



NATIONAL AUSTRALIA BANK SUBMISSION

Treasury Consultation on Design and
Distribution Obligations and Product
Intervention Power – Draft Legislation

14 February 2018

I. Introduction

National Australia Bank (NAB) welcomes the opportunity to respond to the Department of Treasury's consultation on the exposure draft of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* (draft Bill) and related exposure draft Explanatory Memorandum (EM).

NAB has previously participated in the 2014 Financial System Inquiry (FSI) and 2017 Treasury consultation on this issue. In both instances, NAB has expressed support for a principles-based product design and distribution regime and in-principle support for a product intervention power (PIP). Good customer outcomes are at the centre of a strong, transparent and fair financial system as well as a sustainable banking model and NAB continues to support reforms which aim to promote these outcomes.

As noted in NAB's previous submission, a targeted and principles-based approach to product design and distribution is a core part of NAB's product development framework. This framework promotes enterprise-wide customer-centric design, distribution and governance and continues to evolve based on NAB's accumulated insights, with the predominant aim of ensuring that customers are able to make informed choices that meet their needs.

NAB's submission seeks to highlight some matters which would benefit from further clarification to ensure certainty and assist relevant issuers and regulated entities to implement the regime and meet its intended policy aims.

In summary, NAB's submission raises the following key issues:

- In some instances, the language used in the draft Bill means that relevant entities are unable to be certain they have complied with their obligations under the regime. This is particularly so for determining target markets and distributing in accordance with the determination. NAB believes the law should be clarified in this regard and also on the related issue of the regime's intersection with personal advice obligations in the distribution context.
- The delineation between the responsibilities and liabilities of issuers and distributors is unclear in some sections of the draft Bill and should be addressed to minimise duplication and confusion.
- In light of the amount of detail to be included in regulations and ASIC guidance, and significant nature of the changes required to comply with the regime, NAB believes that more than 12 months is needed after Royal Assent before the regime comes into force.
- NAB seeks clarification on the regime's application to some products, including custodial arrangements such as investor directed portfolio services (IDPS), superannuation funds, Wraps and other platforms.
- NAB also seeks clarification regarding aspects of the PIP, including the scope of the powers and the definition of 'significant consumer detriment'.

For the sake of ease, NAB has referred to 'dealings in or advice about a product' as distribution of that product.

NAB would be pleased to discuss this submission with Treasury in further detail.

II. Target market determination (TMD) to be appropriate

As currently drafted, issuers will be required to make a TMD such that it would be '*reasonable to conclude*' that, if the product were distributed in accordance with the distribution conditions, the product would '*generally meet the likely objectives, financial situations and needs of the persons*

in the target market (s993DB(10)). The EM at 1.39 states that the use of this *'language does not reflect a requirement to take into account the personal circumstances of any particular person or to provide personal advice'*. This legislative intent is not currently reflected in the draft Bill.

The expectation that the circumstances of persons within a target market *'such as their understanding of product features, capacity to meet financial obligations or bear losses, and whether their investment needs'* are the same as those the product seeks to meet would appear to require an issuer to have an understanding of an individual's requirements and personal circumstances.¹ NAB submits that further certainty be provided to product issuers by expressly reflecting in the legislation that making a TMD does not require a product issuer (in that capacity) to consider any person's individual circumstances and does not constitute, or require, the provision of personal advice (unless it is specifically part of the issuer's determination). The legislation should make it clear the product issuer is able to limit its consideration to those generic objectives and circumstances likely to be common across the class of persons in the target market.

The draft Bill appears to presume, in the context of an issuer making a TMD, that a single financial product will, in isolation, be able to meet likely objectives, financial situations and needs of the class of person within the target market. As currently drafted, s993DB(10) can be interpreted to require issuers to have certainty about the efficacy of the financial product, using phrases such as *'...the product would generally meet'* and *'be reasonable to conclude'*.

NAB believes the draft Bill at s993DB(10) should be clarified to reflect that any single financial product is extremely unlikely to satisfy all of any person's objectives and needs (noting the exceptions for custodial arrangements which frequently have a diversified range of options – see below at Section VIII). This would be consistent with the EM at 1.38, which states an issuer may conclude that it is appropriate to distribute a product to the relevant target market as part of a balanced portfolio.

