INSURANCE COUNCIL OF AUSTRALIA

9 June 2020

Mr Andrew Fawcett
Senior Executive Leader, Strategic Policy
Australian Securities and Investments Commission
120 Collins Street
MELBOURNE VIC 3000

By email: andrew.fawcett@asic.gov.au

Dear Mr Fawcett

IMPLEMENTATION OF PRODUCT DESIGN AND DISTRIBUTION OBLIGATIONS

The Insurance Council of Australia (Insurance Council)[1] and its members appreciate the opportunity to bring to your attention a number of implementation issues arising in relation to the Product Design and Distribution Obligations (PDDO) in Part 7.8A of the Corporations Act 2001 (Cth). These issues have emerged in recent weeks as our members work through the detailed aspects of their implementation programs.

As outlined in our 11 March 2020 submission, our members are supportive of the overall approach taken in Consultation Paper (CP) 325 of 19 December 2019 and the accompanying draft regulatory guide outlining ASIC's proposals on the implementation of the PDDO, noting that our members have expressed a preference for more insurance specific examples.[2] We also welcome the 8 May 2020 announcement of a 6 months deferral of the commencement date of the PDDO to 5 October 2021 given the impact of COVID-19. [3] The industry has already made considerable progress in their implementation programs; the deferral will provide an additional opportunity for our members to make further improvements.

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[1] The Insurance Council is the representative body of the general insurance industry in Australia. Our members represent about 95 per cent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance). March 2020 Australian Prudential Regulation Authority statistics show that the general insurance industry generates gross written premium of $51 billion a year and has total assets of $133.8 billion. The industry employs about 60,000 people and on average pays out about $169.4 million in claims each working day. Over the 12 months to March 2020 the industry's net profit after tax (NPAT) was $1.5 billion – a 56.7 per cent decrease from the prior year's NPAT of $3.5 billion. The industry's underwriting result was also $1.5 billion, falling by 47 per cent from $2.8 billion in the prior year.

[2] The submission can be found at http://www.insurancecouncil.com.au/submissions#2020Mar.

[3] ASIC media release 20-109MR of 8 May 2020: "ASIC defers commencement of mortgage broker reforms and design and distribution obligations", downloaded from: https://asic.gov.au/about-asic/news-centre.

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In that regard we have also prepared a list of issues for clarification by ASIC that have emerged over the recent weeks. As you will see in Attachment A, the industry is seeking more detailed guidance on the following questions:

1. Should Target Market Determinations (TMDs) be required for a retail product cover which is contained within and automatically provided with and incidental to a larger wholesale offering?
2. Should TMDs be required where general advice is provided in relation to legacy products?
3. How does the statement in RG 000.120 regarding the adequate supervision of distributors apply when there are interposed entities – including online platforms and where a financial institution distributes products on behalf of a third party, and that party is also a competitor in the market?
4. How does the Section 994G requirement to notify ASIC of a significant dealing not consistent with a TMD apply in relation to general insurance?
5. How does the Section 994B requirement regarding the frequency of TMD review periods apply in relation to general insurance?

The Insurance Council and member representatives would welcome an opportunity to meet with you to work through these issues in greater detail. More detailed guidance as soon as practicable, and preferably in the finalised version of the RG (provided inclusion would not delay its finalisation), would greatly assist our members in progressing their implementation programs.

If you have any questions or comments in relation to our submission please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on telephone: 02 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely

Robert Whelan
Executive Director & CEO

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ATTACHMENT A

PDDO IMPLEMENTATION ISSUES AND QUESTIONS

Question	Background	Recommendation
1. Should TMDs be required to be prepared for a retail product offering that are merely incidental to a larger wholesale offering?	Given Section 994B, a TMD must be provided when the customer is a retail client (as defined exhaustively under Section 761G for general insurance products) for whom a PDS must be provided. We understand that industry practice has long been to not provide a PDS for retail offerings that are provided within and incidental to a wholesale offering. Examples include: personal effects (personal and domestic property) cover for employees provided automatically as a small and incidental addition within a larger coverage for general property policies such as Industrial Special Risk; limited automatic cover in relation to motor vehicle coverage incidental to a public liability insurance offering. None of these incidental covers can be purchased or provided separately from the main wholesale cover.	The ICA submits that TMDs should not be required to be for these incidental covers and that the better view is that they are not caught as retail client insurance requiring a PDS and TMD because: ○ The Corporations Regulations definitions were clearly intended to follow the logic of the Insurance Contracts Act 1984 (Cth) (IC Act) standard cover definitions which were designed to capture the major fields of domestic insurance and not automatic incidental covers in non-domestic fields ○ The Revised Explanatory Memorandum for the Financial Services Reform Bill 2001 (Cth) relevantly stated *"The first six listed types of insurance replicate those defined to mean standard cover in the Insurance Contracts Act and Regulations. These are essentially policies for personal, domestic and household protection, or consumer policies. Personal and domestic property insurance is currently covered by insurance complaints handling mechanisms and, as a consumer type of insurance, has also been included…. The list is based primarily on the concept of standard cover in the Insurance Contracts*

