- (d) having in place systems to support ongoing record keeping and monitoring of compliance with processes and controls, as well as the monitoring of outcomes for consumers for whom the product is intended (as a cohort), and any signs of problems being experienced.

- 14 We note that the FSI specifically considered imposing an individual suitability assessment, but ultimately did not recommend that approach.² We therefore anticipate that ASIC's surveillance and enforcement work in relation to the design and distribution obligations will focus on ensuring that businesses have effective product governance processes and controls in place to ensure that any product they issue is appropriate for the class of persons at which it is aimed (the target market), and that these processes and controls are being properly followed.
- 15 To support industry's implementation of the design and distribution obligations, ASIC will provide regulatory guidance. We intend to undertake consultation on this as soon as possible after legislation is passed by Parliament.
- 16 We support the design and distribution obligations applying as broadly as possible. As currently proposed, the obligations would not apply to credit products regulated under the National Credit Act. As discussed in Section A, we consider that the responsible lending obligations and other consumer protections are not equivalent to, or an adequate substitute for, the proposed design and distribution obligations. We think the new obligations would provide a foundational framework for ensuring that credit providers have appropriate product governance processes and controls in place to ensure products are well designed and distributed with a view to consumers' objectives, financial situations and needs. This outcome is quite separate and distinct from the purpose of the responsible lending obligations, which is to reduce the potential for individual consumers to suffer hardship as a result of inappropriate lending.
- 17 The obligations, as currently proposed, would also not apply to products that are exempt or receive concessional treatment under the Corporations Act or the National Credit Act, even if they are regulated under the ASIC Act. As discussed in Section A, we think that there are strong policy grounds for applying design and distribution obligations to these products too.

² The Australian Government the Treasury, [Financial System Inquiry: Final report \(PDF 4.8 MB\)](#), report, 7 December 2014, pp. 201–5.

Product intervention power

- 18 The introduction of a product intervention power will better equip ASIC to respond to market problems that are causing or could cause harm to consumers.
- 19 Providing ASIC with a product intervention power will not mean we can prevent all losses. The product intervention power is not a prudential tool, and will not necessarily prevent product failures or collapses. There will still be risk in the financial markets.
- 20 However, the product intervention power will help us to:
- (a) act more quickly and effectively to address the causes of problems in the market;
 - (b) reduce the number of consumers for whom the risks of a product are misaligned with their objectives, financial situation and needs; and
 - (c) facilitate informed decision making by consumers.
- 21 The product intervention power will provide us with a more timely and responsive regulatory tool than relying on legislation alone to address gaps in the current law.
- 22 We envisage that:
- (a) we would generally only use the product intervention power after a significant process of evidence gathering and consultation;
 - (b) we would look for interventions that represented the most targeted and appropriate regulatory solutions to address identified practices causing detriment, in order to improve consumer outcomes;
 - (c) we would only use more interventionist measures if low-intensity interventions had not or would not address the particular market problem;
 - (d) given the flexible nature of the power, we could withdraw an intervention if the problem has been resolved or if the intervention were not effective; and
 - (e) the consultation process we would undertake with industry before imposing an intervention could potentially be a catalyst for industry to develop its own solution to the market problem we have identified, alleviating the need for formal intervention.
- 23 The product design and distribution obligations and the product intervention power will work together in the interests of consumers. If the design and distribution obligations are being complied with, there will be less need for ASIC to exercise the product intervention power.
- 24 We note that the product intervention power will be introduced with rigorous procedural and accountability requirements for ASIC, including

- requirements around consultation and the release of a statement by ASIC setting out, among other things, why the order is an appropriate way of reducing significant consumer detriment. To provide greater transparency, we will undertake consultation on our approach to using the product intervention power after legislation is passed by Parliament.
- 25 Under the approach taken in the revised exposure draft legislation, we would not be able to make interventions relating to products that are only regulated under the ASIC Act except where specified by the proposed regulations for the revised exposure draft legislation.
- 26 We think the product intervention power should extend to all ASIC Act products. This gap in coverage could grow and present a challenge for the regulatory system, as new products and ways of delivering them arise, potentially bringing with them new sources of poor outcomes for consumers.
- 27 A product intervention power that is as broad and as flexible as possible would permit ASIC to develop measured, comprehensive and appropriate regulatory solutions to address the range of market problems we see. If the product intervention power is not sufficiently broad, this risks expectations about our ability to use the power to address market problems not being met.

About this submission

- 28 ASIC welcomes the opportunity to comment on the revised exposure draft legislation and provide input into its development. Our submission sets out observations and issues for consideration about both the design and distribution obligations and the product intervention power.
- 29 Section A expresses support for the proposed broad coverage of the design and distribution obligations, but proposes that the obligations could be applied to a broader range of products, including credit products.
- 30 Section A also notes that the penalties in the legislation should be aligned with the increased penalties proposed by the ASIC Enforcement Review Taskforce, which have been accepted by Government.
- 31 Section B outlines support for a product intervention power that:
- (a) covers the full range of financial products and credit products that are accessed by consumers, within ASIC's regulatory remit (including all products regulated under the ASIC Act); and
 - (b) can be used to make targeted interventions relating to all circumstances in which a product is distributed, including improving the training of those involved in distribution to address particular problems.

A Design and distribution obligations

Key points

We support the proposed approach in applying the design and distribution obligations across most financial products, with a few limited exceptions. We think the obligations should also extend to products regulated under the National Credit Act and the ASIC Act.

The success of the reforms will also depend on having appropriate enforcement mechanisms and penalties in place.

