21 03 2016

Mr Stephen Powell
Manager, Financial Services Unit
Treasury
Langton Crescent
Parkes ACT 2600

Westpac Place
Level 20, 275 Kent St
Sydney NSW 2000
T. 02 8253 4159
westpac.com.au

Dear Mr Powell,

Westpac welcomes the opportunity to provide a response to Treasury's December 2016 paper on Design and Distribution Obligations and Product Intervention Power.

Westpac supports the:

- introduction of the design and distribution obligations and the product intervention power as recommended in the final report of the Financial System Inquiry; and
- general principles used in designing the proposals set out at section 1.2 of the proposals paper.

Westpac agrees that the 'end-to-end' process of designing, manufacturing and distributing products and services should focus on doing the right thing for customers throughout the life of the relevant product or service. Product issuers and distributors should ensure that their products and services are designed to meet customers' needs and perform as promised, and customers should be provided with the information they need to make informed decisions. Westpac Group has implemented a Product and Services Lifecycle Policy to support these goals.

In this submission, we have provided broad comments on each of the proposed measures and have attached responses to the specific questions contained in the consultation paper at Annexure A.

A. Design and distribution obligation

Multiple consumer protection frameworks

As noted above, Westpac supports the introduction of a principles-based design and distribution obligation which is intended to ensure that product issuers and distributors comply with good practice. In Westpac's view, the drafting of the obligation must consider the current financial products regime so that existing complexities are not compounded by the addition of new rules. As currently drafted, and in light of our understanding of ASIC's interpretation of "General Advice", Westpac considers that there is potential ambiguity in the way these regimes will work together. This ambiguity could cause confusion for licensees, their employees and customers.

The current financial products regime

In summary, the different existing regimes operate as follows:

- Responsible lending – requires exploration of the customer's requirements and objectives and financial situation to understand whether the credit product is "not unsuitable" for the customer;
- Personal advice – requires exploration of the customer's objectives, financial situation and needs in order to provide advice that is in the best interests of the customer;
- General advice – requires disclosure to the customer that the advice has not taken into account the customer's objectives, financial situation or needs; and
- Proposed design and distribution obligations – requires exploration of the customer base to determine the target market and also requires disclosure of what the target market is. For more complex products, further inquiries of the individual customer may be required to ensure that the customer is within the target market.

Similarities with the existing regimes and the risk of complexity

The design and distribution obligations are similar to the existing responsible lending and personal advice requirements. For example, the responsible lending, personal advice and design and distribution regimes require a financial services provider to understand either individual or aggregate customer needs when dealing with customers to varying extents.

Should the design and distribution obligations be enacted, these parallel regimes would apply to products that may be purchased by the same customer from the same organisation, depending on the type of advice model as well as, in some cases, the nature of the product itself. Noting the need for each regime to be supported by clear business processes, controls and monitoring, this creates a complex environment and has the potential to create confusion for licensees, their employees and customers.

General advice/personal advice distinction

The design and distribution obligations may, depending on the target market for a specific product, require licensees to obtain customer information, potentially including information on their objectives, financial situation and needs to determine if the customer is part of the target market or non-target market. If as a result of these questions, either the reasonable customer believes that their objectives, financial situation or needs have been considered, or the issuer or distributor has actually considered a customer's objectives, financial situation or needs, then this might be regarded as a personal advice conversation. This would be an unusual outcome noting that the design and distribution obligations are expressed as only applying to no advice or general advice conversations.

As noted, the current test for personal advice includes a subjective test that is based on the customer's understanding of whether one or more of their objectives, financial situation or needs have been taken into account. Westpac's understanding in this regard is that ASIC's position is that obtaining even generic information from a customer may be enough to cross this threshold such that a conversation becomes a personal advice conversation.

Accordingly, Westpac considers that clarification on the roles of general advice and personal advice would be helpful in order to better understand the role of the proposed design and distribution obligations. A possible outcome of unresolved ambiguity in this area will be to reduce the availability of products under general advice and factual information models.

We do not believe this is in the interests of consumers. The general advice and factual information models cater for the segment of potential investors who are engaged in their finances, consider that they possess an appropriate level of financial literacy and do not wish to incur costs in seeing a financial adviser as a 'gateway' to accessing a particular financial product.

Digital channels

Customers are increasingly using digital channels to help provide them with greater convenience and control over their finances. We believe it is important that existing regimes and the design and distribution obligations support digital consumer channels and service, and do not stifle continued innovation in product design and distribution, by both established and new service providers. Westpac considers that further consideration of the existing laws and the proposed design and distribution obligations governing these engagements would be beneficial.