The EM at 1.40 also states that an issuer must take into account *'all relevant factors'* in determining whether a product is likely to meet the *'objectives, financial situations and needs of persons within the target market'*. NAB is concerned the use of the word *'all'* may set an unattainable threshold for compliance, with issuers unable to be certain they have met the standard, and which may be challenged retrospectively.

NAB seeks confirmation in the legislation that the requirements set out in s993DB(10) regarding the content of the TMD apply at the time the TMD is made, reviewed or refreshed and do not apply to existing customers in the event the TMD is reviewed or refreshed. Similarly, to the extent acquisitions have been made, there should be no ongoing obligation to ensure those customers who have already acquired the product remain in the target market subsequently. This should be clarified in the wording of other sections, for example the record-keeping obligations.

Where reasonable efforts have been made to comply with the requirements of s993DB(10) at the time the TMD is made, refreshed or reviewed, NAB strongly believes a legislative safe harbour provision would assist in providing certainty to product issuers. Alternatively, NAB recommends amending s993DB(10) as follows to ensure that any assessment of a TMD's appropriateness only takes into account factors reasonably known at the time of the determination:

"A target market determination for a financial product must be such that at the time the target market determination was made it would be reasonable to

¹ EM at 1.40.

expect that if the product were issued or sold to persons in the target market in accordance with the distribution conditions, the product could generally help to meet the likely objectives, financial situations and needs common to the class of persons in the target market.”

III. Distribution in accordance with the target market determination

Per ss993DE(1) and (2), issuers and distributors must take reasonable steps to ensure distribution of a financial product is consistent with the most recent TMD. Section 993DE(3) defines ‘reasonable steps’ as those that ‘are, in the circumstances, reasonably able to be taken in relation to ensuring...the financial product is [distributed] in accordance with the TMD, taking into account all relevant matters...’.

NAB is concerned the requirement in s993DE(3) to take ‘reasonable’ steps is drafted more widely than intended, and on a literal interpretation includes any and every conceivable step it was reasonably possible to take, even if it would be unreasonable to expect a person to take that step.

In this way, reflecting NAB’s comments in relation to TMDs at section II above, we have significant concerns that requiring issuers and distributors to take into account ‘all relevant matters’ is an unattainable threshold. Entities cannot know with certainty whether they have complied with the requirement to take into account ‘all relevant matters’ and, in the absence of a legislative safe harbour, there is a real risk that, upon retrospective review, it is concluded not all relevant matters have been taken into account.

In addition, the requirement that distributors must take all relevant matters into account when ensuring they have reasonably complied with the issuer’s TMD would appear to risk the distributor giving personal advice in some circumstances. NAB believes that further certainty would be provided to distributors by expressly noting in the legislation that taking into account ‘all relevant matters’ does not constitute or require the provision of personal advice (unless this is a specific distribution condition set out in a TMD).

For this purpose, NAB submits that ‘all’ be removed from the provision referencing ‘relevant matters’ or otherwise that the provision is amended along the following lines:

‘...reasonable steps means steps that are, in the circumstances, reasonable in relation to ensuring that any dealing in, and financial product advice in relation to, the financial product is in accordance with the target market determination, taking into account all relevant matters that it would have been reasonable to consider at the time.’

Further, NAB seeks clarification in the legislation that where a product is acquired through personal advice and the customer falls outside the TMD, this does not constitute a contravention of a person’s obligations under either s993DE(1) or (2). For example, a product issuer might make a TMD that is narrower in scope than necessary given it must be made in ‘general terms’ and cannot have regard to personal circumstances. In such a case the TMD would still be ‘appropriate’ for those persons within its scope but it may be the product would also be appropriate for some persons outside the TMD’s scope. Accordingly, the law should not prohibit a product issuer or financial adviser from allowing a person outside the TMD to invest if the product would in fact be appropriate for that person.