- 32 We welcome the Government’s consultation on the revised exposure draft legislation to introduce design and distribution obligations in relation to financial products. The obligations will require issuers and distributors to put in place (and follow) appropriate product governance processes and controls. The obligations should therefore operate as a framework to ensure a fair, foundation level of consumer protection, including that products are well designed and distributed consistent with consumers’ objectives, financial situation and needs.
- 33 We are very supportive of the design and distribution obligations and we consider that they have the potential to significantly improve consumer outcomes. However, key factors in the ultimate success of these obligations will include:
- (a) how widely these obligations will apply; and
 - (b) the enforcement mechanisms and penalties associated with non-compliance.
- 34 This section outlines why we support the approach taken in the revised exposure draft legislation—in applying the design and distribution obligations across as wide a range of financial products as possible, with the starting point that the obligations should apply to all financial products made available to retail clients under the Corporations Act with some exceptions (e.g. ordinary shares).
- 35 It also outlines our view that the design and distribution obligations should be extended to apply to all financial products and credit products regulated under the National Credit Act and the ASIC Act to comprehensively address gaps in the current regulatory regime and to avoid potential regulatory arbitrage in issuers choosing to issue financial products that:
- (a) are regulated by ASIC under the ASIC Act; and
 - (b) are functionally equivalent to products regulated under the Corporations Act or the National Credit Act, but technically exempted from regulation under those Acts; and

- (c) would therefore not be subject to the design and distribution obligations.

36 Finally, this section also sets out our view that enforcement mechanisms and penalties should ultimately reflect the recommendations and Government response to the ASIC Enforcement Review Taskforce.

Scope of the design and distribution obligations: Support for a broad and comprehensive approach

37 Through our regulatory work, we have identified specific consumer issues that are currently not well addressed due to gaps in the current regulatory regime. These issues include:

- (a) products that are not well designed to provide utility (e.g. value for money) to many types of consumers;
- (b) products that are only likely to be suitable for a limited class of consumers, but are distributed without appropriate targeting, making it likely that they will ultimately be sold well beyond the class of consumers for which they are suitable; and
- (c) instances where the volume and types of complaints entities are receiving suggest the distribution process is not working effectively to align customers with suitable products, but no action is taken.

38 It has been recognised for some time that disclosure alone is not working to drive fair consumer outcomes—for example, FSI noted that disclosure alone is unlikely to correct the effect of broader market structures and conflicts that drive product development or distribution practices that result in poor consumer outcomes³.

39 Additionally, while the 2012 Future of Financial Advice (FOFA) reforms have achieved significant changes in the advice area, regulation around the design and distribution phases (unless advice is provided) is not subject to similarly focused regulation. This is despite the fact that there are many products that are distributed without advice and that the quality of the design and distribution phases also independently impacts outcomes for consumers, whether or not advice is provided.

40 The missing element has been regulation designed to improve the fairness of the design and distribution process. In identifying this, the FSI recommended that product issuers and distributors take greater responsibility for the design and targeted distribution of products to promote positive consumer outcomes:

³ The Australian Government the Treasury, [Financial System Inquiry: Interim Report \(PDF 3.21MB\)](#), report, July 2014, p. 3-57.

Currently, in seeking to align commercial incentives with consumer outcomes, the regulatory framework is focused on point of sale. Recent examples of poor conduct suggest the alignment needs to start at the point of product design, and then be strengthened through distribution and advice.⁴

- 41 Noting the range of problems that had been seen across different types of products, the FSI’s model was for scalable obligations that would apply broadly, to both relatively simple and more complex products. We support this, and welcome the fact that this approach has been taken in the revised exposure draft legislation.
- 42 While we support the broad coverage proposed for the design and distribution obligations, we acknowledge that, given the range of products covered, this may raise a variety of different compliance issues for particular issuers or distributors. We will work with Treasury to understand feedback provided to it as part of its consultation on the revised exposure draft legislation, and with industry when developing our guidance on how to comply with the obligations.
- 43 We have identified mis-selling and distribution problems across the spectrum of financial products, from those sometimes described as ‘simple’ to highly complex products. Even products with relatively limited features can be sold inappropriately to a consumer, in that the product is not consistent with the consumer’s objectives, financial situation or needs.
- 44 As outlined in the examples below, even at the relatively simple end of the spectrum, there is some variation in the features and conditions that attach to basic banking products—such that not all basic banking products will meet the needs of all consumers.

Example 1: Applying design and distribution obligations to basic banking products

Transaction accounts

Banks may offer both basic and fully featured transaction accounts, with differing fee levels. Due to their objectives, financial situation or needs, a consumer may not require a fully featured transaction account. Yet if they are sold this product, they may be paying ongoing fees to retain those features.

Banks may offer basic deposit products designed to meet the needs of vulnerable consumers. Yet if these products do not reach their target market, these consumers will not receive the benefits of these products and may select or be sold a product that is less appropriate to meet their needs. A framework around the distribution of these products could assist

⁴ The Australian Government the Treasury, [Financial System Inquiry: Final report \(PDF 4.8 MB\)](#), report, 7 December 2014, p. 193.

in preventing these issues and ensure that consumers receive products that are more consistent with their objectives, financial situation and needs.

Similarly, some products may provide a better return if certain conditions are met (e.g. depositing a minimum amount each month). Marketing for those products should be targeted accounting for the fact that consumers who have no prospect of having the financial resources to meet such conditions will not benefit—and indeed may suffer a detriment—from taking out that product rather than another simpler product.

Term deposits

Our reviews of term deposits in 2010 and 2013 found that authorised deposit-taking institutions (ADIs) promoted their term deposits by advertising the high interest rates available on a limited number of term deposit periods, while maintaining significantly lower interest rates for all other deposit periods ('dual pricing'). This resulted in many customers receiving significantly lower interest rates if they stayed with their provider through automatic rollover of their deposit: see [Report 185](#) *Review of term deposits* (REP 185), February 2010, and [Report 353](#) *Further review of term deposits* (REP 353), July 2013.

While we have taken action to address this issue, the example demonstrates that mis-selling can occur even with the most simple of financial products. Targeted distribution can assist in addressing this issue by ensuring that, for example, term deposits that have terms better suited to those prepared for active management of the product are targeted to those consumers.

Additionally, the term deposit experience indicates the importance of product issuers monitoring and adjusting their marketing in response to high volumes of consistent customer complaints. At the time, complaints should have made it clear to term deposit issuers that there was a misalignment between:

- customer expectations (of a product that would over time produce reasonable returns consistent with the overall cost of funds, and which did not require active management of the product); and
- the product actually received (where rates changed dramatically, unrelated to the cost of funds or economic fundamentals, and where very close active management of the product was required).