Compliance considerations

Interaction between issuers and distributors

Issuers of financial products will typically have relationships with many distributors and vice versa. To comply with the design and distribution obligations as proposed, we expect the ongoing management of these relationships will require a large amount of work by both issuers and distributors.

Based on our understanding of the proposals, issuers are required to take a level of responsibility for the conduct of distributors. This would potentially mean that:

- Where a distributor sells multiple products from different issuers it is required to comply with a number of different requirements from each issuer.
- Issuers would need to develop and fund audits of their distributors.
- There would be a large increase in documentary requirements to evidence performance of the obligations, including assessment of target markets, agreement on controls between issuers and distributors, and ongoing reviews of the product.

The high cost and difficulty of managing these relationships and documentary requirements may have a number of outcomes including:

- Products may be withdrawn from sale to retail customers even though they might satisfy legitimate needs;
- Approved Product Lists may contract and new distributors not to be authorised to distribute substantial products due to the burden of due diligence and the provision and review of information amongst multiple parties; and
- Possible increased concentration of issuers and distributors. In turn, this could reduce competition and innovation, in particular where that is being driven by smaller players.

We understand that the experience in the UK has been that establishing these arrangements has been more complex and taken more time than originally envisaged. This should be taken into account in the implementation and transitional arrangements.

Independent obligations and safe harbours

In the interests of mitigating the potential risks of having issuers take responsibility for distributors, it would be useful to consider either having obligations which apply independently to each of issuers and distributors; or a safe harbour mechanic.

"Safe harbour" provisions might operate such that where an issuer can demonstrate that it has followed certain reasonable steps to identify a target market and set appropriate controls, and it has done so in good faith, it will be presumed to have complied with the law. Similar a similar "safe harbour" might then apply for a distributor. This would be consistent with safe harbour provisions that apply in other areas of financial service regulation, including the FoFA regime. It would provide a higher degree of certainty to product issuers and distributors that they will not be taken to have breached their obligations if they have followed the specific requirements and have done so in good faith. We also believe this would deliver a more consistent approach for consumers with respect to product design and distribution arrangements.

B. ASIC Intervention Power

We understand that there is a proposal to provide ASIC with a power to intervene in the market where it considers there to be a risk of significant consumer detriment (product intervention power). In Westpac's view:

- ASIC has a wide range of powers to address specific issues of concern under the current law, including powers to make stop orders, powers to take administrative action (including banning orders, varying licence conditions, suspending or cancelling an AFS licence) and powers to issue infringement notices. Through these powers, ASIC has the ability to take a variety of steps to ensure that a financial services licensee continues to act fairly, efficiently and honestly;
- In light of the above:
    - the product intervention power should be constructed in legislation only to be used where there are gaps in existing powers or where it would be impractical for ASIC to use an existing power. Westpac agrees that any such power should therefore be legislated as a 'power of last resort' as suggested in the proposal paper;
    - to strengthen the regime, legislation should require ASIC to take steps to investigate whether similar issues exist elsewhere in the market before ASIC exercises an individual intervention. If ASIC then decides to proceed with an individual intervention, it should publicly report on the steps taken and outcome of the investigation. This will ensure that ASIC has identified all similar instances of potential risk to consumers and increase transparency and public confidence in the regime; and
    - it is important that, once implemented, ASIC has the skills and resources to exercise the product intervention power as envisaged by the legislation.

Westpac would welcome the opportunity to discuss our views in more detail with Treasury as these proposals are further developed. If you would like any further information on our views please contact Michael Johnston on 02 8253 2726.

Yours sincerely

Brett Gale
Head of Government and Industry Affairs

Attachment A: Responses to questions

Range of products covered by the measures

1. **Do you agree with all financial products except for ordinary shares being subject to both the design and distribution obligations and the product intervention power? Are there any financial products where the existing level of consumer protections means they should be excluded from the measures (for example, default (MySuper) or mass-customised (comprehensive income products for retirement) superannuation products)?**

We believe it is important that the additional obligations are targeted to areas of real customer risk and do not unnecessarily create overlaps or duplications with existing regimes. There are a number of products which we believe should be excluded from the proposed measures, or may warrant further consideration. In general, we have recommended these because they would meet the following criteria:

- the product meets the needs of everyone;
- the product is basic and easily understood; or
- there is an existing regulatory regime that provides a high level of consumer protection and the application of additional design and distribution obligations would be unnecessary duplicative.

Superannuation

Due to its compulsory nature, superannuation has a wide target market. On this basis, we believe there is a compelling case to exclude all superannuation products from the design and distribution obligations. In particular, MySuper products should be excluded from the obligations. The features of MySuper products are dictated by legislation and already address product suitability type considerations.

