



Level 6, 179 Queen Street
Melbourne, VIC 3000

info@consumeraction.org.au
consumeraction.org.au
T 03 9670 5088
F 03 9629 6898

25 March 2020

By email: product.regulation@asic.gov.au

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

Dear Madam/Sir,

Product design and distribution obligations – ASIC Consultation Paper 325

Thank you for the opportunity to comment on ASIC's Consultation Paper 325 – Product design and distribution obligations.

We strongly support the introduction of product design and distribution obligations (**DDOs**). If implemented effectively, these obligations should significantly reduce mis-selling of financial products in Australia, and improve the quality and suitability of products sold to consumers. DDOs principles send the right message to financial firms that consumer interests should be considered throughout the entire product lifecycle and help to ensure suitable product design is embedded in individual firms.

We have made a number of recommendations throughout this submission to strengthen the draft DDO Regulatory Guide. Importantly, we have suggested a number of additional product examples be included in the Regulatory Guide, such as buy now pay later, payday loans, consumer leases, point-of-sale lending and funeral expenses policies.

A summary of recommendations is available at **Appendix A**.

CONTENTS

General comments.....	4
Proposed product governance framework.....	5
B1Q1 Is our guidance on a robust product governance framework useful? What additional matters, if any, do you think are important in ensuring that a product governance framework will be effective and support compliance with the design and distribution obligations?	5
Adopting a consumer-centric approach	6
B2Q1 Is our guidance on the consumer-centric approach issuers and distributors should take to deliver good consumer outcomes useful?	6
B2Q2 What additional matters, if any, do you consider to be relevant?.....	7
Making a target market determination	8
C1Q1 Do you agree with our approach to guidance on the form and content of a target market determination? If not, why not?	8
Identifying and describing a target market	9
C2Q1 Is our guidance on the approach to identifying the target market for new products and continuing products useful?	9
C2Q2 What additional matters, if any, do you consider to be relevant?.....	9
C3Q2 Do you have any comments on the following examples, which we have used in our guidance to illustrate key principles set out in RG 000.66–RG 000.89:.....	9
(a) Example 1: Credit cards;	9
Reference to excess – RG 000.84	9
(d) Example 4: Consumer credit insurance;.....	10
(e) Example 5: Low-value products; and	10
(f) Example 6: Basic banking products	10
C3Q3 What additional matters, if any, do you consider to be relevant?	11
C5Q1 Do you agree that consumer understanding of a product does not necessarily equate to the product being likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market?	11
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?.....	11
C7Q3 Do you agree with our guidance on how a target market determination should be approached for a bundled product? If not, why not?	12
C7Q4 Do you agree with our proposed approach to the application of the design and distribution obligations to products that can be customised at point-of-sale? If not, why not?	12
Reviewing the target market determination	12

C9Q1 Do you have any comments on our guidance on setting appropriate review triggers and maximum review periods?.....	12
Notifying ASIC of 'significant dealings'	12
C12Q1 Are there any additional factors that issuers should consider?	12
Renewal of general insurance policies.....	13
D2Q2 What other steps or controls, if any, do you consider would be appropriate for a distributor to consider what reasonable steps should be taken at renewal?	13
D3Q1 Do you agree that, in most cases, a distributor would have sufficient information about a consumer through its existing sales processes to form a reasonable view on whether the consumer is reasonably likely to be in the target market for a financial product?	13
D3Q3 Do you consider our guidance should identify (in draft RG 000 at RG 000.168) other ways that a distributor's sales processes can assist it to form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product? What other approaches can be taken?	14
D3Q4 Do you have any comments on our proposed guidance (in draft RG 000 at RG 000.169) on how a distributor could reduce the likelihood of leaving a consumer with the impression that their personal circumstances have been considered?.....	14
Interaction with personal advice obligations.....	14
D5Q1 Do you agree that a target market determination for a financial product should be considered by a financial adviser in providing the advice and meeting their best interests duty? If not, please explain.....	14
Interaction with responsible lending obligations.....	15
D6Q2 Are there are any further issues you consider are raised by the interaction of the two regimes that should be dealt with in our guidance?	15
Appendix A: Summary of Recommendations	17

General comments

The past years have seen increased scrutiny of the design and sale of financial products and services, particularly through the Financial Services Royal Commission (**Royal Commission**). This scrutiny has been warranted. The Royal Commission examined several case studies where product design and sales tactics were clearly profit-driven, rather than consumer-focussed. For example, the high-pressure unsolicited sales tactics used to sell poor value accidental death insurance to a young man with Down Syndrome, the inappropriate sign up of a single mother to an unaffordable car loan in a car yard, and the targeted sale of funeral expenses policies to entire families, including babies and children, in Aboriginal communities.