However, in the absence of design and distribution obligations, there was no positive obligation on issuers to monitor complaints or adjust their marketing.

- 45 Similarly, in the area of insurance, consumer outcomes would be significantly improved with the introduction of an obligation requiring product issuers and distributors to consider the particular needs of the target market for different forms of insurance, and the distribution strategies needed to ensure this works effectively.

Example 2: Distribution practices in home insurance

In our [Report 415](#) *Review of the sale of home insurance* (REP 415), we noted that, while all insurers we surveyed provided consumers with comprehensive information and disclosure for home insurance products (mainly through their websites and within formal disclosure), most consumers did not read these disclosures. In general, consumers knew very little about the scope and details of their home insurance policy.

We identified some elements of the distribution process that, if improved, may better assist consumers to select the right product and level of cover, and made a number of good practice observations on how this might be achieved. Having design and distribution obligations in place, including requirements to take reasonable steps to ensure distribution is consistent with a product's target market determination, might have helped address some of these issues.

- 46 In recommending the inclusion of simpler products like basic banking products, the FSI noted that compliance with the obligations would likely be relatively straightforward when the products are likely to be suitable for most consumers. While the FSI noted that simple, low-risk products such as basic banking products would not require extensive consideration and could be treated as a class, with a standard approach to their design and distribution, it still emphasised that the obligations should be universal and scalable. In our view, requiring issuers and distributors to turn their mind to the appropriate design and distribution of products is appropriate even when the products in question are relatively simple.
- 47 While complexity can be a relative concept where financial products are concerned, we have identified product structures and features that are inherently more likely to make a product complex. Our [Report 384](#) *Regulating complex products* (REP 384) outlined some of these products. Complexity in products is significant because it may increase the likelihood that investors misunderstand the nature of a product and its risks. As we outlined in paragraph 3 of REP 384:
- This can lead to an investor acquiring a product that is not aligned with the level of risk that they are willing to tolerate, which can in turn have a negative impact on investor confidence if unexpected loss occurs.
- 48 More complex products are also more difficult to describe in a clear, concise and effective manner in disclosure documents. Further, if inappropriate distribution channels are used for offering complex products to investors, this can increase the risk of mis-selling. Accordingly, it is important that product issuers and distributors effectively manage these risks to reduce the likelihood of mis-selling. We think design and distribution obligations are an effective way to encourage the management of these risks, and as a result, improve consumer outcomes.
- 49 While we have worked within the current regulatory framework to improve disclosure and distribution, as well as provided warnings to investors in

relation to these products, we think that issuers and distributors need to take greater responsibility around the design and distribution of these products to ensure that these products are generally consistent with the objectives, financial situation and needs of consumers at whom they are targeted.

Scope of the design and distribution obligations: Extending product coverage

- 50 Under the framework established by the revised exposure draft legislation, the design and distribution obligations would generally apply to financial products made available to retail clients under the Corporations Act with some exceptions (e.g. ordinary shares). As currently proposed, the obligations would *not* apply to:
- (a) credit products issued under the National Credit Act; or
 - (b) financial products and credit products that do not fall within either the Corporations Act or the National Credit Act, but are regulated by ASIC under the ASIC Act (e.g. funeral expenses insurance and certain extended warranties).
- 51 We support extending the design and distribution obligations to the broadest range of financial products and credit products possible.

National Credit Act products

- 52 The revised Exposure Draft Explanatory Memorandum explains that the reason for not applying the design and distribution obligations to credit products regulated under the National Credit Act is that such products are already subject to specific rules such as the responsible lending obligations.⁵ As noted in our previous submission, we consider that the responsible lending obligations and other consumer protections are not equivalent to, or an adequate substitute for, the proposed design and distribution obligations.
- 53 The new obligations provide a foundational framework for ensuring that firms have appropriate product governance processes and controls, that apply to the entire product lifecycle. In contrast, the responsible lending obligations are directed at individual transactions and do not expressly require credit providers to:
- (a) identify appropriate target markets for their products, taking into account whether a product is likely to be consistent with the likely objectives, financial situation and needs of persons within the target market;

⁵ Revised Exposure Draft Explanatory Memorandum, p. 10, footnote 12.

- (b) select distribution channels that are likely to result in products being marketed to the identified target market; and
- (c) periodically review products to ensure that the identified target market and the selected distribution channel continue to be appropriate for the product.

Responsible lending is different

- 54 The regulatory purpose of the responsible lending obligations is to reduce the potential for individual consumers to suffer hardship as a result of inappropriate lending. Overall, responsible lending is transactional in nature. This is quite separate and distinct from the role of the design and distribution obligations, which will establish an underlying framework for ensuring that products are well designed and distributed with a view to consumers' objectives, financial situation and needs.
- 55 Table 1 outlines the differences between the responsible lending obligations and the design and distribution obligations in relation to credit products. It also outlines how the design and distribution obligations would build on the current regulatory regime for credit products.

Table 1: Provision of credit: Regulatory coverage and potential impact of design and distribution obligations

Design and distribution obligations	Equivalent obligations under credit regime	Potential impact of design and distribution obligations
<p>Design obligations</p> <p>Identify appropriate target market for products, taking into account whether a product is likely to be consistent with the likely objectives, financial situation and needs of consumers within the target market.</p>	<p>There are no equivalent obligations under the current credit regime.</p>	<p>In the product design and development phase, credit providers would be required to consider whether the product, its features and costs would likely be consistent with the likely objectives, financial situation and needs of an identified target market—for example, whether the product is more appropriate for consumers who require long-term or short-term credit needs, or those with fewer or multiple existing loans.</p>
<p>Selecting appropriate marketing and distribution channels</p> <p>Select distribution channels that are reasonably likely to result in products being distributed to the identified target market.</p>	<p>There are no equivalent obligations under the current credit regime.</p>	<p>Credit providers would need to consider appropriate distribution channels consistent with the product reaching its intended market—for example, ensuring that high-cost or complex credit or leasing products are not inappropriately promoted to financially vulnerable consumers, or that marketing of interest-only loans is not inappropriately aimed at first home buyers looking for a long-term owner-occupied property.</p>