More broadly, superannuation is already highly regulated and the introduction of a new product suitability regime in addition to existing consumer protections is likely to increase compliance costs for superannuation funds, without necessarily bringing additional protections for consumers. Currently:

- Superannuation funds are subject to dual regulation by APRA and ASIC, with superannuation funds as registrable superannuation entities and superannuation trustees as AFS licensees;
- Superannuation funds, superannuation trustees and trustee directors are already subject to a range of regulatory obligations under trust law, the Superannuation Industry (Supervision) Act, APRA prudential standards (which have the force of law), Corporations Act and ASIC Act (for example, among other things, the duty to act in the best interests of members, the duty to act efficiently, honestly and fairly and prohibitions on misleading and deceptive conduct); and
- Suitability considerations are already captured in contexts where no specific assessment of financial position or needs is legally required. For example, superannuation trustees are encouraged under industry guidance to ascribe a standard risk measure against each of their investment options.

Compliance costs for employers would also increase as the breadth of the proposed definition of distributor in the proposal paper suggests that an employer would be regarded as a distributor. Expecting an employer to take certain factors into account before an employee (who elects not to exercise choice of fund) is able to be defaulted into the employer's nominated default fund would be particularly onerous, especially for smaller employers. As it is, employers are subject to a range of regulatory requirements

under the Superannuation Guarantee (Administration) Act, Superannuation Guarantee Charge Act, the Fair Work Act and relevant awards/industrial agreements.

Basic banking products

Basic banking products, as defined in s 961F of the Corporations Act, should not be subject to the design and distribution obligations. These products are commonly regarded as simple, easily understood and generally suitable for a wide target market. This is acknowledged in the proposals paper, which indicates that simple products (e.g. basic savings and deposits accounts) will generally have no (or very small) non-target markets. We believe that the design and distribution obligations will have limited usefulness for these products, while adding additional compliance and distribution costs for product issuers and distributors.

This should also extend to non-cash payment facilities, including online banking, stored value cards and travellers cheques, provided the requirements of Corporations Regulation 7.9.07FA are met.

Foreign exchange contracts

A foreign exchange/currency contract that is a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately, in accordance with s764A(k)(ii), should not be subject to design and distribution obligations. Similar to basic banking products, this product is simple and generally used to facilitate an exchange of one currency for another settled with 2 business days. It is not typically used for investment or speculative purposes. Based on the nature and intended use of the product, there is no risk of mis-selling, nor is there ambiguity around the target or non-target markets. On this basis, the design and distribution obligations will have limited usefulness for improving consumer protection in relation to this product.

Listed instruments

We agree with the proposal that ordinary shares be excluded from the design and distribution obligations because "they are widely understood by consumers, and it would reduce the regulatory costs associated with companies undertaking capital raisings". Similar policy considerations are relevant in relation to hybrid securities. The listed hybrid securities market is highly developed and plays a critical role in the efficient raisings of capital which in turn supports economic activity. Between January 1998 and March 2017, $72.14 billion was raised through 352 hybrid security issues. Given the frequency of issuance, the quality of disclosure and investor education available, independent broker and press coverage on hybrid issuances and ASIC activity in this space, investors have developed increased familiarity with hybrid securities.

Limited consumer protection benefit when hybrids are listed: Once hybrid securities are issued and listed, any retail investor (including non-target market investors) would be freely able to purchase these securities on the secondary market. In light of this, the consumer protection outcomes that will be achieved from applying the design and distribution obligations to primary issuance of hybrid securities are not clear.

Existing consumer protections of a high standard: Market practice is well developed given the deep market that exists and provides a high standard of consumer protection. Existing consumer protections include high quality disclosure documentation for listed hybrid securities, established due diligence

practices among market professionals, adherence to ASX listing requirements, increased discipline in distribution processes, investor education modules and independent research report for frequent issuers. There has also been a comprehensive programme by ASIC to engage with issuers, dealers and investors regarding hybrid securities over the last decade on disclosure, distribution, investor awareness and education. As ASIC concluded in "REP 365 Hybrid Securities" in August 2013:

> *"what we have done is to engage with hybrid issuers and the brokers that sell hybrid securities so that these features and risks are clearly disclosed and the products are not being mis-sold."*

While this statement recognises the high quality disclosure provided to investors for these products, it also acknowledges that distribution of these products is disciplined and mitigates against mis-selling concerns.