However, we also appreciate the danger of creating loopholes that might facilitate persons investing in products that are inappropriate for them. To balance these considerations we suggest the law should make clear that a responsible or regulated person does not contravene their obligation under 993DE(1) or (2) where a person is investing in reliance on personal financial advice from an authorised adviser or they otherwise reasonably believe the investor has otherwise decided that the product is nevertheless suited to their objectives, situation and needs. If the investor's decision to invest is motivated by adviser conduct that was not appropriate or not in the client's best interests then there are already laws to regulate that conduct in the *Corporations Act 2001* (Corporations Act) Part 7.7A.

NAB notes substantial civil and criminal liability attaches to the obligation imposed on issuers and distributors in 993DE. In light of the significant potential penalties and extremely high threshold to be met under this section, NAB strongly believes the liability of the issuer and distributor should be clearly delineated in the law. In the absence of a specific deficiency in its own process, an issuer should not be held liable for a distributor's failure to take 'reasonable steps' to ensure a distribution is consistent with the TMD (and *vice-versa*).

In this regard NAB is also concerned that 993DE(1) appears to require a product issuer to ensure not only that dealings and advice by itself and its representatives are consistent with the TMD, but also dealings and advice by any other person. We note 993DE(2) only requires a regulated person to ensure its dealings or advice are consistent with the most recent TMD for a product and believe that 993DE(1) should be limited in the same way. However, if the broad literal meaning of 993DE(1) was intended NAB submits this would be unrealistic and unduly onerous.

NAB also seeks clarification about operation of the following:

- 993DC(5) – This appears to presume there will be a contractual arrangement between an issuer and a regulated person for the purposes of giving a notice not to distribute a product until the TMD has been reviewed. This will not always be the case and 993DC(5) should permit an issuer to give a 'direction or publish a notice' – for example, on the issuer's website.
- 993DC(6) – This should allow a regulated person a reasonable time in which to comply with a notice under 993DC(5). In practice, before a regulated person is able to comply with a notice under 993DC(5), they may need to take a number of steps which will require time to implement – for example, alert representatives, update systems and amend or take down external materials. This issue suggests a facilitative compliance approach may be required after the provisions are mandatory.

IV. Record keeping obligation

NAB acknowledges the necessity and importance of ensuring a TMD is reviewed and monitored over time to establish it remains appropriate, including through collection of distribution information. The definition of 'distribution information' set out in 993DF(2) includes the proportion of the number of issues and sales of the product that the person makes that were consistent with the TMD. In this regard, NAB suggests clarification of 993DF(2) to distinguish clearly between the 'issuer' (*the person*) and the distributor (*the regulated person*) as the sub-sections (c) to (g) only refer to the 'person', which might be interpreted as only referring to the issuer. However, consideration should be given to amending the law such that reporting of data, and potentially record keeping, is done by exception where the acquisition falls outside the TMD. This would assist in reducing the significant amount of data to be gathered, stored and transmitted, therefore mitigating some of the costs.

NAB believes that currently, as either an issuer or distributor of third party products, the NAB entities which fall within coverage of the draft Bill do not collect information sufficiently granular to meet the requirements of this section (even if done by exception). The requirement to do so will be operationally complex and will require significant investment in systems and processes. Additionally, contract renegotiations will be necessary to ensure distributors of products issued by the relevant NAB entities are also providing the necessary information to a NAB entity as an issuer. We note that regulations (or guidance) will be needed to clarify requirements in relation to 'distribution information', and this will mean additional changes to systems and processes (regardless of whether reporting is by exception). NAB is concerned compliance with these (and other) requirements will not be possible to meet within the current timeframes provided by the draft legislation (as discussed in greater detail below).

Additionally, the requirements set out in s993DF do not appear to address circumstances where issuers do not have a contractual relationship with distributors. It will not be feasible for NAB to collect information as an issuer where no commercial relationship exists. NAB requests the draft Bill be amended to address such circumstances or provide that issuers need only take 'reasonable steps' to obtain and maintain such information; it may not always be reasonable to expect the product issuer to know and record for certain whether the issue or sale was, or was not, consistent with the TMD where the issue or sale results in part from advice and dealings to which the product issuer was not privy.

V. Regulations and regulatory guidance

Implementation of this significant new regime is dependent upon finalisation of supporting regulations to the legislation (which are yet to be released) and issuance of regulatory guidance.

