



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

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Product Regulation
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

Email: product.regulation@asic.gov.au

Re: Consultation paper 325 – Product design and distribution obligations

In brief:

AIST welcomes draft regulatory guidance that provides flexibility in enabling trustees to meet their design and distribution obligations and to ensure that their products are aligned with members' financial situation, objectives and needs.

AIST has raised concerns regarding the overlap with APRA's Business Performance Review requirements and the listing of employers as a superannuation distribution channel in one of the examples. AIST also advocates for more guidance on superannuation specific product issues.

Introduction and context

The Australian Institute of Superannuation Trustees (AIST) is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$1.5 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of their gender, culture, education or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

AIST welcomes the opportunity to make a submission to CP 325 Product design and distribution obligations. AIST has long supported the implementation of these measures that enhance ASIC's powers to intervene and protect members' best interests. These measures will also reduce the likelihood of members being mis-sold products that are not aligned with their financial situation, objectives and needs.

Our specific concerns regarding the consultation paper are:

- No guidance has yet been provided on managing the overlap with APRA Business Performance Review (BPR) and legislated annual outcomes assessment requirements.
- More guidance on how a target market determination applies to a Choice product that offers a range of investment options.
- Insufficient guidance on what triggers a target market review.
- Listing employers as a distributor in an example and their associated obligations.
- More guidance needed on superannuation specific product issues.

We note that profit-to-member superannuation funds have had a long history of developing products and services which are specific to the membership demographics. AIST member funds have also adopted the AIST Governance Code which contains the requirement to design and manage appropriate investment strategies having regard to member demographics and circumstances during both the accumulation and decumulation phases¹.

Overlap with APRA Business Performance Review and annual outcomes assessment

The business performance review requirement in SPS 515 requires an RSE licensee to ‘undertake a holistic assessment of its performance across its business operations, services and product offerings’. In addition, SPG 515 states that an ‘RSE licensee should give due consideration to whether any specific member cohort outcomes are appropriate, reflecting the different products and options that are made available to various groups of members and the demographic or other characteristics of these member cohorts.’

This illustrates that there is a clear overlap between the design and distribution requirements and the Business Performance Review. The consultation paper acknowledges these as separate but complementary obligations and suggests that ASIC will work with APRA to determine whether specific guidance is required. The draft Regulatory Guidance however does not provide any guidance on how the two obligations interact for an RSE licensee and therefore may result in duplication of processes – both of which are seeking to address a similar problem.

Whilst trustees need flexibility to appropriately navigate the two regimes, more guidance would be beneficial and would need to be provided as soon as possible to provide funds with adequate time to implement.

Target market determination

ASIC does not propose to give definitive guidance on the content and form of a target market determination and, in particular, the formulation of a target market. We believe that additional guidance would be helpful for there to be consistency across the financial services industry. Lack

¹ AIST Governance Code (2017). Available from <https://www.aist.asn.au/AIST/media/General/Governance/Governance%20Code/aist-governance-code-2017.pdf>

of overall consistency could lead to a reduction in comparability and substandard outcomes for members.

The European Securities and Market Authority (ESMA) decided to develop guidelines in MiFID II which mainly address the 'target market assessment' required, as this aspect was identified as the most important one for ensuring common, uniform and consistent application. Their guidance² lists five categories when identifying target markets;

1. The type of clients to whom the product is targeted
2. Knowledge and experience
3. Financial situation with a focus on the ability to bear losses
4. Risk tolerance and compatibility of the risk/reward profile of the product with the target market
5. Client's objectives and needs.

Specifically, AIST believes there is a need for ASIC to provide further guidance on how a target market determination applies to a Choice product that offers a range of investment options. *Example 7: Superannuation products* in the draft Regulatory Guide acknowledges this difficulty and states that '*this is likely to involve a single target market determination for the Choice superannuation product that describes multiple target markets for each investment option or group of investment options offered as part of the product.*'

Further guidance would assist trustees in determining the type and level of detail they would need to include about investment options offered by a Choice product within a single target market determination.

AIST also supports statements in the draft guidance that it would be useful for an issuer to consider those for whom the financial product is clearly unsuitable (negative target market), bringing the requirements closer in line with international best practice.

Target market reviews

The draft Regulatory Guide does not provide guidance regarding the triggers that may drive the need for entities to undertake target market reviews, instead it sets out examples. In addition to these examples, AIST recommends that ASIC guidance provides further clarity regarding these triggers.

AIST recommends that the Guidance should also include:

- A set of principles for driving reviews.

² European Securities and Markets Authority (ESMA), Guidelines on MiFID II product governance requirements. Available from: https://www.esma.europa.eu/sites/default/files/library/esma35-43-620_guidelines_on_mifid_ii_product_governance_requirements_0.pdf

- That target market reviews include an examination of the outcomes of the product upon cohorts of consumers as well as product take-up rates. This would assist with ensuring both the suitability and any ongoing need for the product occurs.

In support of our recommendation, AIST draws attention to the fact that MiFID II includes the concept of examining outcomes, e.g. sales numbers. AIST strongly recommends that ASIC Guidance should expand its guidance to include a specific requirement to analyse if the product is being used. Without this, the current problems surrounding the proliferation of products (over 40,000 member investment choices, many with very few members) will continue. The proliferation adds to the costs of the industry as well as member confusion.