Design and distribution obligations	Equivalent obligations under credit regime	Potential impact of design and distribution obligations
<p>Distribution</p> <p>Must take reasonable steps so that distribution is consistent with the most recent target market determination.</p>	<p>Credit providers are required under the credit regime to ensure that a particular credit product is 'not unsuitable'.</p> <p>However, credit providers are not required to consider whether a consumer falls within the intended market for the product. This means they are not required to take into account the class of consumers that the issuer has determined they will be most useful and appropriate for.</p> <p>Further, although credit providers will have responsible lending obligations regardless of distribution channel, in some instances the point of sale exemption will apply so that particular distributors will not be required to meet the responsible lending obligations.⁶</p>	<p>At or near point of sale, we think that there would be synergies between the new distribution obligations for product distributors and the responsible lending obligations. In particular, these would arise in relation to the existing requirements to:</p> <ul style="list-style-type: none"> • make reasonable inquiries about a particular consumer's financial situation and the consumer's requirements and objectives in relation to the particular credit contract or consumer lease in question; and • take reasonable steps to verify the consumer's financial situation. <p>If the design and distribution obligations applied, inquiries carried out and information gathered as part of the responsible lending obligations would likely assist the credit provider in determining whether the consumer falls in the target market for a product.</p> <p>However, the responsible lending assessment itself is focused on ensuring the product is not unsuitable for the consumer—that is, the consumer has the capacity to meet the financial obligations under the credit contract or lease and that the contract meets the requirements and objectives of the consumer. In contrast, the distribution obligations would require consideration of whether, at a more general level, the consumer is within the target market for the product.</p>
<p>Post-sale obligations</p> <p>Distributors must provide to issuers the number of complaints about the product and distribution information relating to the product that issuers have specified.</p> <p>Distributors must notify a product's issuer, and an issuer must notify ASIC, of a significant dealing in a product that is not consistent with the product's target market determination.</p>	<p>There are no equivalent obligations under the credit regime.</p>	<p>Credit providers would need to review their target market determination for the credit product where events and circumstances reasonably suggest that the target market determination is no longer appropriate.</p> <p>This might include data on refinances, rates of early payout (to which additional fees may apply), rates of arrears and defaults, or requests for hardship applications.</p> <p>This information would feed back into the product management process.</p>

⁶ For example the exemption can apply where credit is sold through retailers. See reg 23 of the National Consumer Credit Protection Regulations 2010.

- 56 The examples below illustrate the potential benefits of applying the design and distribution obligations to credit products.

Example 3: Payday loans

When consumers make a choice to use payday loans they are seeking to meet their short-term needs (e.g. accessing \$1,000 to pay an electricity bill) potentially at the expense of their longer term needs (to avoid becoming dependent on an expensive form of finance).

The responsible lending obligations require the lender to only consider the consumer's immediate requirements and current financial situation, while the design and distribution obligations propose a more comprehensive analysis of the requirements of the class of consumers that would form the target market for the product. This could result in changes to design, or the clear identification of some classes of consumers who should be offered products on different terms.

Example 4: Home loans

Lenders can offer a range of home loan products with different features and pricing. For example, a lender may offer two similar home loans—one that has an offset account that allows the consumer to reduce the amount payable under the home loan by the interest earned on a savings account, and the other that does not (but is slightly cheaper).

The responsible lending assessment may identify that both loans are not unsuitable. However, the design and distribution obligations could limit the marketing or promotion of the home loan with the offset account to identified classes of consumers likely to benefit from it (for example, not to young consumers on a modest income with no capacity to generate savings). Alternatively, the product may be redesigned so the offset feature is not priced separately.

Addressing demand-side weaknesses and misaligned incentives

- 57 Enhancing the credit regime to include design and distribution obligations is likely to significantly improve consumer outcomes in this sector. The new obligations will promote an efficient, resilient and fair financial services system, encouraging credit providers to take a consumer-centric approach by creating products that do what they say they will do, and ensuring the design of products does not take advantage of consumer biases or lack of knowledge about a product. Such an approach is likely to be effective and efficient in addressing identified demand-side weaknesses and misaligned incentives across this sector.
- 58 Credit products, in particular, have inherent features that rely on a higher level of consumer trust in comparison to many other retail goods and services, as information asymmetries can be particularly hard to overcome. Supply side behaviours that capitalise on consumer biases and/or obfuscate important information (for example, about price, or exclusions) undermine the capacity of consumers to place demand-side pressure on financial

services entities (for example, by choosing products that are better aligned with their interests).

- 59 The Productivity Commission’s final report on competition in the Australian financial system identified choice overload as a demand-side weakness in the credit sector. The report noted that with some credit products ‘there is a large array of options presented to individuals to choose between’.⁷ For example, the report noted that there are nearly 4,000 different residential property loans on offer and over 250 different credit cards. The report explained that this array of products does not necessarily assist the consumer or indicate a greater degree of competition among providers:

While the existence of a large number of marginally different products can allow a closer tailoring to consumer needs, it typically is a choice overload for consumers. It also creates an illusion of choice, and the perception of a greater degree of competition among providers than actually exists.⁸

- 60 The report also explored the impact of choice overload on consumer decision making and how providers can take advantage of this, noting:

While variety and choice at some level are essential components of improved consumer outcomes, the need to decide between a large number of complex and poorly explained options can lead to choice overload ...

When faced with a large number of products or services to choose from, consumers tend to look for one or two pieces of information to make decisions, rather than considering the wider range of benefits and costs. For example, consumers may assess the value of a credit card based on the rewards points and free travel insurance, ignoring the interest rate and other fees.