ASIC's development of the Regulatory Guide for the new DDOs presents an opportunity to shift the corporate culture of financial firms to ensure customers are at the centre of the entire product lifecycle, and that offending firms are held to account if they sell products that cause harm. The Regulatory Guide must set out a strong, enforceable product governance framework that provides practical guidance and tackles the serious compliance issues in internal controls identified by the Financial System Inquiry (**FSI**) and the Royal Commission.

While we appreciate that some flexibility is required in the Regulatory Guide as it applies to a large range of products, we are concerned that the high-level principles-based guidance in the Regulatory Guide is not specific enough about ASIC's expectations for compliance. Issuers and distributors are being given significant leeway to determine their own target markets and approach to how they will meet their obligations, along with a self-reporting framework reliant on distributors and issuers 'doing the right thing'.

This is concerning in the context of industry's demonstrated reticence to comply with existing laws and obligations, much less to meet community expectations as shown throughout the Royal Commission. This is particularly true for otherwise largely unregulated sectors that are now covered by DDOs, such as buy now pay later providers. As such, we have recommended additional examples and guidance throughout this submission that would provide more specific guidance to industry about compliance. We also recommend that monitoring compliance with the DDO regime, including data collection and proactive surveillance, be an enforcement priority for ASIC.

While we are supportive of the DDOs regime, we also want to reiterate our support for a range of other measures recommended by the Royal Commission which would complement the DDOs and contribute to improved consumer outcomes. In particular:

- Removal of the point-of-sale lending exemption (Recommendation 1.7);
- Removal of the insurance claims handling exemption (Recommendation 4.8);
- Introducing a deferred sales model for add-on insurance (Recommendation 4.3);
- Banning hawking of insurance and superannuation (Recommendations 3.4 and 4.1);
- Capping vehicle dealer commissions on insurance and warranties (Recommendation 4.4);
- Making it more difficult for insurers to avoid paying out claims (Recommendations 4.5 and 4.6); and
- Introducing a compensation scheme of last resort (Recommendation 7.1).

We also note that in consultations relating to the implementation of Royal Commission recommendations, particularly in relation to the deferred sales model for add-on insurance and the ban on hawking, some firms have expressed concern about limits being placed on contacting customers to sell their products. However, in consultations on DDOs firms have expressed concern about being required to contact customers to ensure their products remain appropriate. Industry can't have it both ways – if you can contact potential customers to sell them your product, you can also contact existing customers to make sure the product remains suitable. This is particularly true at insurance renewal time.

In relation to dispute resolution, we consider that the Regulatory Guide should provide some guidance in relation to how DDO-related disputes should be handled by internal dispute resolution and external dispute resolution. It is unclear what the regime will mean for the Australian Financial Complaints Authority (AFCA) as the Regulatory Guide looks like it only addresses the situation where consumers go to court (unless ASIC takes action per 000.227). We consider additional guidance on how this regime applies if a person has already gone to AFCA for an irresponsible lending matter and had a determination would be helpful.¹

RECOMMENDATION 1. Include additional examples for products such as buy now pay later, payday loans, consumer leases, point-of-sale lending and funeral expenses policies.

RECOMMENDATION 2. Monitoring compliance with the DDOs regime, including data collection and proactive surveillance, be an enforcement priority for ASIC.

RECOMMENDATION 3. Include additional guidance on how DDOs regime intersects with dispute resolution, including AFCA.

Proposed product governance framework

B1Q1 Is our guidance on a robust product governance framework useful? What additional matters, if any, do you think are important in ensuring that a product governance framework will be effective and support compliance with the design and distribution obligations?

We support a strong product governance framework. In particular, we support the requirements that a firm must focus on the identified target market across the lifecycle of the product, be designed to reduce the risk of mis-selling and be documented, monitored, reported on and regularly reviewed. We also support the requirement that the DDOs regime be focussed on good consumer outcomes (see Figure 2), be implemented in the day-to-day conduct of firms' business, and that people at all levels including senior management need to be committed to it (RG000.39-40).

However, we remain concerned that target market determinations might be made so wide as to render them meaningless, as set out in further detail below.