In the event that a general exemption for listed hybrid securities is not adopted, the application of the proposals would need to consider the following matters:

- market testing for listed securities: the proposal encourages market testing for complex products. Given hybrid securities are listed, this expectation of market testing causes some concern as even the mere fact that market testing is taking place may be considered price sensitive for certain issuers (i.e. as it flags a deal may be about to be launched). Any legislation or regulations should clarify that market testing is not expected or required where the product is to be listed;
- safe harbours if reasonable step taken: If issuers and dealers can evidence that they have used reasonable steps to comply with the design and distribution obligations, they should have the benefit of a due diligence defence to any claims made against them in respect of such obligations. It would provide legislative clarity about best practice for issuers and the steps expected to be taken by issuers to obtain this defence;
- Terms largely set by APRA: the terms of these instruments are largely determined by APRA in order to achieve certain prudential objectives rather than being primarily motivated to meet investor objectives. The final legislation and regulations should make exemptions from any design obligations place on ADI issuers to the extent that design features are set by APRA for prudential reasons;
- obligations limited to primary issuance: many elements of the proposal assume that products will be continually offered through distribution channels and such distribution channels and the products themselves be reviewed periodically. In contrast, an issuer of listed hybrid securities can only control distribution during the primary issuance phase and the issuer only offers the product during the offer period – i.e. during the primary issuance phase. After this time, the hybrid securities would be listed and would freely trade on the secondary market. Any legislation or regulations in this space should reflect that any obligations (including the review obligations) of the issuer and dealers are strictly limited to the primary issuance phase and not to any subsequent trading where the issuer or the dealers have no control. That is, issuers can review the product issued and how it was distributed but it should be clear that further reviews are by definition not required; and
- exemption for rollover hybrid and security holder offers: A long practice in this market is that a portion of each issuance is taken up by (a) existing hybrid securities holders who are rolling over their investment and (b) existing security holders (including the issuer's shareholders) in the issuer. These proposals may make it more difficult for these investors (who are most likely to appreciate the complexity of these products) to access the hybrid market. For example, the

proposal includes commentary that for complex products, execution only offers (i.e. offers without direct engagement with the investor) would rarely be appropriate. These investors would typically only invest on an execution only basis. We would therefore propose that the legislation or regulations contains an exemption for issuers to make rollover offers or offers to existing security holders on an execution only basis.

Simple Corporate Bonds

In 2014 amendments were made to the Corporations Act to introduce the Simple Corporate Bond regime. This was intended to reduce the regulatory burden associated with issuing Simple Corporate Bonds to retail investors. This is to support the broader policy objective of deepening the corporate bond market in Australia and to provide greater funding options for issuers. According to the Explanatory Memorandum to the Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014, "only relatively low risk and less complex bonds are able to qualify for the streamlined disclosure regime".

Similar to ordinary shares, applying the design and distribution obligations to Simple Corporate Bonds will increase the regulatory costs associated with capital raisings and move this market away from the stated legislative intent. Given the low risks associated with Simple Corporate Bonds, defined legislative framework and green shoots developing in this market, we do not believe further regulation is needed and that these instruments be excluded from the design and distribution obligations.

Margin lending

The regulatory regime for margin lending under the Corporations Act is similar to the regime for other forms of consumer credit (covered by the National Consumer Credit Protection Act) and includes a corresponding requirement for margin lenders to meet responsible lending obligations. As a result, margin lending should be included in the definition of regulated credit and exempt from the design and distribution obligations.

Platforms

A platform or a 'wrap' account is a service that combines all of a customer's managed funds, shares, insurance and superannuation into one account where they and/or their adviser can manage their portfolio. This reduces the effort involved in managing multiple individual investments and provides a range of account management services including application, investment execution, client portfolio administration, taxation and reporting. Platforms are used by financial advisers on behalf of their clients but are also available directly to customers to self-manage their portfolios.

We believe there are some complexities in applying the proposals to platforms and these need to be considered further, including whether a platform operator is a distributor or product issuer for the purposes of the design and distribution obligations and how the proposals would apply in either case. This is an area where we believe there is scope for innovation for the benefit of consumers and we would be concerned in the proposals did not support this.

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.**

Both measures should only apply to products issued to retail clients as defined in s 761G of the Corporations Act. This will ensure the regime is targeted at increasing consumer protection for retail consumers, who are generally less well informed and financially literate than wholesale clients.

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.**

We agree with this proposal.

Regulated credit products are already subject to a substantial regulatory regime under the National Consumer Credit Protection Act, including responsible lending obligations for credit providers and intermediaries. This requires credit providers and intermediaries to undertake an individual assessment of the borrower's requirements and objectives and to undertake an assessment to ensure that the credit contract is not unsuitable. Therefore, a suitability regime already applies at an individual level for regulated credit contracts. Applying an additional target market assessment at a broader level would add an unnecessary additional regulatory burden, complexity and cost for these products and is unlikely to deliver enhanced consumer protection outcomes.