Product providers are aware that consumers make decisions using this narrowed framing, and advertise and market products in a way which highlights or downplays certain prices or features for commercial gain.⁹

- 61 In relation to credit cards, our [Report 580](#) *Credit card lending in Australia* (REP 580) found that consumers are being provided with credit cards that do not meet their needs. For example, many consumers carry balances over time on high interest rate products, when lower interest rate products would save them money. Some consumers also repeatedly exceed their credit limit. This suggests consumers are not being sold appropriate products.

- 62 Applying the design and distribution obligations to credit products would go some way to addressing these demand-side problems because designers and distributors of credit products will become accountable for ensuring that products are:

- (a) designed with consumer needs in mind; and
- (b) marketed and sold to the section of the population for whom they are useful and appropriate.

⁷ Productivity Commission, [Competition in the Australian financial system: Inquiry report](#), June 2018, pp. 12–13.

⁸ Productivity Commission, [Competition in the Australian financial system: Inquiry report](#), June 2018, p. 13.

⁹ Productivity Commission, [Competition in the Australian financial system: Inquiry report](#), June 2018, pp. 630–1.

63 Further, in requiring credit providers to implement product governance frameworks, the design and distribution obligations will also likely reduce the occurrence of providers designing products or services that maximise their interests over the interests of consumers.

ASIC Act only products

64 We consider the design and distribution obligations should cover financial products and credit products that are not regulated by either the Corporations Act or the National Credit Act, but are regulated under Div 2 of Pt 2 of the ASIC Act.

65 These products are functionally similar to products regulated under the Corporations Act or the National Credit Act, and include certain funeral expenses insurance and certain extended warranties (which may be equivalent to insurance products regulated under the Corporations Act). There are also ‘credit facilities’ that are ASIC Act products but are not regulated by the National Credit Act. This includes some short-term credit products that are outside the National Credit Act because they fall within the exemption for short-term credit in s6 of the National Credit Code, and other credit products that are otherwise not regulated by the National Credit Act.

Note: Section 6 of the National Credit Code outlines types of credit to which the Code does not apply. This includes short-term credit that satisfies certain requirements as to the maximum period of the loan and the maximum amount of credit fees and interest charges that may be imposed.

66 While these products are subject to consumer protection provisions set out in the ASIC Act, this does not provide an equivalent framework to the design and distribution obligations. In fact, such residual products regulated under the ASIC Act but not the Corporations Act or the National Credit Act are currently subject to the least regulation (e.g. because persons dealing in such products are not required to be licensed and comply with the positive conduct obligations attaching to licensees), resulting in a lower level of protection for consumers accessing these products, and creating incentives for regulatory arbitrage.

67 In the course of our regulatory work, we have identified significant consumer detriment in relation to these products and sought to address the problems, albeit with our existing limited toolkit. This has included products that are poorly designed, and that may provide limited utility to many of the consumers to whom they are regularly sold.

68 We have also seen some businesses deliberately structuring their products to avoid the credit and financial services regulatory regimes, often to the detriment of consumers—such products would also not be subject to the design and distribution obligations (although regulated under the ASIC Act). Where these problems are identified, amendments to the current regulatory framework have been proposed by ASIC, and others.

Example 5: Life insurance exemptions

Some forms of life insurance products are not subject to the financial services regulatory regime.¹⁰

On 14 September 2016, the Senate referred an inquiry into the life insurance industry to the Joint Parliamentary Committee on Corporations and Financial Services for report. The report was released on 27 March 2018.¹¹

The report found that:

... consumer protections that currently apply to life insurance are substantially weaker than the consumer protections that apply to other financial and non-financial services and other products sold together with life insurance. This leads to confusion for consumers in understanding and asserting their rights.

The committee also considers that the inconsistent application of consumer protection law also creates inappropriate incentives for industry participants that are subject to weaker consumer protections.

The committee therefore recommended that consumer protections for financial products, including life insurance, be aligned with the Australian Consumer Law.

This recommendation included removing a number of exemptions that the life insurance industry currently enjoys compared to other financial services, including removing the exemptions in s765A(1)(v). To ensure that life insurance industry participants are treated fairly, the committee also recommended that the changes uniformly cover all types of life insurance, all sectors (direct, retail and group), and all industry participants.

Example 6: Funeral expenses products

Funeral expenses products provide a good example of a residual product where specific regulation—such as application of the design and distribution obligations—is appropriate.¹² While funeral insurance is regulated under the Corporations Act, funeral expenses products fall under a technical exemption from the Act. These products provide a benefit for the sole purpose of meeting expenses of, and incidental to, a funeral and burial or cremation.

Like funeral insurance, funeral expenses products are complex and long-term. The concerns identified with funeral insurance can apply equally to funeral expenses products. ASIC Report 454 *Funeral insurance: A snapshot* highlighted that funeral insurance premiums tend to rise steeply for the over-50s and that many people cancel their policy in the first few years, losing the benefit of premiums already paid. The high rate of cancellations points to problems not only with cost, but the design, marketing and sales of funeral insurance. These findings indicate many

¹⁰ A life policy or a sinking fund policy, within the meaning of the Life Insurance Act 1995, issued by an employer to an employee of the employer is exempt under s765A(1)(v) of the Corporations Act.

¹¹ Parliamentary Joint Committee on Corporations and Financial Services, [Life insurance industry](#), March 2018.

¹² The Final Report of the FSI noted that specific regulation within the financial system may be particularly appropriate. We consider that this is especially so for many financial products provided to retail consumers, such as funeral expenses policies, which rely on a high level of consumer trust in comparison to other retail goods and services: The Australian Government the Treasury, [Financial System Inquiry: Final report \(PDF 4.8 MB\)](#), report, 7 December 2014, p. 10.

consumers do not understand important features of the product until after they have signed up.

In addition to these general problems, in the funeral expenses industry specifically, there are few widely available quality competing products and a low number of providers. Consumers in target markets are often on very low incomes. Certain groups of targeted consumers (such as members of Indigenous communities) may also be vulnerable due to cultural, language or financial literacy factors. Distribution channels are limited and are not conducive to vulnerable consumers understanding the product. There is a higher risk that corporate behaviour in connection with the product and its distribution does not meet community expectations.