Based on past experience with the financial sector using 'scalability' as a means to all but not comply with their obligations,² we also have misgivings about the statement in RG000.37 that "*the product governance framework will be affected by the nature, scale and complexity of an issuer's or distributor's business*". This would open a loophole for seemingly 'simple' products, such as payday loans, to continue to be sold to inappropriate target markets. We see this as a particular risk in the credit sector, where firms have done very little to ensure their

¹ RG 000.225

² E.g. CBA provided evidence in the Royal Commission that rather than taking steps to verify an applicant's expenses for an overdraft application (even if it held that information), it still complied with its responsible lending obligations 'taking into account scalability'. Royal Commission, Transcript of Proceedings (Day 7, 20 March 2018) 595.

products are designed in a way this is suitable for a particular target market – rather, inappropriate products have been designed and sold broadly. For example, a store credit card is designed to be sold to anyone who might want to use credit to purchase an item (even though credit limits are often higher than the value of the item being purchased). Credit cards and personal loans are often thought of by industry as ‘simple’ products, that require less compliance measures than other products. However, these products are not always simple, can have complex terms (such as interest-free promotions) and cause frequent consumer harm. From 1 July 2017 to 30 June 2019, nearly 70% of files opened by our financial counsellors through the National Debt Helpline included financial difficulty related to credit card debt, personal loans or both.³ The statement referenced above appears to be unnecessary and will likely only be used to reduce compliance obligations.

The scalability concept is likely to be used as an opening to reduce compliance with the DDOs to little or nothing. This is a particular risk for distributors operating under an exemption from the *National Consumer Credit Protection Act 2009 (NCCP Act)*, as monitoring and compliance with these arrangements has already been shown to be lacking during the Royal Commission. We therefore recommend removing RG000.37.

It is unclear how the product governance framework would apply to ‘complimentary’ insurances. For example, travel insurance on credit cards and the Commonwealth Bank’s new complimentary consumer credit insurance (CCI).⁴ The cost of these products is generally bundled with the main product and is not transparent, so while it is marketed as ‘free’ there is ultimately a cost borne by the consumers. These products often offer very poor coverage compared to insurance from direct sales channels or are considered very poor value when purchased as an add-on (for example, CCI). We recommend clarifying how the DDOs regime would apply to these products. We are concerned that firms may seek to move to “complimentary” insurances to avoid the operation of the DDOs and other reforms.

RECOMMENDATION 4. Remove the statement in RG000.37 that “*the product governance framework will be affected by the nature, scale and complexity of an issuer’s or distributor’s business*”.

RECOMMENDATION 5. Clarify how the DDO regime applies to ‘complimentary’ insurance products.

Adopting a consumer-centric approach

B2Q1 Is our guidance on the consumer-centric approach issuers and distributors should take to deliver good consumer outcomes useful?

We strongly support the focus on delivering good consumer outcomes, and the requirement for issuers and distributors to consider consumer vulnerabilities. We also support references to the ineffectiveness of disclosure, and guidance that issuers and distributors should not take advantage of behavioural biases or factors that can impede good consumer outcomes.

There could be more guidance in the Regulatory Guide on practical methods and strategies for undertaking a consumer-centric approach in the design of products, particularly in relation to vulnerable consumers. For example, how is it possible for a payday lender or consumer lease provider to genuinely say they have a consumer-centric approach in this regard? This is a critical aspect of the DDOs but the consumer outcomes section appears to be comparatively minor in the regulatory guidance.

³ Where financial difficulty type was recorded.

⁴ See joint consumer submission to The Treasury, Exposure draft legislation – Deferred sales model for ad-on insurance, Financial Services Royal Commission Recommendation 4.3, 28 February 2020, page 7-8: <https://consumeraction.org.au/joint-submission-exposure-draft-deferred-sales-model-for-add-on-insurance-fsrc-rec-4-3/>.

In relation to product design being driven by features that benefit the consumer, product issuers and distributors should consider measurable 'consumer benefits' that are focussed on wellbeing and financial security, or other factors that reflect genuine consumer benefit. Concepts of performance-based regulation might be useful in this context.⁵ It is not difficult for issuers and distributors to promote apparent consumer benefits for marketing purposes, but often the actual effects of these products do not benefit particular groups of consumers. For example, a consumer lease provider might claim that their product benefits a consumer who cannot afford to pay upfront for their household goods, despite the fact they charge exorbitant rental rates. In-store credit card issuers might claim the ability to make further interest-free purchases on a remaining credit limit to be a consumer benefit for all of their customers, while also advertising to their potential retail partners that this aspect of the product will increase the likelihood of additional purchases.⁶

Finally the guide needs to be explicit in ensuring that marketing material including advertising that plays on people's biases and vulnerabilities will be considered when determining whether good outcomes have been achieved. Examples raised by industry – including the use of gold to attract ethnic Chinese Australian customers to charge higher rates for credit cards with lower value (gold being a symbol of good luck, success and good fortune) – are just the type of exploitation of behavioural biases that lead to poor consumer outcomes that this guidance should assist in avoiding.

RECOMMENDATION 6. Provide more practical methods and strategies for undertaking a consumer-centric approach in the design of products, particularly in relation to vulnerable consumers.

RECOMMENDATION 7. Product issuers and distributors should consider measurable 'consumer benefits' that are focussed on wellbeing and financial security, or other factors that reflect genuine consumer benefit.