NAB looks forward to reviewing draft regulations and, where it would assist, providing ASIC with input to facilitate the completion of the overall framework in a timely manner. In this regard, these materials are required sufficiently early and prior to the commencement of the proposed law to provide clarity and enable compliant and efficient implementation including:

- How a TMD for a financial product may or should describe the class of persons who comprise the target market for the product and related distribution conditions and review triggers. Guidance should include commercially practical examples for a range of common products and distribution methods.
- How a person who makes a TMD can discharge their obligation to ensure the TMD is 'likely to meet the objectives, financial situations and needs of persons within the target market' (noting that the obligation is not intended to require a person to take into account the personal circumstances of any particular person or to provide personal advice (as per the EM at 1.39)).

In this respect, we note that EM 1.40 includes a non-exhaustive list of factors that may be considered, however, EM 1.41 notes '*there are likely to be other factors that need to be taken into account*'. Further regulatory guidance should be provided on factors to be taken into account, together with commercially practical examples for a range of products and distribution methods.

- How a person who makes a TMD, or a how a regulated person who distributes a financial product for which a TMD has been made, may comply with the obligation to take reasonable steps and take into account 'all relevant matters' for the purposes of 993DE (noting NAB's recommendation to amend this provision above). Guidance should include commercially practical examples for a range of common products and distribution methods.

- How ASIC will exercise its discretion and powers to issue a stop order in relation to a product under 993DI or make product intervention orders under the *Corporations Act* and *National Consumer Credit Protection Act 2009* (Credit Act).

VI. Timing

The design and distribution regime will require: significant investment in systems and processes for product issuers and distributors; new technology builds; development of additional compliance frameworks; training and education; and contract renegotiations between issuers and distributors to ensure that TMDs are complied with and distribution information is collected and provided as required.

In our previous submission, NAB suggested at least a 12 month implementation period after Royal Assent (in response to the proposed six month implementation timeframe). NAB has, in many past submissions, indicated legislative amendments involving major systems and/or process changes require at least 12 months lead time from the finalisation of provisions.

In considering the scope of changes required to ensure compliance with this regime, and the necessity of further regulations and ASIC guidance, NAB believes a 12 month implementation period from Royal Assent is insufficient.

A more appropriate implementation timeframe would be an effective date 12 months from the beginning of the financial year following the year in which final legislation, including regulations, is made and ASIC guidance issued. A further 12 months transition before the provisions are mandatory is recommended in order to allow finalisation of guidance including addressing unanticipated issues (similar to the Future of Financial Advice regime). This would also reflect the timeframes for similar international regimes, such as the MiFID II Regime which came into effect in the European Union on 3 January 2018, following consultation from 2014 onwards.

VII. Products exempted from the design & distribution regime

NAB generally supports the current exemptions to the regime articulated in the draft legislation.

Ordinary shares

In relation to the anti-avoidance provision for ordinary shares, NAB supports the intent of this provision and believes it is important to ensure issuers do not deliberately design products to avoid the regime. However, a large number of ASX listed companies include provisions in their constitutions permitting the conversion of ordinary shares to preference shares under certain circumstances (including NAB).

The practical impact of this anti-avoidance provision may therefore be to render the exemption for ordinary shares ineffective for a large number of companies across different industries. Considering this, NAB submits an anti-avoidance provision premised on the purpose of the issuer would be more appropriate (for example, a provision similar to the existing s707(3) of the *Corporations Act*, which requires disclosure in circumstances where, *inter alia*, 'the body issued the securities with the purpose of the person to whom they were issued selling or transferring the securities...').

VIII. Products included by regulation in the design & distribution regime

In relation to the products which will come into scope through regulation, NAB seeks clarification on the following matters.

Listed instruments and secondary markets

NAB understands the design and distribution regime is not intended to apply to secondary markets. Where a product (for example, a bank issued hybrid instrument) is available on single issuance and then enters the secondary market, NAB seeks clarification issuers will not be required to undertake subsequent TMD reviews under s993DC (as there is no further issuance of the product). NAB requests this be clarified in the relevant provisions of the legislation (or EM).