69 We think applying the design and distribution obligations to the full range of financial products and credit products regulated by ASIC would help address some of these instances of consumer detriment, in requiring product providers and distributors to have more robust controls and processes in place.

70 Indeed, while drafted on the basis that they will form part of the Corporations Act disclosure regimes for financial products, the design and distribution obligations are in many ways similar to the consumer protection standards set out in the ASIC Act, in that they provide a foundational framework that sets some universal standards against which more specific regulation is overlain through the financial services regime in the Corporations Act.

71 We acknowledge that including ASIC Act products would require a modified drafting approach, given these products are not subject to a disclosure requirement (where not otherwise regulated under the Corporations Act). However, we think that the design and distribution obligations have the potential to address some of the problems we have seen in this area.

Example 7: Warranties sold with motor vehicles

ASIC has undertaken a broad range of work with insurers to improve consumer outcomes from the sale of add-on insurance products with cars. These outcomes include:

- significant refunds totalling over \$122 million in recognition of past unfair sales (see [Media Release \(18-008MR\)](#) *Allianz refunds \$45.6 million in add-on insurance premiums* (17 January 2018));
- some insurers voluntarily lowering commissions (from as high as 79% of the premium to around 20% of the premium), and therefore improving the value to consumers, both through lower premiums and in the amount paid back in claims relative to the premium (see

[Consultation Paper 294](#) *The sale of add-on insurance and warranties through caryard intermediaries* (CP 294)); and

- insurers improving the design of their products, so that they better meet the needs of consumers.

However, these changes are not entirely systemic given they have been achieved in some cases through cooperation. Having design and distribution obligations in place would encourage positive change to practices on a more comprehensive basis.

If design and distribution obligations are not extended to ASIC Act only products, the difference in regulation of functionally equivalent products could encourage regulatory arbitrage.

For example, some car dealers currently sell warranties that are functionally similar to mechanical breakdown insurance (MBI) products, as they cover the cost of repairs to the consumer's car. The providers rely on the exemption in s763E of the Corporations Act for products that are an incidental component to another non-financial product (although they would fall within the extended definition of 'financial product' in the ASIC Act).

We have identified that these products may include discretionary pricing—that is, there is no fixed price and the car dealer sells the warranty for the price at which they assess the consumer will agree to it. For example, one consumer may be sold the warranty for \$1,995, while another consumer may be sold the same warranty for \$6,505.

We are concerned that some car dealers may respond to the reductions in commissions that are paid on MBI products by electing to increasingly offer warranties that are not regulated under the Corporations Act, and increase the price they charge for these products.

Applying design and distribution obligations to products regulated under the ASIC Act, including warranty products that are technically exempted from the Corporations Act, would require issuers of these products to meet the same obligations as insurers offering similar products. This would include identifying appropriate target markets and distribution channels for their products—to reduce the risk of products being provided to consumers for whom they are not appropriate.

Additional products to be included by regulation

- 72 The revised Exposure Draft Explanatory Memorandum notes that the Government proposes to make regulations that would apply the regime to a number of products that do not currently require disclosure under the relevant sections of the Corporations Act, including products exempt from disclosure under ASIC legislative instruments such as an interest in an investor directed portfolio service.¹³

¹³ Revised Exposure Draft Explanatory Memorandum, pp. 13–14.

73 We support the coverage of the design and distribution obligations being as broad as possible. We will work with the Government and Treasury in their development of regulations to ensure that any products that are technically exempted because they do not currently require disclosure under the relevant sections of the Corporations Act, including where this results from an exemption under an ASIC legislative instrument.

Self-managed superannuation funds (SMSFs)

74 We support the application of the design and distribution obligations to the distribution of interests in SMSFs, as well as the distribution of other products to SMSFs.

75 Under the approach set out in the revised exposure draft legislation, the distribution of financial products to retail client SMSF trustees would be captured. However, the initial distribution of interests in SMSFs (that is, the establishment of the SMSF) may not be captured by the revised exposure draft legislation. We consider this to be inconsistent with the underlying policy intention to promote the responsible distribution of financial products to retail clients.

76 Under the Corporations Act, there is an exemption from the requirement to give a PDS for the offer of an interest in the SMSF, if the issuer or adviser believes on reasonable grounds that the member has received or has (and knows that they have) access to all of the information that the PDS would be required to contain¹⁴. If this exemption applies, the design and distribution obligations would not apply to the establishment of an SMSF. Where a PDS is required, SMSF trustees would be subject to the obligation to make a target market determination in relation to the issue of an interest in the SMSF. We consider that the obligation to make a target market determination should properly apply to the person (the SMSF promoter) that arranges for or advises on the establishment of the SMSF, in all cases, whether or not the exemption from disclosure applies.

77 We have seen problems with consumers establishing SMSFs when that was not appropriate for them. In particular, we have seen consumers encouraged to set up SMSFs through cold calling, property seminars and online SMSF establishment tools in circumstances where they receive only general advice. These processes will often be focused on promoting the use of superannuation as a way to reduce tax or invest in a particular asset (such as property), without broader consideration as to whether an SMSF is an appropriate retirement savings structure. These SMSF ‘spruikers’ are the SMSF promoters to whom we consider the design and distribution obligations should apply.

¹⁴ See s1012D(2A) of the Corporations Act, and ASIC Regulatory Guide 168 at paragraphs RG168.50 – 168.52.