RECOMMENDATION 8. The guide needs to be explicit in ensuring that marketing material including advertising that plays on people's biases and vulnerabilities will be considered when determining whether good outcomes have been achieved.

B2Q2 What additional matters, if any, do you consider to be relevant?

In relation to taking advantage of behavioural biases or factors that can impede good consumer outcomes, it should be explicit that disclosure is not sufficient to overcome poor product design and sales practices. ASIC's joint report with the Dutch Authority for the Financial Markets (**AFM**) on disclosure⁷ confirms what consumer advocates have long known: we cannot rely on disclosure to ensure people are sold fair, safe, and good value financial products. The DDOs are a step in the right direction towards a product safety approach to financial services. A product disclosure statement or Key Fact Sheet cannot fix consumer harm associated with an inherently poorly designed or sold product. Financial firms must stop designing and selling products in a way that is deliberately complex, confusing and unfair.

RECOMMENDATION 9. It should be explicit that disclosure is not sufficient to overcome poor product design and sales practices.

⁵ See research by Professor Lauren Willis.

⁶ E.g. See <https://www.hsbc.com.au/credit-cards/products/classic/retailer-sign-up/>

⁷ <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>

Making a target market determination

C1Q1 Do you agree with our approach to guidance on the form and content of a target market determination? If not, why not?

We are concerned that ASIC does not propose to give definitive guidance on the content and form of a target market determination or the formulation of a target market. As noted above, we predict that a significant avoidance mechanism will be the drafting of target market determinations that are so broad they are effectively useless. We recommend a non-exhaustive range of examples be provided to provide some additional clarity. This is not to allow the industry to use the examples as a template or to rely upon to do the bare minimum described in the examples. We do support the industry genuinely engaging with the process to develop target markets themselves - but it is to provide further guidance as to the lengths that ASIC are expecting industry to go to in undertaking the task of formulating a target market.

We expect many companies to make incredibly broad target market determinations that will render them essentially meaningless, as noted above. We therefore consider that examples for 'simple' credit products, such as credit cards and buy now pay later products would be particularly useful.

We can imagine a credit card provider or buy now pay later provider saying that their target market is anyone who wants to buy a good or goods 'interest-free', which means they can continue to sign people up to high limits so they can sell them more interest-free goods in the future even if they are unlikely to make payments on time. If the DDO regime were to operate effectively, it should reduce the harm at point of sale by keeping credit limits to the cost of the item the person wanted to buy, as a target market determination should not be considered compliant if the lender simply says that the credit card is a general purpose card for all of that person's interest-free purchases. Simply branding a credit card an 'everyday card' for any purposes should not render the target market so broad as to be meaningless.

An example in the Regulatory Guide for credit cards should demonstrate that cards with particular product features, such as frequent flyer points, should not be targeted towards consumers who are unlikely to repay their entire balance each month as the value of the frequent flyer points would be far outweighed by interest, fees and charges. Further, a credit product sold at point of sale should only provide limits up to the value of the goods being purchased.

We also recommend that ASIC proactively review target market determinations and make this an enforcement priority (see RG 000.73). While requirements on firms to report contraventions of the DDOs is welcome, proactive ASIC enforcement will also be required to ensure issuers and distributors to be required to demonstrate their compliance with the obligations in making their target market determinations.

While target market determinations will be unlikely to be used by the general public, it is important that they are available publicly, particularly for consumer representatives such as financial counsellors and lawyers (see RG 000.63). They must also be provided by mortgage brokers to their clients – particularly when their client is seeking to take up a product that they do not fall within the target market identified.

RECOMMENDATION 10. Provide a non-exhaustive range of target market determination examples be provided to provide some additional clarity.

RECOMMENDATION 11. Target market determinations must be made available to the public.

Identifying and describing a target market

C2Q1 Is our guidance on the approach to identifying the target market for new products and continuing products useful?

We find the questions on “critical assessment and refinement” (RG 000.81) to be helpful but flag that in instances where an issuer has already determined that a financial product meets its target market, these questions will likely not be enough to change that assessment. Previously, insurers have argued for a deeming provision, where they simply send you a list of last year’s disclosure questions and the obligation is on the consumer to say otherwise. We suspect they want to do the same for target markets, which we consider unacceptable.

RECOMMENDATION 12. Ensure that reviews to ensure consumers fit within a target market cannot be avoided by using a deeming provision.

C2Q2 What additional matters, if any, do you consider to be relevant?

ASIC should make it very clear that ‘target market’ is different to the marketing sense of the word. ASIC has done it to some extent, but we think there is value in reiterating this point (RG 000.45).