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.**

We believe the product intervention power is intended to increase protection for retail consumers and should be limited to credit provided under the National Consumer Credit Protection Act. Extending to 'credit facilities' covered by the unconscionable conduct provisions in the ASIC Act would bring small business lending contracts under the regime. We do not believe this is necessary.

The Australian Small Business and Family Enterprises Ombudsman has recently undertaken an inquiry into small business loans. In her final report, the Ombudsman made a number of recommendations aimed at increasing customer certainty and transparency in relation to small business lending. We support the majority of the Ombudsman's recommendations in full. We would be concerned that applying the product intervention power would increase the risk of lending to small business and potentially impact credit availability.

<u>Design and Distribution Obligations</u>

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?**

We agree with this definition.

6. **Do you agree with defining distributors as the entity that arranges for the issue of a product or that:**

   (i) **advertise a product, publish a statement that is reasonable likely to induce people as retail clients to acquire the product or make available a product disclosure document for a product; and**

   (i) **receive a benefit from the issuer of the product for engaging in the conduct referred to in (i) or for the issue of the product arising from that conduct (if the entity is not the issuer).**

We agree with this definition subject to further clarity.

The definition of "benefit" is very broad. Further clarity is required on what would be considered a benefit for the purposes of this definition.

"Advertising" should also be defined for the purposes of the legislation. This should be in line with current ASIC guidance in RG 234.

In addition, to ensure corporate structures are captured, the definition would need to extend to benefits:

- made by or on behalf of the product issuer or a related body corporate of the product issuer, or
- received by or on behalf of the distributor or a related body corporate of the distributor.

We believe the definition should specifically exclude the provision of disclosure documents, as providing a disclosure document is not taken to be a "financial service" under the Corporations Act.

In addition, we agree that publishers and media outlets should be explicitly excluded where they are engaged to advertise products. The extent of the exemption should be consistent with the guidance for publishers and media outlets in RG 234.

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?**

No additional comments.

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?**

A substantial regulatory regime already applies to financial product advisers, including the requirement that they act in the best interests of their client. As with responsible lending, a client's personal financial circumstances are taken into account and advisers are trained to provide advice on appropriate products for the client. It would be superfluous to undertake additional investigations to determine whether a client falls within the target market in those circumstances.

In addition, we would recommend that issuers of products sold solely under personal advice should be excluded from the obligations. Those products can only be accessed by consumers who have received personal advice which has taken into account their personal financial circumstances and best interests. The protections provided by that regime ensure that consumers are not sold products which are not suitable for their personal circumstances.

In particular, the legislation needs to accommodate circumstances where an advised client changes to become self-managed. This occurs when a customer obtains a product under personal advice and at a future point ends their relationship with their adviser and decides to manage their investments directly. It should be clear in the legislation that this would not trigger any new obligations on an issuer and that the product can continue to be managed directly with the customer.

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?**

We agree that unlicensed product issuers should be subject to the obligations. Without consistency, there may be gaps in the framework which will leave consumers vulnerable. However, we would note that there may be challenges where the unlicensed entity is a non-corporate. The current regime exists under the Corporations Power in the Constitution. Consideration needs to be given to how this power would be extended to other structures such as partnerships.

We would recommend that "referrers" be exempt from the definition of distributor. The exemption should be consistent with the AFS licensing exemptions in Corporations Regulations 7.6.01(e) and (ea). The rationale for this is that a client will be referred to the issuer or another distributor in any event, who will be obliged to meet the relevant distribution obligations.

If "referrers" are caught by the distributor obligations, this will place a significant compliance obligation on referrers and issuers to ensure that referrers are only referring clients in the target market, which is disproportionate to the straight-forward nature of referrals and the relatively low risk.

In addition, there should also be a power within the legislation for ASIC to grant additional exemptions on a case by case basis.

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?**

We agree that issuers should identify appropriate target and non-target markets for their products.

Factors that issuers should have regard to include:

- Customer demographics, including age, employment status, minimum wealth available, income levels and existence of dependents;
- Customer needs; and
- Purpose for the product (e.g. owning a home versus accumulating wealth for retirement).

As discussed above, we recommend the inclusion of a "safe harbour" to ensure that an issuer that has taken reasonable steps to determine the target market and done so in good faith has some protection against this being reassessed with the benefit of hindsight.

In addition, further clarity is required on how narrowly the target and non-target markets need to be defined for a product. In, addition it is not clear whether a product can have multiple target markets depending on

how the product is being used, for example where a product is being used as a standalone product as opposed to part of a broader portfolio.

The proposals paper states that in some cases, for any particular target market, a product could be standalone or form part of a broader portfolio of products. Further, where it is intended for a product to be used as part of a broader portfolio of products for a particular target market, the issuer should identify how the product is intended to fit into the broader portfolio and may need to identify what the maximum percentage of the portfolio that should be invested in the product is (and this should then inform the distribution strategy).