- 78 We consider that it would be appropriate to make SMSF promoters subject to the design and distribution obligations both to:
- (a) determine a target market for SMSFs, as a class of product; and
 - (b) market, promote and otherwise engage in distribution conduct in relation to the establishment of an SMSF in accordance with that determination.
- 79 Applying the design and distribution obligations to the establishment of SMSFs could have the potential to improve consumer outcomes, particularly in cases where consumers are encouraged or advised to open an SMSF when they only have a low balance, and do not properly understand the risks and ongoing costs involved. In ASIC [Report 575](#) *Improving the quality of advice and member experiences* we found that:
- (a) total expense ratios of SMSFs generally decline as the fund balance increases. As at 30 June 2016, SMSFs with assets of \$50,000 or less had the highest average expense ratio of 14% for total expenses. This compares to SMSFs with assets of more than \$500,000, which had an average expense ratio of approximately 1%; and
 - (b) consumers with a balance of \$100,000 or less had consistently negative returns after expenses across the five-year period 2011–12 to 2015–16.
- 80 Our [Report 576](#) *Member experiences with self-managed superannuation funds* (REP 576) found that SMSFs are not an appropriate retirement savings structure for everyone. Critical considerations will include:
- (a) whether a superannuation balance is enough to justify setting up an SMSF;
 - (b) the cost of setting up and running an SMSF;
 - (c) the time and commitment associated with running an SMSF;
 - (d) the financial literacy skills required to run an SMSF; and
 - (e) succession planning.

We expect that an SMSF promotor would have regard to the above considerations in determining a target market for the establishment of an SMSF.

Example 8: ASIC's report on SMSFs

In 2017, ASIC conducted an in-depth examination of member experiences in setting up and running an SMSF (member research): see [REP 576](#).

The member research highlighted that many members lacked a basic understanding of their SMSF and their legal obligations as SMSF trustees. For example:

- 33% of members did not know that an SMSF must have an investment strategy;
- 30% of members had no arrangements in place for their SMSF if something happened to them;
- 29% of members thought they were entitled to compensation in the event of theft and fraud involving the SMSF; and
- 19% of members did not consider their insurance needs when setting up an SMSF.

The research also identified a significant gap between consumers' experiences and their expectations in that:

- 32% of members found running their SMSF to be more costly than expected (compared with 9% of members who found it less costly than expected); and
- 38% of members found running their SMSF to be more time consuming than expected (compared with 15% of members who found it less time consuming than expected).

These findings suggest that the establishment of an SMSF may not be consistent with the likely objectives, financial situation and needs of many members, even where personal advice is given. Applying the design and distribution obligations to SMSFs, as a class of product, could address these issues by facilitating service providers of SMSFs promoting and recommending these products appropriately.

Enforcement and penalties

- 81 In general, we are very supportive of the fact that the revised exposure draft legislation includes a range of alternative criminal and civil penalty sanctions for contraventions.
- 82 In relation to the enforcement and penalty provisions attaching to the design and distribution obligations as a whole, it is important that the penalties are consistent with any changes arising from the reforms following the review by the ASIC Enforcement Review Taskforce.
- 83 We also support the revised exposure draft legislation providing for a private right of action for retail clients affected by breaches of the design and distribution obligations.
- 84 The relevant breaches are for:
- (a) failure by an issuer to review the target market as required, and associated obligations;
 - (b) distribution of a product without a target market determination; and
 - (c) failure by a distributor to take reasonable steps to comply with a target market determination.

- 85 We consider that a civil action should also be available where an issuer fails to make a target market determination, where one is required.
- 86 In addition, it would also be beneficial to include a provision similar to s12GNB and 12GNC of the ASIC Act, which allow ASIC to take action in relation to loss or damage suffered by a class of persons who are non-party consumers, and obtain court orders requiring a range of different remedial actions.

B Product intervention power

Key points

ASIC welcomes the introduction of a product intervention power that will better equip us to respond to market problems that are causing or could cause harm to consumers.

We support the proposal under the revised exposure draft legislation to extend the scope of the product intervention power to funeral expenses insurance, certain extended warranties and short-term credit that is currently not regulated under the National Credit Act.

However, we think the product intervention power should extend to all ASIC Act products.

It is also important for the product intervention power to be comprehensive and flexible enough for ASIC to tailor interventions to the specific circumstances of different market problems, including in relation to training.

This section outlines our observations on some of the proposals regarding the product intervention power. Specifically, it covers:

- the scope of products that would be the subject of the product intervention power;
- the types of interventions ASIC could make using the power; and
- enforcement mechanisms.

Expanding the scope of coverage

ASIC Act products

- 87 We support the proposed approach in the revised exposure draft legislation for the product intervention power to extend to:
- (a) financial products made available to retail clients under the Corporations Act; and
 - (b) credit products regulated under the National Credit Act.
- 88 We also support the proposal in the revised Exposure Draft Explanatory Memorandum to extend the scope of the product intervention power to include the following products, which fall within ASIC's regulatory responsibility under the ASIC Act but are not regulated by either the Corporations Act or the National Credit Act:
- (a) funeral expenses insurance;
 - (b) certain extended warranties that are functionally equivalent to add-on insurance; and

(c) short-term credit that is currently not regulated under the National Credit Act.¹⁵

89 However, we think the product intervention power should extend to all ASIC Act products.

90 We consider that there is a need for a comprehensive product intervention power that covers all financial products and credit products within ASIC's regulatory responsibility. As discussed in Section A, products regulated under the ASIC Act but not the Corporations Act or the National Credit Act are currently subject to the least regulation, resulting in a lower level of protection for consumers accessing these products, and the potential for regulatory arbitrage.

91 We acknowledge that the revised exposure draft legislation allows additional products to be brought within the scope of the product intervention power through regulations. However, we are concerned that this process may hinder an effective and timely response to emerging risks.

92 In our experience, law reform—including the making of regulations—can take significant time to be implemented, depending on the legislative agenda. In that time, the harm to consumers may occur, or continue whilst ASIC does not have the ability to intervene.

Example 9: Buy now pay later

Buy now pay later arrangements allow consumers to enter into a deferred payment arrangement to pay for purchases from eligible merchants. Similar to a layby facility, consumers purchase goods and pay for it over a period of time. However, the consumer is able to take immediate possession of the goods.

The buy now pay later sector is growing rapidly driven by consumer demand. Despite being within ASIC's regulatory responsibility, many providers of buy now pay later arrangements are likely to fall outside the scope of the product intervention power.