Question	Background	Recommendation
		Act 1984 (Insurance Contracts Act), plus a couple of additional categories of policies also regarded by industry as consumer policies… It is not desirable from a policy perspective to capture wholesale products, such as marine insurance and property insurance for businesses, which are also general insurance products. Such an approach would also be inconsistent with the concept of consumer insurance policies in existing insurance legislation." Paragraphs [2.25] to [2.26] In relation to a retail product offering that is merely incidental to a larger wholesale offering, the decision is being made about the product that can only be sold to wholesale customers (e.g. the liability cover) not the incidental cover which is included with the cover.
2. Should TMDs be required to be prepared where general advice is provided in relation to legacy products?	Section 994B(2) has the effect that a TMD has to be made before any person engages in "retail product distribution conduct" which is defined in Section 994A to expressly include the provision of financial product advice in relation to the product to a retail client (as well as a dealing, and the provision of a PDS or a disclosure document).	The ICA submits that TMDs should not be required to be prepared for legacy products where the customer is no longer making a purchasing decision. General advice on such products would be in relation to rights and obligations under the existing arrangements or with respect to endorsements that do not constitute retail product distribution conduct.

Question	Background	Recommendation
	This means products issued before the commencement of the PDDO, for which general advice may be given after commencement and prior to the expiry of the product, would potentially trigger TMD obligations under Section 994B(2) even though the product will not be arranged, issued or renewed after the commencement date. Relevantly, RG 000.16 provides that closed products for which no further offers or issues are being made after commencement (legacy products) are not affected by the PDDO, referencing Section 994B(2). However, given that the provision of financial product advice is said to be “retail product distribution conduct”, it is unclear whether RG 000.16 covers situations where general advice is given in relation to legacy products.	
3. How does the statement in RG 000.120 regarding the adequate supervision of distributors apply when there are one or more interposed entities – including online platforms and where a financial institution distributes products on behalf of a third party and that party is also a competitor in the market?	Section 994E requires an issuer to take reasonable steps that will result in distribution being consistent with the TMD. In this regard RG 000.120 states that ASIC will consider whether an issuer has adequately supervised the distributor and its processes, having regard to the target market and the potential for consumer harm.	The ICA submits that ASIC should provide flexibility in *how* an issuer monitors distribution conduct as set out in RG 000.120 when there are interposed entities between the issuer and the distributor, as long as its arrangements provide an effective mechanism for monitoring the distributor’s conduct.

Question	Background	Recommendation
	In particular, ASIC would regard as inappropriate a strategy where: there is limited oversight of the distributor; or where the issuer does not have a direct communication with the distributor. More detailed guidance is sought on how RG 000.120 would apply when there are one or more interposed entities – which could pose unique challenges for the insurer in obtaining the data necessary to monitor the distributor's conduct. For example: • The issuer (insurer)'s contractual relationship can be with the online platform rather than the distributor (the broker). This could result in the issuer being dependent on the online platform for the data necessary to monitor the distributor's conduct. • In relation to competing insurers with distribution arrangements: for example, a general insurer which issues its own home and contents insurance product may also distribute the motor insurance product of another general insurer, which also offers home and contents insurance. Where the information sought amounts to a request for comparative information on the performance of a particular product, this information is likely to be commercially sensitive. Complex issues of competition law may arise in an exchange of data required to meet the PDDO requirements and these may restrict the types of data which are able to be shared.	• In relation to online platforms, the issuer should be able to rely on the online platform as long as it can provide the data necessary to monitor the distributor's conduct. • In relation to competing insurers with distribution arrangements, it may be necessary for the guidance to outline how institutions should consider ASIC's expectations in conjunction with their existing competition requirements. The combination of a publicly available TMD with issuer-directed data flows from the distributor to the issuer may provide significant insight into the operations of the distributor and have adverse impacts on competition.

Question	Background	Recommendation
4. How does the Section 994G requirement to notify ASIC of a significant dealing not consistent with a TMD apply in relation to general insurance?	Section 994G provides that an issuer must notify ASIC if it becomes aware of a significant dealing in the product that is not consistent with the TMD as soon as practicable (within 10 business days). Draft RG 000.147-148 notes that "significant dealing" is not defined and is to be determined in the circumstances of each case; and that ASIC expects the following factors will be relevant in considering whether a significant dealing has occurred: 1. the proportion of consumers not in the TM acquiring the financial product; 2. actual or potential harm including amount of monetary loss resulting from consumers not in TM acquiring the product; and 3. the nature and extent of inconsistency of distribution with the TMD (noting this is not intended to be an exhaustive list of factors).	We would appreciate a discussion with ASIC about potential scenarios under which Section 994G could apply to general insurance (particularly given that many of our key offerings are mass marketed products with largely homogenous sales transactions).
5. How does the Section 994B requirement regarding the frequency of TMD review periods apply in relation to general insurance?	Section 994B provides that the issuer must state in its TMD the frequency of proposed periodic reviews. RG 000.134 states an ASIC view that a complex and high-risk investment product with a narrow target market, which has the potential to result in consumer harm, would likely be reviewed more frequently than a product that has less potential to result in consumer harm.	We would like to confirm with ASIC that there is no prescribed approach to determining appropriate review periods, and that this is a decision that each issuer should make having regarding to the complexity, risks involved, and the breadth of the target market as identified in RG 000.134.