More broadly, while NAB understands the regime will not apply to secondary markets, we seek clarification of the regime's application to trading platforms, which are considered a product under s993DB(5). It is unclear the extent to which such trading platforms will be required to apply an issuer's TMD for a product that is on the platform and within scope of the regime. We also reference our comments above regarding the ability of issuers to collect distribution information from distributors where there is no contractual relationship.

The application of the regime to entities providing an execution service for secondary trading would not appear to deliver greater protections for retail clients, and may result in reduced access to the Australian market for ordinary clients. For example, if broker firms and trading platforms are required to consider an issuer's TMD when distributing ordinary shares capable of conversion, this may result in a class of consumers being unable to trade shares in a significant number of companies where they may fall outside the target market. It is important to note in this context that secondary markets are crucial to maintaining market liquidity and function. Additionally, the conduct of Market Participants is currently regulated through ASX Operating Rules and ASIC Market Integrity Rules.

Wholesale debentures

The EM at 1.29 lists the products the Government proposes to include within the regime by regulation, including 'debentures of a body that is an Australian ADI'. We note the intent to include these products, which would otherwise be excluded from the regime due to a specific carve-out from the Prospectus requirement in the *Corporations Act*. However, NAB seeks clarification, preferably in the legislation, that wholesale debentures issued by ADIs are not proposed to be included within the scope of the regulations, given they would rely on a separate exemption from the disclosure requirements of the *Corporations Act*.

Simple deposit products

We note the Government intends to include simple deposit products within the scope of the regime through regulation (see EM at 1.29). As stated in our submission to the Treasury consultation on this matter in 2017, NAB believes an exemption for simple deposit products, for example transaction and savings accounts, and cash hubs (particularly in superannuation) is appropriate.

These products are generally widely understood by consumers and respond to the needs of an extremely wide target market. Indeed, in most cases, it is not possible to receive salary and wages without a bank account. NAB believes imposition of additional regulatory requirements for these types of products will increase costs and, either act to limit accessibility without commensurate additional benefits for customers or, need to be so broad as to be virtually meaningless.

Noting NAB's comments in relation to timing above, if basic deposit products are to be within the scope of the regime, then draft regulations need to be released for public consultation sufficiently prior to the commencement of the obligations.

Custodial arrangements, including IDPS', superannuation funds, Wraps and Separately Managed Accounts

The EM states the Government intends, via regulations, to include custodial arrangements which would not otherwise be within the scope of the new regime. This captures an IDPS which is defined in the EM as a 'product'.

IDPS' are effectively administration and tax management platforms and not presently regulated as 'financial products' in their own right under the *Corporations Act* (although superannuation funds operating like IDPS' (i.e. pure wrap superannuation platforms) or 'hybrid' structures are financial products and regulated as such – see further below).

The current draft framework creates significant complexities for these structures particularly with regard to the role of the operators. While NAB acknowledges the EM states the policy intent to include such arrangements, consideration to exemption, or appropriately reduced obligations, is necessary. We address some of the issues below but these are not exhaustive.

An IDPS typically provides access to a wide range of separately issued financial products with an associated PDS (where required) for each of the products. The should law make it clear IDPS operators do not have obligations to separately create or determine the target markets for the individual products held on the platform where a TMD has been made by the issuers.

Similar treatment should be afforded a superannuation fund operating in the same way as an IDPS when providing externally sourced financial products on the fund menu (investment option menu). The terms for these investment options are mainly governed by the PDS' (where required) That is, the trustee for superannuation funds operating like an IPDS should be able to rely on the assessment and determination of the target market performed by the issuers of the products offered through the fund as 'investment options'.

In the event the IDPS and similar platforms are not excluded from the design and distribution obligations generally or from the TMD requirements, then to the extent it is accurate to do so, NAB believes that:

- These entities should be able to make a broad TMD that the IDPS/platform is appropriate for any class of persons,² to the extent it offers a sufficiently wide range of investment options to meet any class of persons' needs. This should not require these entities to impose a condition that each person does in fact make investment choices which suit that person's particular needs and circumstances.
- In particular in relation to wrap superannuation platforms, the trustee should be able to make a broad TMD stating the investment options sufficiently meet any class of persons' needs by relying on/referring to the investment strategies and objectives for the investment options the trustee has determined as a result of the assessment they are required to perform under the s52(6) of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the APRA Standard SPS 530.