These arrangements are not without risk to consumers, noting:

¹⁵ Revised Exposure Draft Explanatory Memorandum, pp. 45–6.

- providers may carry out limited inquiries of consumers' financial situations prior to providing credit (noting the responsible lending obligations do not apply);
- some providers are funding high cost purchases (up to \$30,000) over long repayment periods;
- consumers may lack understanding of what fees and charges are payable and when; and
- vulnerable consumers may be using these products.

ASIC currently understands that buy now pay later arrangements fall into three categories – those that:

- do not meet the definition of credit within the National Credit Code. Some providers extend funds without charging fees or interest and as such do not meet the definition of 'credit' under the Code;
- meet the definition of credit but are exempt under s6(5) of the National Credit Code. Some providers rely on the continuing credit contract exemption under s6(5) of the Code as the only fee they charge is an establishment and/or account fee that does not vary according to the amount of credit provided and is set at a maximum of \$200 in the first year and \$125 every year thereafter; or
- meet the definition of credit but are exempt under s6(1) of the National Credit Code: Some providers rely on the short term credit exemption under s6(1) of the Code which requires that the term not exceed 62 days and fees and charges not exceed 5% of the amount of credit.

Only the last category would be captured by the product intervention power as proposed in the revised draft legislation.

Expanding the scope of interventions

Training interventions

- 93 The approach in the revised exposure draft legislation is that ASIC could generally make interventions relating to specified conduct in relation to a product or class of products. However, we could not require a person to satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person by or under the Corporations Act.
- 94 While we understand the need to clearly define the scope of the product intervention power, we think additional flexibility in relation to training is important to ensure that the power allows us to:
- make appropriate, targeted and proportionate interventions to address the particular market problem we have identified; and
 - improve consumer outcomes without unnecessarily affecting consumer choice.

- 95 We note that the majority of the financial services industry is already subject to minimum standards of training and acknowledge the Government's concern that the product intervention power should not be used to impose significant new training standards. Nevertheless, we think imposing more constrained and targeted training requirements, where limited to the context of improving distribution practices in relation to particular products, could be the most appropriate and proportionate response in some situations. We think that such an intervention would be focused on the practices that need to be improved, rather than prescribing a particular training method or requirement.
- 96 We recognise that, to balance concerns that ASIC may use the product intervention power to impose significant new training requirements, the scope of the power might need to explicitly exclude ASIC imposing more general training requirements for an industry sector (e.g. setting broad standards, imposing exams, or creating or requiring the creation of an infrastructure for doing those things). We acknowledge these issues are already dealt with by existing regulation, including by standard-setting authorities, such as the Financial Adviser Standards and Ethics Authority (FASEA).
- 97 However, while financial advisers are subject to education, training and ethical standards, distributors of financial products that are not licensed financial advisers listed on the Financial Advisers Register are not covered by a standards body. Where, in these business models, poor consumer outcomes are caused by or exacerbated by the absence of education or training requirements in specific products, we think that targeted regulatory intervention can be effective to address this risk.
- 98 Accordingly, we think that the scope of the product intervention power should include an ability to require that a product may only be distributed by staff who have had specific training in the features, benefits and risks of the product (product-specific training intervention). A product-specific training intervention could further be limited to cases where that intervention is made as part of an intervention relating to the distribution of a product.
- 99 Without a flexible power, we may not be able to choose a targeted option and would be in the incongruous position of having to consider a blunt, wide-reaching tool—such as an outright ban on the sale of the product, or imposing a licence condition—even when a less interventionist approach would be more appropriate.
- 100 Imposing additional training requirements to address a particular issue we have identified is not a novel approach. In the course of our regulatory work, we sometimes accept enforceable undertakings from licensees that include new or additional training requirements (e.g. a program of additional training for employees). However, this type of result is achieved as a negotiated outcome. Having scope within the product intervention power to

impose a targeted training requirement in the context of improving distribution practice may allow us to achieve these kinds of results in a more comprehensive manner.

101 While we acknowledge that the introduction of the design and distribution obligations will lead to improvements in distribution conduct, it is important that the product intervention power allows ASIC as much flexibility as possible to address potential harm to consumers, with appropriate limitations.

102 Having scope within the product intervention power to impose a targeted training requirement in the context of improving distribution practices for a specific product will allow us the flexibility to take an approach that takes into account the potential impact on business and consumer choice, while directly addressing the cause of harm.

Enforcement and penalties

103 Generally, we are very supportive of the fact that the revised exposure draft legislation provides for both civil and criminal sanctions for breaches of a product intervention order.

104 As discussed in Section A, we note that any changes arising out of the work of the ASIC Enforcement Review Taskforce may need to be taken into account in settling the final provisions, to ensure:

- (a) consistency across the legislation; and
- (b) enforcement mechanisms and penalties are set appropriately.

105 Additionally, similarly to the design and distribution obligations, we think it would be beneficial to include in the enforcement provisions relating to the product intervention power a provision similar to s12GNB and 12GNC of the ASIC Act. These provisions allow ASIC to take action in relation to loss or damage suffered by a class of persons who are non-party consumers, and obtain court orders requiring a range of different remedial actions.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASIC Act product	All financial products as defined in Div 2 of Pt 2 of the ASIC Act
ASIC Enforcement Review Taskforce	The taskforce established by the Australian Government in October 2016 to review the adequacy of ASIC's enforcement regime, in order to deter misconduct and foster consumer confidence in the financial system
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
FSI	Financial System Inquiry
MBI	Mechanical breakdown insurance
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
Pt 9.4 (for example)	A part of the Corporations Act (in this example numbered 9.4), unless otherwise specified
REP 580 (for example)	An ASIC report (in this example numbered 580)
residual product	An ASIC Act product that is not regulated by the Corporations Act or the National Credit Act
responsible lending obligations	The obligations under Ch 3 of the National Credit Act
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
revised Exposure Draft Explanatory Memorandum	The explanatory memorandum accompanying the revised exposure draft of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018

Term	Meaning in this document
revised exposure draft legislation	Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018
SMSF	Self-managed superannuation fund