

11 March 2020

Mr. Andrew Fawcett  
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Australian Securities and Investments Commission  
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By email: [product.regulation@asic.gov.au](mailto:product.regulation@asic.gov.au)

Dear Mr. Fawcett,

## Response to ASIC Consultation Paper 325: Product Design and Distribution Obligations

Thank you for the opportunity to comment on this consultation paper (**CP 325**) and the draft regulatory guidance (**Draft RG**) and to participate in the round table discussion hosted by ASIC on 5 March 2020. The roundtable discussion was very useful and highlighted the issues that insurers in particular face with the product design and distribution obligations (**PDDO**). RACQ Insurance Limited (RACQ) considers member experience to be a critical component of robust end-to-end proposition design. We support the continuous development of a disciplined product design process that allows for the ongoing assessment of how distribution approaches ensure high-value products reach the consumers appropriately.

We have had the benefit of reviewing the Insurance Council of Australia's (**ICA**) response to CP 325 and support the recommendations made therein. We add the following points in support of this submission.

### 1. Clarification that the PDDO obligations apply at the class level, not the individual consumer level

Together with the ICA, we urge ASIC to ensure that proposed Regulatory Guide does not conflate the distribution obligations under the *Treasury Laws Amendments (Design and Distribution Obligations and Products Intervention Powers) Act 2019* (the **Act**) with a positive obligation to ensure that each issue of a financial product is to a person whom the issuer has actively determined is within the target market.

The obligation under the Act is for an issuer to “take reasonable steps that will, or are reasonably likely to result in, retail distribution conduct ...being consistent with the [target market] determination”<sup>1</sup>. The Draft RG appears to extend this obligation to an obligation to “form a reasonable view that a consumer is reasonably likely to be in the target market for a financial product”<sup>2</sup>. There is a significant difference between these two obligations, and it is our submission that the Draft RG, as currently drafted, has the effect of extending the duties of issuers/distributors beyond the requirements of, and intention behind, the Act.

The Draft RG also anticipates a level of knowledge about individual consumers that is not reflective of practice. In the context of insurance, there is typically little consumer specific information taken by an issuer at the point of contract. For example, the Draft RG, at RG 000.84, provides that insurers must consider ‘how their products are likely to perform in practice and the likely outcome for consumers in the target market, having regard to their circumstances in totality’. The paragraph then goes on to specify affordability of excesses as a criterion of suitability. However, in the general insurance context, an insured's financial means, (income, savings etc) are not typically assessed. The value of the asset

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<sup>1</sup> S994E(1)

<sup>2</sup> Table 5, see also RG 000.163-000.169



being insured is usually the only financial data provided by a consumer. An issuer simply does not have that information about a consumer (unlike, for example, in the context of debt products).

Accordingly, we support the ICA's submission that the Draft RG be revised to clarify that the PDDOs apply at the *class* of consumers level, and to not to individual purchase transactions.

We support ASIC's approach that processes should not be framed in a way that indicates to consumers that their personal circumstances have been considered in issuing the product<sup>3</sup>. However, there is a real tension between this requirement and the sections of the Draft RG which require a distributor to consider information about specific consumers, as opposed to the class of consumer, as required under the Act. We submit that this too demonstrates the need for the Draft RG to be revised to align with the requirements of the Act.

With respect to paragraphs RG000.53-000.55, we agree that a consumer-centric approach should be fundamental to product design and distribution. However, we are concerned to see concepts such as choice architecture, and consumer biases considered in determining whether an issuer has taken a consumer-centric approach. These are subjective criteria which impact each consumer differently and, we submit, have limited application at a class level. With respect to specific examples given (i.e. add-on insurance in the context of "decision fatigue") we note that separate regulatory action has been taken to control the sale of such products.

Finally, we have a concern that, if the Draft RG remains as currently worded, there will be a negative impact on consumers who become uninsured by default because issuers cannot be confident that they, individually, are within the TMD (as opposed to being within the class of consumers described in the TMD). With the introduction the anti-hawking regime, insurers are constrained in terms of alternatives that they can offer prospective consumers which will compound this issue. We submit that both the industry and consumers would benefit greatly from considered guidance from ASIC about the interplay between the PDDO and anti-hawking regime.

## **2. Renewal of insurance policies**

We are pleased to see that the issue of renewal of insurance policies has been addressed in the Draft RG. The insurance industry has been clear in its desire for guidance on renewals since this is a product feature which is distinct from other classes of financial products such as mortgages or IDPS.

However, example 14, together with the matters outlined in the section "*Reliance on existing information about the consumer*" in Table 5, are again indicative of an obligation to assess the individual situation of the renewing customer, rather than a determination of whether the distribution activity is consistent with the target market determination (TMD) for the product<sup>4</sup>.

We appreciate the point made by ASIC at the roundtable discussion that it is ASIC's intention that issuers, including general insurers, will start to use consumer data differently to inform its compliance with the PDDO. However, we submit that taking into account "*matters that can reasonably be implied or assumed*" from data already held in respect of a customer not only goes beyond the obligations under the Act but also encourages a level of conjecture which is not warranted under the Act and could lead to adverse consumer outcomes.

Accordingly, we propose that Table 5 and Example 14 be reviewed and clarified to ensure consistency with the requirements of the Act.

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<sup>3</sup> RG 000.169

<sup>4</sup> See, for example, the last bullet paragraph in example 14 which provides "*When an insurer assesses that it is likely that a consumer is no longer in the target market for an insurance policy*"



### 3. Disclosure of review triggers

At the roundtable discussion, a question was raised as to the required level of granularity required in TMDs. We submit that the TMD should not be required to be granular nor exhaustive in respect of the review triggers. As noted in CP 325, at paragraphs 22-24, PDDO represents a new regulatory framework to the financial services industry and that compliance will be informed by practical experience gained as the regime matures. Accordingly, we recommend that the Draft RG be revised to make it clear that not all review triggers need to be disclosed and that the metrics which trigger review (for example number of complaints, variation of claims loss ratio to projected ratio) need not be disclosed. This will allow issuers to continue refining their frameworks and permit a level of flexibility in reacting to changing market circumstances. It will also ensure that issuers are not required to provide certain proprietary or competitive information in public document – for example loss ratio targets.

We trust that this response has provided useful insights into impact of the proposed guidance on issuers of general insurance products and will assist ASIC in providing guidance on how it will regulate this substantial reform.

We are happy to provide further information or answers to any questions ASIC officers may have with respect to this submission. Please contact Leah Watt or [REDACTED].

Yours sincerely

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