We also recommend that the Regulatory Guide make it clear that the post-sale process should include addressing legacy products, for example, credit cards that are no longer being issued but still have customers with large persistent debts (RG 000.51).

RECOMMENDATION 13. Clarify that a target market is different to the marketing sense of the word.

RECOMMENDATION 14. The Regulatory Guide make it clear that the post-sale process should include addressing legacy products, for example, credit cards.

Our examples for different product sectors

C3Q2 Do you have any comments on the following examples, which we have used in our guidance to illustrate key principles set out in RG 000.66–RG 000.89:

(a) Example 1: Credit cards;

We support the commentary on credit cards in this example, particularly in relation to conduct encouraging consumers outside the target market to acquire the product likely not meeting the obligation to take reasonable steps.

In relation to promotions, such as annual fee waivers and interest-free periods – whether a consumer meets the target market also must consider whether the credit card would be suitable for the consumer if the promotion was not offered. For example, a card with an annual fee waiver will not be suitable to a consumer who cannot afford the fee once that promotion ends. Similarly, a card with an interest-free period that switches to high interest rates (particularly if the interest-free promotion only applies to some purchases), the effect of the high interest rate must be considered in relation to the target market determination.

Reference to excess – RG 000.84

Excess is referenced as a factor that may alter a target market. We support this inclusion despite industry objections. It is true that

an insurance product that offers lower upfront costs in the form of more affordable premiums will be unsuitable for the target market of consumers the product is intended for, if the excess level is set so high that consumers in the target market are unlikely to be able to pay the excess necessary to make a claim on the product. (RG00084)

While the variation of excess may be suitable for a vast array of consumers, many levels of excess are indeed difficult for more financially vulnerable people. \$1000 is difficult for many people to stump up – particularly for lower income, pensioners.

(d) Example 4: Consumer credit insurance;

Arguably, if DDOs are operating effectively, this product should not be sold as it offers such poor value for money. Unless there are significant improvements to claims ratios and other consumer outcomes, we cannot conceive an appropriate target market for this product.

(e) Example 5: Low-value products; and

There could be many more products highlighted in the low-value product example, such as consumer leases and payday loans. Furthermore, this example should explicitly state that a low-value product would be expected to have a very narrow target market determination if there is any market at all for them.

In terms of vulnerability, we consider examples relating to payday loans and consumer leases in this section in particular would be useful (RG 000.54 and onwards). Arguably, it is also hard to conceive an appropriate target market for these high cost products.

(f) Example 6: Basic banking products

This example should be updated to reflect the most recent Australian Banking Association Code of Banking Practice changes (many of which came into effect on 1 March 2020). The Royal Commission demonstrated that although these products have existed, there have been many practical issues in their distribution to the target market – including a lack of proactive distribution as well as the creation of obstacles for a clear member of the target market to be able to access these products.

It would be beneficial to mention negative target markets in relation to non-basic banking products. Although the negative target market determination is not required, ASIC should state that it is best practice and could use the offering of inappropriate standard transaction accounts with fees to consumers eligible for fee-free basic banking products. We also note that even 'basic' products can be harmful, such as buy now pay later products (RG 000.37).

In relation to later examples in the submission, we query the appropriateness of Example 15 on tyre and rim insurance, given that this product provides incredibly poor value to consumers and should not be sold in its current form. Further, it should be clarified in example 16 that issuers and distributors should not generally be selling direct life insurance to people without dependents or who have existing coverage through their superannuation fund.

RECOMMENDATION 15. Update product examples for credit cards, insurance excess, consumer credit insurance, low value products and basic banking products.

C3Q3 What additional matters, if any, do you consider to be relevant?

We would add that the sale of car loans in car yards have similar pressure sales tactics to add on insurance (see 000.53). We also encourage ASIC to make it clear that some products, unless major improvements to consumer outcomes are evidenced, are unlikely to meet requirements and should cease being distributed particularly to vulnerable groups e.g. consumer credit insurance, payday loans, and consumer leases (RG 000.6g).

We also query whether the following statement should be rephrased in light of the Royal Commission and current Senate Inquiry into payday loans and leases which has evidence that industry is not always best placed to identify target markets with a view to improving consumer wellbeing (as opposed to simply selling high cost low value products):

We consider that industry is ultimately best placed to identify the target market and assess its financial products to ensure that they are likely to be consistent with the likely objectives, financial situation and needs of consumers it intends to sell its products to.

RECOMMENDATION 16. Make it clear that some products, unless major improvements to consumer outcomes are evidenced, are unlikely to meet requirements and should cease being distributed particularly to vulnerable groups.

RECOMMENDATION 17. Rephrase the statement that '*industry is ultimately best placed to identify the target market and assess its financial products*'.