To determine whether a particular customer is accessing the product as an appropriate part of a broader portfolio, distributors will need to ask questions about the customer's personal financial circumstances. We believe this is a clear example of where distributors may have difficulty complying with the obligations in a general advice situation.

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)?**

In principle we agree that consumers who take out insurance should benefit from the significant features of the product. However, we consider that this may be difficult to prescribe in legislation. Insurance products may have multiple benefits and a customer may benefit from some and not others depending on their changeable circumstances (i.e. health, employment status). Customers may still get value from an insurance policy even though they may not benefit (or be able to claim for) all items or events covered by the policy. These may be difficult to measure objectively as they may be specific to that customer, their circumstances and the features that they value from the product. Where the customer has made an informed choice, we do not believe the design and distribution obligation should prevent them from accessing the product.

It is also important that these obligations continue to support a viable insurance market. In insurance, product sustainability requires scale to ensure the product earns sufficient revenue to pay expected claims. This also assists in making the product more affordable as the cost of claims is spread over a larger premium base. Defining a target market too narrowly or excluding people because they may not be able to access all features of the product (but can access some of the features) may have the unintended consequence that the product is unsustainable in the market. Further, this would potentially inhibit product innovation and development.

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.**

In principle, we agree with the proposal that issuers should select distribution channels and marketing approaches that are appropriate for the identified target market. This obligation should also be imposed on distributors, who are likely to have greater control over the manner in which a product is promoted and distributed.

However, issuers and distributors should not be prohibited from marketing a product to the public generally, provided it is not targeted specifically to consumers in the non-target market. This is particularly the case for products that are widely understood. For example, it should be reasonable to advertise motor

vehicle insurance, without specifically identifying that, in general, it is only appropriate for consumers who own or have an interest in a motor vehicle.

We also suggest that "distribution channel" needs to be defined. It is not clear from the proposals paper whether this is intended to be synonymous with "distributor" or is intended to incorporate forms of distribution e.g. digital, in branch, etc. The commentary in the proposals paper is particularly focussed on training of representatives and skills and ability of staff employed to explain the risks of the product. It is important to recognise that many products are distributed through digital channels with little or no person-to-person engagement. This is entirely appropriate for products where controls can be put in place to avoid mis-selling.

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?**

We do not agree that the target market should be set with regard to the listed factors. The "target market" is intended to define the group of customers for which the product is intended to be suitable. In our view this should be agnostic to the likely distribution channels. Appropriate distribution channels and controls would then be determined with regard to the target market.

We would also query the proposed focus on the complexity of the product. Rather, it may be more appropriate to require issuers to consider a product's level of risk. There are complex products which can be low risk but quite simple products which can be high risk for consumers.

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?**

We agree that issuers should periodically review their products. The frequency of review should not be prescribed in legislation but rather should depend on the type of product, the level of risk, the time it has been in the market, and whether it currently is available for offer. For example, annual reviews may be appropriate when a product is first brought to market. However, a product which has been available for some time, and for which previous reviews indicate that the identified target market and distribution channels continue to be appropriate, may only require full review every three years. Issuers should be expected to be monitoring the performance of their products on an ongoing basis and increase the frequency where any material issues are identified.

We also agree that issuers should advise ASIC where a distributor is selling outside of the intended target market, subject to a significance threshold. As indicated, this is not an individual appropriateness test and the proposals paper does indicate that a small number of sales outside the target market would be acceptable. It would be appropriate to notify ASIC where a distributor is knowingly or recklessly selling to the non-target market or there are significant volumes of the product being sold to consumers outside the target market. However, it would seem unnecessary where a small number of sales have been made either inadvertently or because the product was sought by customers outside the target market.

In relation to the factors that should be taken into account in the reviews, we would make the following observations:

- The proposals paper suggests profit margins associated with the product should be taken into account. While this is a relevant consideration for an issuer seeking to run a successful and competitive business, it is not clear that it is relevant for consumer protection purposes.

- The proposals paper also suggests that consumer feedback about the product should be taken into account. This is an important mechanism to identify issues and concerns about the product. However, for the purposes of prescribing the factors that reviews must take into account, we believe issuers should only be obliged to take into account material issues identified in consumer feedback and complaints.

The proposals paper also suggests that issuers will not be directly accountable for the conduct of external distributors under the reforms. However, it also states that "product issuers cannot be wilfully blind if distributors are acting in a manner that is inconsistent with their expectations". It is not clear whether there is an expectation that issuers will monitor and audit distributors' controls and practices and who would be expected to bear the cost of such monitoring. An obligation to do this is likely to create a significant burden for both issuers and distributors.

