

## *Upcoming Product Requirements*

- **The BEAR - Product Accountability**
- **Design & Distribution Obligations And Product Intervention Powers**

---

### **Author**

- Samantha Carroll, Practice Director | Governance, Compliance & Regulation

Ash St. Legal & Advisory  
L21, 1 York Street, Sydney  
W: [ashstreet.com.au](http://ashstreet.com.au)  
E: [info@ashstreet.com.au](mailto:info@ashstreet.com.au)

## 1. THE BEAR - PRODUCT ACCOUNTABILITY

---

Effective 1 July, the Banking Executive Accountability Regime (BEAR) legislation went live for small to mid-tier ADIs.

However, more recently, [APRA communicated](#) to the market its proposed approach to product responsibility through Recommendation 1.17 of the final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

In the APRA letter to ADIs outlining its proposed approach, APRA has focused on 4 key considerations to implementing the responsibility which include:

- a broad interpretation of what is in scope for end to end accountability which extends beyond design, delivery and maintenance of all products to issues such as remediation, linkages to IT systems, data quality, outsourcing and incentive arrangements;
- a single point of accountability for all products rather than just retail products and extending to white-labelling and distribution arrangements;
- the legislative mechanism for introducing the new responsibility as an additional particular responsibility under the Banking Act regime; and
- joint accountability to be implemented equally where more than one accountable person is identified to ensure there are no gaps or dilution.

### What is the deadline?

Initial consultation is underway with impacted ADIs. ADIs are required to submit their responses back to APRA by **23 August 2019**.

APRA then aims to release a draft schedule with the proposed product responsibility requirements for further consultation in October 2019, and the final legislative instrument in December 2019. APRA expects to implement the new requirements by 1 July 2020.

### What do I need to do?

Clearly, a number of practical challenges are likely to arise as a result of the proposed approach to the new product responsibility. In particular, where multiple persons are involved in the end to end process, organisations may need to map out the end to end process to understand potential impacts and how this will need to be managed going forward.

The proposed responsibility should also be considered in the context of the new product design and distribution obligations and other related obligations such as incident identification and remediation.

ADIs should consider the proposed approach and provide initial feedback and submissions to APRA by 23 August to ensure any practical challenges or issues are taken into consideration in the final approach.

### Ash St. Legal & Advisory can help

Ash St. are able to assist you with advising on potential impacts of the proposed approach and submissions to APRA.

Once the approach has been finalised, we can assist with updating:

- relevant materials for your organisation to conform with the new requirement;
- Accountability Statements and Maps; and

the development of supporting materials and frameworks.

To get started or to find out more reach out to **Catherine Tomic on + 61 2 8651 8710 or 0414 088 165**.

## 2. DESIGN AND DISTRIBUTION OBLIGATIONS AND PRODUCT INTERVENTION POWERS

---

On 5 April 2019, the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (DDO & PIP ACT) was passed and received Royal Assent.

This new legislation amends the Corporations Act 2001 and the National Consumer Credit Protection Act by

- introducing design and distribution obligations on:
  - **product issuers** to prepare a target market determination for certain retail financial products;
  - **product issuers and distributors** to take reasonable steps to ensure that the distribution of these retail financial products is consistent with the target market determination; and
- giving ASIC product intervention powers to proactively intervene if it is satisfied that a financial product or credit product is likely to result in significant detriment to consumers.

### Financial product impacted

The new design and distribution obligations generally apply to financial products that are issued and distributed where there is a requirement to issue a Product Disclosure Statement (PDS). It also applies to financial products as defined under the ASIC Act which includes credit facilities. The requirement to provide a PDS applies to retail clients. It does not apply to financial products acquired solely by wholesale clients and there are a number of financial products expressly excluded from the regime (such as margin loans).

The product intervention powers apply to both financial products (as defined under the Corporations Act 2001 and ASIC Act 2001), credit products (as defined under the National Consumer Credit Protection Act 2009) and additional products prescribed by regulation.

### Offences and penalties applicable

Failure to comply with the design and distribution obligations will give rise to:

- civil penalty proceedings or criminal prosecution; and
- liability to persons suffering loss or damage through civil action.

In addition, the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019, which received Royal Assent on 12 March 2019, amends the civil penalty and criminal offence provisions of the Corporations Act 2001 and the National Consumer Credit Protection Act 2009 and will apply to the design and distribution obligations upon commencement of this regime.

The product intervention powers provide ASIC with a proactive power to intervene, when the product has resulted, will result or is likely to result in significant detriment to consumers. The detriment does not need to be linked with a breach of the law for the intervention powers to be exercised by ASIC. Under the new power, ASIC can make an individual product intervention order or a market-wide product intervention order.

### Key Timeframes

The product intervention powers commenced on 6 April 2019 and design and distribution obligations come into effect on 6 April 2021.

## What do I need to do?

With product intervention powers already in force, product issuers need to assess which of their products are at a high risk of causing detriment to consumers to ensure there are appropriate **governance and compliance arrangements** to mitigate any risks of the product intervention powers being exercised. This may include revisiting the design of products, ceasing to distribute certain types of high risk products, restricting distribution of products to limited categories of consumers or enhancing controls such as monitoring and supervision arrangements over product distribution.

In addition, ASIC released *Consultation Paper 313 Product intervention power* on 26 June 2019 which sets out ASIC's proposed approach to exercising its product intervention power. Submissions on the Consultation Paper are due on 7 August 2019. ASIC has also indicated it will provide further regulatory guidance to support industry's implementation of the design and distribution obligations which is anticipated to be released for consultation later this year.

Although the industry are awaiting further guidance from ASIC and the design and distribution obligations do not commence until 6 April 2021 product issuers and distributors should start planning how they will implement the design and distribution obligations. . In particular, ASIC has indicated in CP 313 when appropriate financial product governance processes and controls are in place, it will be less likely to exercise the product intervention power. It would therefore be prudent to commence reviewing or developing appropriate measures and controls now to ensure there is sufficient time for implementation of the new obligations and to mitigate the current risk of the product intervention powers being exercised by ASIC.

### Ash St. Legal & Advisory can help

Ash St. are able to provide you with insights and guidance on how the new legislation should be considered and interpreted within your organisation as well as ensure that appropriate compliance and governance systems are in place and new distribution requirements are adhered to.

To get started or to find out more reach out to **Catherine Tomic on + 61 2 8651 8710 or 0414 088 165.**

**DISCLAIMER:** This communication is intended to provide commentary and general information only. It is not intended to be a comprehensive review of all aspects of the matter referred to. It should not be relied upon as legal advice as to specific issues or transactions.

### ABOUT THE AUTHOR



[scarroll@ashstreet.com.au](mailto:scarroll@ashstreet.com.au)

+61 438 323 584

### **SAMANTHA CARROLL** | Practice Director Governance Compliance & Regulation

Samantha is a governance, compliance and regulation expert with 10 years' experience in the Governance and Compliance division of a top-tier law firm and three years as the Head of Compliance for a mid-tier bank.

Samantha has significant experience advising public and private sector clients on the implementation, upgrading and review of their governance and compliance systems and is an accredited Governance, Risk and Compliance professional and Fellow GRC Institute. Samantha also has extensive experience advising public and private organisations at an executive and board level and has held board positions. She is currently the Deputy Chair on the BABI Youth and Family Service Board and a fellow of the Governance Institute of Australia.