Definition of distributors and their obligations

AIST has concerns regarding *Example 9: Superannuation*.

AIST is concerned about the inclusion of employers as a distribution channel in this example. It is unreasonable to expect that the obligations for distributors also apply to employers that have nominated a MySuper product as their default product for the employees. The Corporations Regulations 2001 prescribes further details on who the design and distribution obligations apply to, where the Regulations exempt an employer complying with certain superannuation guarantee obligations from the DDO regime. In addition, MySuper products are not subject to the design and distribution obligations.

In practice, employers have a limited role in engaging their employees regarding superannuation. The PDS for a default member is sent by the fund to the member directly. The short form PDS also outlines the other investment options available and many provide links to further information about associated risks. In addition, prior to selecting an investment option other than the default, members are provided with additional information about the risks of that option. For example, this may be via a member online portal or an investment information booklet that accompanies an investment switch form. It is therefore unclear what benefit there would be in an employer needing to circulate a factsheet to employees as specified in the example.

Our other concern regarding example 9 is that example provides a situation where the trustee customises the options presented to members after they log in. The options presented are based on member characteristics information which the trustee holds and also prompts the member to contact the fund if they select an option that they are not likely to be in the target market for. Given that trustee may be considering a members' likely objectives, financial situation and needs to make this determination more clarification is needed to provide trustees with comfort that this would not be deemed personal advice.

Product-specific issues

ASIC has given additional guidance to how the target market determination applies to certain products when the application of the obligation is not straightforward. Other examples where more guidance would be helpful are;

- Successor fund transfers (SFT). An SFT is a transfer of the members' benefits from a registrable superannuation entity (RSE) to a different RSE (a successor fund) where the consent of the individual members with those benefits is not required. AIST believes that guidance should make it clear that such a transfer is exempt from DDO.
- Reversionary beneficiaries. In the cases that a reversionary beneficiary is nominated, the nominated person (generally a spouse) will automatically continue to receive a pension after the members death. A valid reversionary beneficiary nomination is binding on the trustee. The guidance should make it clear that this type of acquisition is exempt from DDO.
- Payment splits for family law purposes. Following the breakdown of a marriage or de facto relationship, spouses can split their superannuation interests. The payment is often made by the ex-spouse becoming a member of the relevant superannuation fund, particularly where they have no account of their own, or by nominating an existing super fund. The guidance should make it clear that such a payment is exempt from DDO.

AIST response to consultation questions

We have provided a summary of our concerns outlined above in response to the consultation paper questions below.

Consultation question	AIST response
C1Q1 Do you agree with our approach to guidance on the form and content of a target market determination? If not, why not?	AIST believe that additional guidance is needed in order for there to be consistency across the financial services industry.
C3Q1 Do you have any comments on our approach to guidance on identifying and describing the target market?	Specifically, more guidance would assist trustees in determining the type and level of detail they would need to include about investment options offered by a Choice product within a single target market determination.
C6Q1 Do you agree that it may also be useful for an issuer to describe the negative target market for its financial product? If not, why not?	AIST supports guidance that it would be useful for an issuer to consider those for whom the financial product is clearly unsuitable. This could be strengthened by making it clear that this should be considered as opposed to something that is useful to consider.
C6Q2 Is our guidance on the role of describing a negative target market adequate and useful? If not, please explain why, giving examples.	

<p>C8Q1 Do you have any comments on the following examples, which we have used in our guidance to illustrate key principles set out in RG 000.107–RG 000.120:</p> <p>(a) Example 7: Superannuation products;</p> <p>(c) Example 9: Superannuation</p>	<p>a) There is a need for ASIC to provide further guidance on how a target market determination applies to a Choice product that offers a range of investment options. This would assist trustees in determining the type and level of detail they would need to include about investment options offered by a Choice product within a single target market determination.</p> <p>c) AIST has concerns regarding example 9 and the inclusion of employers as a distribution channel in this example.</p> <p>It is unreasonable to expect that the obligations for distributors also apply to employers that have nominated a MySuper product as their default product for the employees.</p> <p>Our other concern regarding example 9 is that example provides a situation where the trustee customises the options presented to members after they log in. The options presented are based on member characteristics information which the trustee holds. More clarification is needed to provide trustees with comfort that this would not be deemed personal advice.</p>
<p>C9Q1 Do you have any comments on our guidance on setting appropriate review triggers and maximum review periods?</p>	<p>The draft Regulatory Guide does not provide guidance regarding the triggers that may drive the need for entities to undertake target market reviews and instead sets out examples. In addition to these examples, AIST recommends that ASIC guidance needs to provide further clarity regarding these triggers.</p>

For further information regarding our submission, please contact Zach Tung, Policy and Regulatory Analyst on [REDACTED]

Yours sincerely,

[REDACTED]

Eva Scheerlinck
Chief Executive Officer

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$1.5 trillion profit-to-members superannuation sector, AIST advocates for financial wellbeing in retirement for all Australians regardless of their gender, culture, education or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.