Consumer understanding

C5Q1 Do you agree that consumer understanding of a product does not necessarily equate to the product being likely to be consistent with the likely objectives, financial situation and needs of consumers in the target market?

We strongly agree that consumer understanding should not be a consideration in target market determinations. This is inherently subjective and would encourage providers to simply rely on ineffective disclosure to avoid compliance with the DDO regime (RG 000.8o). We also support ASIC's commentary on behavioural biases (RG 000.53).

Defining a 'negative target market'

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?

We agree that it would be useful for an issuer to describe the negative target market for its financial product (RG 000.9o), as it is complementary to describing the positive target market and would provide clarity to consumers and staff about the suitability of products for particular consumer groups. We recommend that ASIC specify that publishing negative target markets is best practice.

Product-specific issues

C7Q3 Do you agree with our guidance on how a target market determination should be approached for a bundled product? If not, why not?

Bundled products result in a lack of transparency and hinder the ability for a consumer to compare similar products. The target market determination for each product within a bundle is relevant; however, it is important to consider the overall design and distribution of the bundled package as well. For example, credit cards are often tacked on to a home loan – a requirement to get a better rate. A consumer may separately be in the target market for a home loan and that of a credit card at the same time. However, the target market for a home loan packaged with a credit card would logically be much smaller. Keeping the target market determinations separate for each financial product in a bundle will not capture the many issues that bundling creates. This is a similar issue in insurance, where insurers want to bundle different products such as home and car insurance.

C7Q4 Do you agree with our proposed approach to the application of the design and distribution obligations to products that can be customised at point-of-sale? If not, why not?

We agree that there may be different target markets related to different features of a product, and that these should be specified in the determination. It does not seem to follow, then, that bundled products would not be treated the same (in relation to the previous question). Bundling more than one financial product together is essentially a change to that product's features, which should be reflected in a target market determination.

Reviewing the target market determination

C9Q1 Do you have any comments on our guidance on setting appropriate review triggers and maximum review periods?

Review triggers should include enforcement and legal action, default rates and feedback from stakeholders and data collected through credit applications. RG 000.127 should also include an example about credit.

RECOMMENDATION 18. Review triggers include enforcement and legal action, default rates and feedback from stakeholders and data collected through credit applications.

Notifying ASIC of 'significant dealings'

C12Q1 Are there any additional factors that issuers should consider?

Notification of significant dealings is heavily reliant on trust that the financial industry will comply with these obligations and self-report any breaches. It seems unlikely that the required seismic culture shift has occurred in order for this to be effective. In relation to distributors, particularly those that are exempt under the NCCP Act, this seems even less likely. As noted above, we strongly encourage proactive surveillance and enforcement of the regime, which does not rely on notification of 'significant dealings'.

Renewal of general insurance policies

D2Q2 What other steps or controls, if any, do you consider would be appropriate for a distributor to consider what reasonable steps should be taken at renewal?

We consider that insurers, as distributor, should actively engage with customers at renewals time. That includes asking and engaging with policyholders on an annual basis to confirm whether anything has changed. We do not support any ability for an insurer to deem that a policyholder is in a target market if they do not contact the insurer to provide updated information. While we are concerned with the risk of policyholders becoming uninsured through disengagement, direct insurer engagement is required in order to shift policyholders away from a 'set and forget' model that has resulted from auto-renewals and direct debits – a model that has benefited insurers to the detriment of consumers. We are equally concerned that people will be rolled over into the same product that is now no longer suitable to their situation nor able to be claimed on. We will end up in the same position that we are currently – where people have a form of illusory insurance – paying for a product that they believe covers for them but in reality does not. Insurers have long been uninterested in the disengagement that has led to serious consumer harms including:

- people not being covered because of unilateral changes to their policy such as moving from agreed value to market value and new exclusions being included;
- people ending up with two insurance covers for the same risk.

We agree with Example 14 that further steps that may be appropriate and should include obtaining further information from consumers, or informing them that the available information indicated they may no longer be in the target market, and to offer alternative products.

The Regulatory Guidance should give greater clarity on how the contact should occur. For example, an email with information buried in fine print is less likely to lead to active engagement by the consumer by comparison to a conversation. It would also be helpful to give guidance on the timeframe to start such contact. For example, where a consumer is likely to be outside the target market, insurers should start conversations at least one month before auto-renewal. The current practice of 14 days is not enough time for consumers to actively engage.

RECOMMENDATION 19. Provide additional details about how insurers should contact consumers at renewal.

Reasonable view on whether a consumer is reasonably likely to be in the target market

D3Q1 Do you agree that, in most cases, a distributor would have sufficient information about a consumer through its existing sales processes to form a reasonable view on whether the consumer is reasonably likely to be in the target market for a financial product?