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

To continue to support innovation in banking and financial services and to allow for changing customer expectations and preferences, we support a principles-based legislative regime. The legislation should include all key features of the issuer obligations to ensure they do not require significant additional guidance but they should also not be overly prescriptive. There is a need to retain sufficient flexibility to allow for unique circumstances that do not always allow issuers to strictly meet these obligations, which we also believe should inform the approach to any ASIC prepared regulatory guidance.

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?**

In principle, we agree with this proposal. However, it is not clear what responsibility an issuer has for ensuring that they are implemented and maintained and who would be liable. It would impose a significant compliance burden on issuers if they are expected to audit distributors on a regular basis.

Possible examples of controls in the proposals paper include "using customer information". As previously discussed, the way this is described may result in it being considered to be personal advice. The legislation should clarify that using personal information, including about a consumer's objectives, financial situation and needs, to assess whether a consumer comes within the target market does not constitute personal advice, even when coupled with the provision of information or general advice about the product.

There may also be system limitations to being able to fully implement such a control. Banks have a large number of systems and it would not be reasonable to assume that at every customer interaction, a financial services provider has access to all the information that it holds about that customer.

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

As stated in the consultation paper, consumers are ultimately responsible for their own financial decision making. As mentioned above, we do not believe that the design and distribution obligations should operate as an individual appropriateness test and that customers should retain control of their own financial decision making.

It is appropriate that once an issuer has identified a target market, they should ensure that appropriate distribution channels are selected. In doing this, issuers and distributors should not directly target consumers outside the target market. However, if a consumer who is outside the target market approaches the issuer or the distributor in relation to a product or type of product, and they are eligible to apply for the product (and receive relevant product disclosures), the issuer or distributor should not be arbitrarily precluded from offering the product to the consumer.

In addition, in many cases it will be difficult for issuers to select channels that do not reach non-target markets. For example, as discussed earlier the target market for motor vehicle insurance is likely to be people with motor vehicles. However, this should not prevent issuers from broadly marketing or selling through channels that will reach a mass market.

It is also important to ensure that the obligations do not limit customers' ability to make decisions around future needs. For example, with a bonus saving account, if a customer has not to date made any deposits, the product may still be appropriate if the customer is waiting for a large transaction to come through (e.g. proceeds of asset sale).

The paper identifies that a small number of sales outside the target market would not constitute a breach. Further clarity should be provided on what threshold should be applied by ASIC in determining whether a breach has occurred.

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

We believe it is appropriate that information on the target and non-target markets be included in general information about the product. For example, PDSs could include a clear statement, at or near the front of the PDS, identifying the target market. Provided a PDS has been given or made available in accordance with the legislative requirements, customers should be free to choose a product. We would support the introduction of a consent mechanism to ensure the customer is aware that they are not in the target market and have made an active and informed decision to take up the product.

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?**

We agree 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.

We do not believe that an equivalent obligation should apply to distributors that provide personal financial advice. As mentioned above, we believe that issuers of products which are only permitted to be sold under personal advice should also be exempt from the design and distribution obligations.

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

We support a principles-based legislative regime. The legislation should include all key features of the distributor obligations to ensure it does not require significant additional guidance but it should also not be overly prescriptive. The legislation needs to retain sufficient flexibility to allow for unique circumstances that do not always allow issuers to strictly meet these obligations, which we also believe should inform the approach to any ASIC prepared regulatory guidance.

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.**

Implementing the obligations will require a considerable implementation program including systems-based changes, training and related change management measures including the implementation of new processes within financial services providers. We will need time to determine due diligence processes and to assess distributors, determine information requirements for monitoring and ensure that information can be exchanged and determine operational controls and establish monitoring arrangements. This could include material changes for products currently in development. We would recommend a minimum of 12 months to enable this to occur.

22. **Do you agree with the obligations applying to existing products in the market 2 years after the reforms receive Royal Assent? If not, please explain why with relevant examples and indicate what you consider to be a more appropriate transition period.**

The obligations will apply to hundreds of products within the Westpac Group. Given the extent of changes that may be required, which we have outlined above, we believe that a period of two years would be challenging. Westpac has a relationship with a larger number of distributors. We would need to assess their appropriateness under the regime, review agreements, and revise and implement controls. As a result, we would suggest a five year period with products phased in over the five years starting from year 2, based on potential consumer risk e.g. year 2: managed investments year 3: insurance, etc.

A further issue here, on which additional clarity is required, is the application of the design and distribution obligations to products which have been grandfathered but for which changes are permitted e.g. insurance products where changes to cover are permitted. It is not clear whether the design and distribution obligations would apply at the time the customer makes the change.