Similar considerations may apply to Separately Managed Accounts and other 'IDPS-like' registered managed investment schemes.

To the extent these arrangements are captured, NAB's comment above (see section III) regarding clarity on the delineation between issuers and distributors also applies in this context, particularly in relation to Division 3, Schedule 1 which aggregates the obligations of each. For example, NAB strongly believes clarification will be required in the draft Bill to clearly enunciate how an IDPS

² Subject to common-sense conditions like having legal capacity to invest.

operator's TMD would be constructed separately and distinctly from the TMDs associated with the 'disclosure based products' captured under s993DB ('PDS products') and the associated obligations for each. The principal law or regulations must be very clear on which TMD applies for which purpose to reduce confusion and avoid duplication of liability or accountability including record keeping and reporting.

It will be crucial that regulations make clear which entity is issuing the product(s) and which entity has the obligation to manage communication of, and reporting about, the 'distribution condition' to the PDS product issuers on the IDPS (and/or to the IDPS operator) noting that an entity may be both an issuer and a distributor for different products. That is, which entity creating the TMD has what obligations (and hence liabilities) under Division 3, Schedule 1.

Implementing the regime will require reporting frameworks to ensure that, where applicable, distributors are able to report the acquisitions made by particular cohorts of retail clients to the IDPS operator, superannuation fund trustees or other PDS product issuers.

Given the potential for overlapping obligations and complexity which arises through the potential dual roles of custodial-type entities (as issuers and distributors), and to the extent exceptions are not made from the regime, NAB recommends that Division 3, Schedule 1 includes a regulation provision to deal to these (and other) issues, particularly for these arrangements.

Superannuation funds – additional considerations

A number of superannuation funds operate in a similar fashion to IDPS', effectively offering 'investment options' that would, if offered directly, constitute, and be regulated as, third party financial products (including listed exchange securities). These funds are frequently referred to as Superannuation Wraps or Platforms. Additionally, many funds operate as 'hybrid' platforms providing 'investment options' specific to the fund (including MySuper) as well as options which are also third party 'financial products'.

In any of these cases, a superannuation fund or platform can be considered both a regulated 'financial product' in its own right and a platform which provides 'investment options' where an 'investment option' may be:

- a mix of exposures to investments obtained by the trustee on wholesale markets but not being a single discrete product that could be offered in its own right externally (for example an 'investment option' labelled 'conservative' predominantly comprising FI, cash, and limited exposure to equities); or
- a separate 'sub financial product' from a third party backed by separate PDS', for example, managed funds (sub-products).

As noted above, for the third party 'sub-products', a platform administrator would generally seek to rely on the issuer's TMDs for its products.

A further complexity for superannuation more generally (whether similar to an IDPS, hybrid or other) is the lack of clarity in the legislation regarding what constitutes separate 'financial products'. As required by the *Corporations Act*, a superannuation fund member is issued with a superannuation product when they first become a member of a particular super fund. Members may frequently choose from a menu of 'investment options' following that acquisition but this does not amount to the issue of a further financial product to the member. While 'special' rules have been developed in the Corporations Regulations to deem certain events to involve the issue

of a further superannuation ‘financial product’ to an existing fund member, this is predominantly for disclosure purposes.³

In summary, considering the complexities outlined above, NAB strongly believes further clarification is required in the law regarding custodial arrangements, including superannuation. This includes:

- What responsibility a platform operator will have as a product issuer of its platform-level product and hence as a ‘responsible person’.
- What responsibility (if any) a platform operator will have as a product issuer of an issuer of indirect equitable interests in the underlying legal products issued by other product issuers to the platform operator.
- Related to the previous two points, how much a platform operator can leverage the underlying TMDs done by underlying product issuers and have a broad general TMD for its own platform product.
- What responsibility (if any) a platform operator will have as distributor (and hence a ‘regulated person’) in relation to indirect acquisitions of underlying products made by platform clients.
- How that responsibility will interact with the responsibility of an advice licensee and its adviser representatives as an adviser/distributor (and hence also a ‘regulated person’) for the very same indirect acquisitions on which the advice licensee or its advisers advised.