We are concerned with the key point at the start of section D which states: "*In limited cases, the reasonable steps obligation will involve the distributor asking direct questions...*". It is unclear to us why questioning would be limited when it seems to be the way that a distributor would understand whether a person falls within the target market determination.

We also note that buy now pay later providers in particular are collecting very little information about consumers which would assist them to determine the suitability of its product (as opposed the marketability) and therefore these providers cannot rely on existing information (see table 5 and 000.165). In general, RG 000.165 will only be

good in relation to retailers/car dealers if they change their practices which have shown insufficient or incorrect consumer information has been collected at point of sale to make responsible lending decisions.

The Regulatory Guide should specify that unsolicited selling is usually inappropriate. This is demonstrated by the upcoming ban on unsolicited sales of insurance and superannuation (see table 5).

RECOMMENDATION 20. The Regulatory Guide specify that particular issuers and distributors, such as buy now pay later providers, based on their current conduct cannot rely on existing information collected.

RECOMMENDATION 21. Specify that unsolicited selling is usually inappropriate.

D3Q3 Do you consider our guidance should identify (in draft RG 000 at RG 000.168) other ways that a distributor's sales processes can assist it to form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product? What other approaches can be taken?

In relation to 000.168, we find the guidance in "Note 2" to be critical and recommend it appear in the regular text of the guidance rather than as a "note". In our experience, consumers are not uncommonly required to self-certify in order to access a credit product, such as ticking a box that a credit card "meets their requirements and objectives" rather than an actual assessment of this in relation to responsible lending.

RECOMMENDATION 22. In relation to 000.168, the guidance in "Note 2" appear in the regular text of the guidance rather than as a "note".

D3Q4 Do you have any comments on our proposed guidance (in draft RG 000 at RG 000.169) on how a distributor could reduce the likelihood of leaving a consumer with the impression that their personal circumstances have been considered?

The proposed guidance in 000.169 is confusing in the context of the provision of credit and the crossover with responsible lending requirements, which require the lender to have information on the individual circumstances of the potential borrower in order to assess that the credit product is not unsuitable for them. While we understand that the DDOs and the responsible lending obligations are complementary but separate, they will be fulfilled at the same time in a practical sense. However, in general we support ASIC's explanation of how the DDO and responsible lending regimes interact – the guidance in 000.169 should simply be clarified on this point.

Interaction with personal advice obligations

D5Q1 Do you agree that a target market determination for a financial product should be considered by a financial adviser in providing the advice and meeting their best interests duty? If not, please explain.

We strongly agree that target market determination for a financial product should be considered by a financial adviser in providing advice and meeting their best interests obligations.

Conflicts of interest are rife within the financial advice industry. Conflicts include commissions, asset-based fees or simply a large institutional placing pressure on advisers in their networks. These often lead advisors to recommend financial products that are poor value or even harmful to their clients. ASIC recently reviewed the

quality of financial advice and found that 75% of files reviewed failed to comply with the law.⁸ It's clear the industry needs stronger safeguards to ensure that advisers are recommending people high-quality financial products.

Advisers remain incentivised to recommend products their licensee owns or that will earn them the biggest pay-cheque. Ensuring that advisers are required to consider a target market determination will be an important step forward in ensuring that people are recommended products that match their financial needs. At a minimum, financial advisers should only recommend products that satisfy the target market determination.

Advisers must also consider target market determinations for the choice of platform they recommend to people. The Banking Royal Commission highlighted that licensees are incentivised to recommend platforms that they own, or platforms will provide them with the highest revenue. The client's financial interest in choice of platform is often afterthought, if at all. Commissioner Hayne found that AMP was charging their customers considerably higher fees to access an AMP-owned platform, rather than recommending a cheaper option. The Commission concluded that:

*"AMP preferred its own financial interests over the interests of the investors (by continuing to charge the investors fees that were more than 15% above market rates)."*⁹

The charging of platform fees is largely invisible to consumers and are often deducted automatically from a client's platform account. There are no competitive drivers for the adviser to find either a more cost-effective or more suitable platform that may be in the best interest of their client. It's essential that an adviser's choice of platform should be captured by the Distribution Obligations.

A financial adviser has existing best interests duty obligations under the *Corporations Act* (2001) that extends well beyond considering target market determinations. ASIC must clearly state in their guidance that an adviser considering a target market determination does not alone satisfy an adviser's best interests obligations. Financial advice must be viewed in holistic terms well beyond simply selling products to people. The advice industry must guide people through important stages in their financial journey. At times, the best quality advice will be to take no action or do nothing, rather than invest in a financial product. However, we are concerned that advisers will view satisfying the target market determination as a green light to sell that product to consumers. ASIC must emphasise in their guidance the importance of providing holistic advice. The guidance must state that an adviser satisfying a target market determination is only one consideration in satisfying their best interest obligations.