Product intervention power

23. **Do you agree that ASIC should be able to make interventions in relation to the product (or product feature), the types of consumers that can access a product or the circumstances in which a consumer can access the product. If not, please explain why with relevant examples.**

We agree that these interventions are appropriate where there are no other avenues to achieve the same outcome.

In defining the types of consumers who can access the product, it is important to note that over time consumers may move in and out of such definitions. Where this occurs, it is not appropriate that a financial services provider be held to be in contravention of the intervention order based on an analysis undertaken in hindsight.

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

We believe the proposals paper covers the range of appropriate interventions ASIC should be able to make. It should be clear that the power is not able to be used to intervene on matters relating to price or make amendments to the main subject matter of the contract.

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?**

While broadly we agree with the factors proposed, to provide certainty to industry participants our preference would be that the legislation include objective criteria for ASIC to satisfy in order to be able to use the power.

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?**

We believe it is critical that ASIC be required to undertake consultation and consider the use of alternative powers before being able to make an intervention. In cases where ASIC undertakes targeted engagements where individual intervention is being considered, the exercise should be kept confidential between ASIC and the impacted party until the finalisation of the process. The impacted party should have the opportunity to determine whether to voluntarily agree to change its practices (if relevant) prior to the finalisation of the process and this should have a bearing on whether ASIC chooses to publicly disclose the details of the consultation. This would be akin to a safe harbour or recognition for good behaviour. This ensures that the reputation of the impacted party is preserved while an outcome is being reached.

In addition, where ASIC is proposing to take action in relation to an individual financial services provider, it should also be required to examine other similar products and the practices of other industry participants in that segment or sub-segment. It should then be required to take that into account, including whether the intervention should apply more broadly. The outcome of these inquiries should be published by ASIC if they proceed to an intervention against an individual financial services provider.

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?**

Subject to the views about confidentiality in response to question 26, we agree that ASIC should be able to publish information about an intervention. However, issuers should be allowed to review information before publication to ensure factual correctness. Relevant details of the intervention, including the products affected, and the length of intervention, should be outlined in the published information.

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.**

We believe that an initial duration of up to 18 months is too long and will adversely impact product innovation and cause market uncertainty. A time frame of up to 12 months maximum with no ability for extensions offers an ideal balance for ASIC to conduct its investigations and to ensure there is a sufficient motivation for issuers to promptly address any concerns.

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?**

We believe that the duration of an intervention should not be extended by an administrative or judicial appeal unless the Administrative Appeals Tribunal or court rules otherwise. In particular, where a market wide intervention applies, and one affected financial services provider seeks judicial review, it would create uncertainty for other affected companies if they face an indefinite extension.

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

We believe it is appropriate that market wide interventions are made permanent through specific legislation through the Parliament or associated regulations.

In most cases, it may be sufficient to enforce an individual intervention by the Treasurer confirming the Government supports permanent intervention with ASIC to undertake monitoring to ensure ongoing compliance. If there are ongoing concerns about compliance with the intervention or examples in the broader market are identified, the Government could consider more formal mechanisms.

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

More clarity and unambiguous regulatory guidance around the circumstances in which ASIC may use the power would assist (e.g. an example where all of the other powers in its enforcement toolkit would not be appropriate and that the product intervention power would work best). As mentioned above, objective criteria that ASIC must satisfy in order to be able to use the power would also provide greater certainty to industry. In addition, as discussed, ASIC should be required to undertake market-wide inquiries and publicly report on those before it proceeds with an individual intervention.

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

We agree that the powers should apply from Royal Assent, although for products in the market at the time of Royal Assent, this should be subject to further grace or non-prosecution period where the licensee is acting under reasonable endeavours.

Enforcement and consumer redress

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

The range of existing enforcement options listed in the proposals paper would seem appropriate for breaches of the design and distribution obligations or the requirements of an intervention. As discussed above, we would like to see a safe harbour included for the design and distribution obligations to provide clear guidance for financial services providers on how the regime should be applied.

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?**

The paper canvasses a range of redress options. In relation to the design and distribution obligations, it is important to recognise that the cost of any consumer redress such as cancellation of a contract or refund is likely to be borne by the issuer and not the distributor. This is the case even where the issuer has fulfilled its obligations and the breach is the result of a distributor's conduct.

The proposed remedies include "declaring the whole or part of a contract void, or otherwise varying the terms of the contract." We are concerned that this may present issues if a change results in unintended consequences for issuers and other product holders. For example, if it alters the risk profile for a product.

We agree with the proposal that, where the intervention power has been exercised, consumers already in the product would only have the ability to seek redress for a breach of existing laws and the intervention will not itself trigger any rights for these existing contracts.