Clarification of employer role in superannuation

Due to the *Superannuation Guarantee (Administration) Act 1992* and *Fair Work Act 2009* employers must make minimum contributions for most employees to a fund with a ‘MySuper product’ for any employee who has not made an active investment choice (known as default super).

As noted above, the manner in which superannuation funds operate can mean that a so-called ‘MySuper product’ could merely be part of a single ‘financial product’ with other choice ‘investment options’ (noting there are additional and extensive prudential obligations that must be met for this purpose). While MySuper is exempted from the proposed regime, an ‘employer sponsor’ contributing for an employee to meet their legislated obligations (or, at the direction of an employee for example for salary sacrifice) may be captured by the regime.

NAB submits that an appropriate amendment to the definition of ‘regulated person’ in s993DA should be drafted to ensure an ‘employer sponsor’ is not considered to be dealing in (or advising on, or offering) a financial product in the context of superannuation. Employer sponsors are not ‘sellers’, ‘offerers’, or ‘dealers’ in superannuation products in the sense that is, or should be, intended for this purpose. NAB recommends the law make it clear employer sponsors in the superannuation context are explicitly excluded.

IX. ASIC powers

The draft Bill grants ASIC the power to order that specified conduct in respect of the financial product must cease (stop orders under s993DI(2); under Part 7.9A of the *Corporations Act* and

³ These events are an election to move from accumulation phase to pension phase and a move between “sub-plans”: see Corporations Regulations 2001 regulations 1.0.02, 7.9.01, and 7.9.02. In addition the MySuper regime introduced the concept of a ‘MySuper product’ being a ‘class’ of beneficial interest distinct from the other classes of defined benefits and the ‘choice product’ class – but without the law actually treating MySuper as a necessarily distinct financial product. Subsequent fee disclosure provisions in the Corporations Act and Regulations draw a distinction between a ‘MySuper product’ and ‘investment options’ but within a legal framework that allows the MySuper product and the (other investment options) to be part of the same single product if that is how a trustee wants to structure its product offer.

Part 6-7A of the *Credit Act*). NAB believes early regulatory guidance to provide further clarification on the scope of the power would assist. If it is not possible to have guidance, issued at the date of Royal Assent, NAB recommends at least a six month delay to the effective commencement date of Schedule 2 of the draft Bill to allow the regulator time to produce the guidance.

The EM at 2.36 states the range of orders ASIC can make under the PIP is 'extensive', subject to restrictions contained in s1022CC(6) and the equivalent NCCP amendment. This includes for example, that an intervention cannot impose requirements in relation to a person's remuneration, other than so much of the remuneration as is conditional on the achievement of objectives directly related to the financial product.

As recommended by the FSI, NAB believes the PIP is more appropriately articulated exhaustively, specifically allowing ASIC to intervene to require or impose:

- Amendments to marketing and disclosure materials.
- Warnings to consumers, and labelling or terminology changes.
- Distribution restrictions.
- Product banning.

NAB seeks clarification of the definition of 'significant detriment to retail clients'. The EM at 2.30 states that this can include reference to subjective factors, such as the impact of the detriment on affected consumers. NAB believes the EM should further clarify, in line with the FSI, the power is not intended to address problems such as 'where a large number of consumers have incurred a small detriment',⁴ or similar situations where the product is operating within anticipated parameters (for example, products with variable risk and/or volatility leading to temporary loss/detriment) noting s1022CD(3). The EM should also clarify the power is not intended to apply where a small, specific subset of consumers has experienced detriment (but other investors within the TMD have not).

In addition, NAB notes the regulations may prescribe additional requirements in respect of the consultation process by ASIC for purposes of complying with s1022CE(1)(c). NAB submits that, as a matter of procedural fairness, those regulations should include a requirement for ASIC to consult with affected persons and provide evidence for its view that a financial product '*has resulted in or will, or is likely to, result in significant detriment to retail clients*'. This should include sufficient detail to enable any person who may be affected by the proposed order to respond appropriately.

⁴ Financial System Inquiry, *Final Report*, p206.