RECOMMENDATION 23. ASIC emphasise in their guidance the importance of providing holistic financial advice, and that an adviser satisfying a target market determination is only one considering in satisfying the best interests obligation.

Interaction with responsible lending obligations

D6Q2 Are there are any further issues you consider are raised by the interaction of the two regimes that should be dealt with in our guidance?

We support the guidance on the relationship with responsible lending. However, we suggest that ASIC includes a more explicit statement that a person being included in the target market should not lead to responsible lending checks being scaled back.

⁸ ASIC 2018, Report 562, Financial advice: Vertically integrated institutions and conflicts of interest

⁹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2019, Final Report, p.137

However, as per our comments in relation to 000.169, there are requirements set out in the DDOs regulatory guidance about not considering individual circumstances or giving the impression that a distributor has done so, which will conflict with responsible lending obligations. In practice, this will create confusion and potentially lead to worse outcomes for consumers, who may be even more likely to be granted an unsuitable loan.

Please contact Policy Officer **Katherine Temple** at **Consumer Action Law Centre** on 03 9670 5088 or at katherine@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



Katherine Temple | Director Policy & Campaigns
CONSUMER ACTION LAW CENTRE



Erin Turner | Director Campaigns & Communications
CHOICE



Karen Cox | CEO
FINANCIAL RIGHTS LEGAL CENTRE



Fiona Guthrie | CEO
FINANCIAL COUNSELLING AUSTRALIA

Appendix A: Summary of Recommendations

- RECOMMENDATION 1.** Include additional examples for products such as buy now pay later, payday loans, consumer leases, point-of-sale lending and funeral expenses policies.
- RECOMMENDATION 2.** Monitoring compliance with the DDOs regime, including data collection and proactive surveillance, be an enforcement priority for ASIC.
- RECOMMENDATION 3.** Include additional guidance on how DDOs regime intersects with dispute resolution, including AFCA.
- RECOMMENDATION 4.** Remove the statement in RG000.37 that “*the product governance framework will be affected by the nature, scale and complexity of an issuer’s or distributor’s business*”.
- RECOMMENDATION 5.** Clarify how the DDO regime applies to ‘complimentary’ insurance products.
- RECOMMENDATION 6.** Provide more practical methods and strategies for undertaking a consumer-centric approach in the design of products, particularly in relation to vulnerable consumers.
- RECOMMENDATION 7.** Product issuers and distributors should consider measurable ‘consumer benefits’ that are focussed on wellbeing and financial security, or other factors that reflect genuine consumer benefit.
- RECOMMENDATION 8.** The guide needs to be explicit in ensuring that marketing material including advertising that plays on people’s biases and vulnerabilities will be considered when determining whether good outcomes have been achieved.
- RECOMMENDATION 9.** It should be explicit that disclosure is not sufficient to overcome poor product design and sales practices.
- RECOMMENDATION 10.** Provide a non-exhaustive range of target market determination examples be provided to provide some additional clarity.
- RECOMMENDATION 11.** Target market determinations must be made available to the public.
- RECOMMENDATION 12.** Ensure that reviews to ensure consumers fit within a target market cannot be avoided by using a deeming provision.
- RECOMMENDATION 13.** Clarify that a target market is different to the marketing sense of the word.
- RECOMMENDATION 14.** The Regulatory Guide make it clear that the post-sale process should include addressing legacy products, for example, credit cards.
- RECOMMENDATION 15.** Update product examples for credit cards, insurance excess, consumer credit insurance, low value products and basic banking products.
- RECOMMENDATION 16.** Make it clear that some products, unless major improvements to consumer outcomes are evidenced, are unlikely to meet requirements and should cease being distributed particularly to vulnerable groups.
- RECOMMENDATION 17.** Rephrase the statement that ‘*industry is ultimately best placed to identify the target market and assess its financial products*’.
- RECOMMENDATION 18.** Review triggers include enforcement and legal action, default rates and feedback from stakeholders and data collected through credit applications.
- RECOMMENDATION 19.** Provide additional details about how insurers should contact consumers at renewal.

RECOMMENDATION 20. The Regulatory Guide specify that particular issuers and distributors, such as buy now pay later providers, based on their current conduct cannot rely on existing information collected.

RECOMMENDATION 21. Specify that unsolicited selling is usually inappropriate.

RECOMMENDATION 22. In relation to 000.168, the guidance in “Note 2” appear in the regular text of the guidance rather than as a “note”.

RECOMMENDATION 23. ASIC emphasise in their guidance the importance of providing holistic financial advice, and that an adviser satisfying a target market determination is only one considering in satisfying the best interests obligation.

