

Q&A: Design and Distribution Obligations (DDO) as at 30 June 2021

The ASFA DDO Working Group has asked ASIC a number of questions in relation to DDO. This document lists the questions asked by Working Group members and ASIC's answers, as at 30 June 2021.

1. Application of DDO

1.1. When does DDO apply?

Broadly, the DDO applies to all choice superannuation products for which a product disclosure statement (PDS) is required, including retirement products. The DDO regime does not apply to a MySuper product, 'defined benefit interest' (within the meaning of the SIS regulations) or an interest in an eligible rollover fund, or superannuation products that are no longer for issue or sale.

While MySuper products, including default insurance offered as a component of the product, are not subject to the DDOs, the links between MySuper and other financial products mean that the DDOs are likely to touch on aspects of MySuper product design and distribution. For example, many trustees offer the same insurance to consumers holding MySuper and choice superannuation products. As well, the marketing and promotion of MySuper and choice superannuation products may have common elements.

Closed products for which no further offers or issues will be made from 5 Oct 2021 will also not be affected by the DDO regime. Notwithstanding that a product is closed, a PDS may still need to be issued. If the PDS obligation is triggered in relation to a closed product, then there is need to consider whether DDO applies to the product.

If there is to be a new super product issued from 5 Oct 2021, and the product is not exempt from the DDO (e.g., MySuper products), the DDO will apply.

1.2. How does DDO apply?

The DDOs apply at the product level. Investment options are a key attribute, and will affect whether the product is likely consistent with likely objectives, financial situation and needs of consumers.

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One or more options offered may be more 'suited' to particular groups of members based on their likely objectives, financial situation and needs.

Failure to identify investment option sub-markets risks consumer being issued a product via an option whose characteristics are not consistent with their likely objectives, financial situation and needs.

1.3. How does the DDO apply when personal advice is provided?

For the purposes of the DDOs, personal advice, and any dealing by a person or their associate that consists of arranging for a consumer to apply for, or acquire, a product for the purpose of implementing the personal advice that was given, is considered excluded conduct.

When providing personal advice or implementing personal advice, a financial adviser is not required to take reasonable steps to ensure the distribution of a choice superannuation product is consistent with the TMD. However, consistent with guidance in [RG 274](#), advisers should consider the TMD for the choice superannuation product in order to meet their best interest's duty when providing personal advice.

While some distribution obligations do not apply to the excluded conduct, all distributors, including financial advisers, must still collect and maintain complete and accurate records of distribution information from all retail product distribution conduct. This obligation applies to all excluded conduct.

Distributors who give personal advice in relation to a choice superannuation product must provide information specified in the product's TMD to the trustee and the number of complaints about the product according to reporting periods specified in the TMD. In addition, a distributor of a choice superannuation product, including an adviser, must notify the trustee of a significant dealing in the product that is not consistent with the product's TMD. These record-keeping and reporting obligations are necessary for the review of TMDs as part of the DDOs and to support the effectiveness of the DDOs.

1.4. How does the personal advice exemption to ask questions apply?

In some cases, superannuation trustees may need to ask questions of a consumer to determine whether the consumer is in the target market for a choice superannuation product. The law provides an exemption from personal advice obligations for trustees and any other person to ask a consumer for information solely to determine whether they are in the target market of a superannuation product. This exemption also applies when informing the consumer of the result of the determination.

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1.5. With regard to Defined Benefit (DB) members, there are often additional accumulation accounts connected to the DB membership within a super fund (for example, a DB member could make extra lump sum contributions which do not form part of their DB formula). The additional accumulation accounts are often able to be invested in accordance with the member's investment choice. Are these additional accumulation accounts, as they are part of the overall member's DB interest with a super fund, exempted via the DB target market determination exemption?

This will depend on each individual product.

1.6. Are superannuation administrators 'distributors' for the purposes of the DDO regime?

Whether a superannuation administrator is a 'distributor' for the purposes of the design and distribution obligations (DDOs) depends on whether the administrator is a 'regulated person' as defined in section 994A(1) of the *Corporations Act 2001*, as inserted by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*. The 'regulated person' definition is broad and includes, for example, any holder of an Australian financial services licence (AFS licence) and AFS licence holder authorised representatives. The definition also includes persons that are not required to hold an AFS licence because they provide services described in regulation 7.6.01 of the *Corporations Regulations 2001* that are covered by an exemption.

However, not all conduct of regulated persons is subject to the distribution obligations. The obligations only apply where a regulated person engages in 'retail product distribution conduct' which is also defined in section 994A(1). As the [Explanatory Memorandum](#) to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 notes, a regulated person engages in retail product distribution conduct in particular if they:

- issue or arrange to issue a financial product;
- provide financial product advice; or
- give a PDS or disclosure document (to a retail client).

As such, a superannuation administrator will be a distributor for the purposes of the DDOs, and subject to the distribution obligations, to the extent that their activities are retail product distribution conduct. For example, if an administrator provides financial product advice in relation to a product via a call centre, they will be subject to the distribution obligations. Administration functions such as data management, contribution and statement processing and insurance claim administration are not likely to be retail product distribution conduct.

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Personal advice and conduct associated with implementing personal advice, which would otherwise constitute retail product distribution conduct, is excluded from most of the distribution obligations: see the 'excluded conduct' definition in section 994A(1). The exceptions are the distribution obligations relating to record keeping and the obligation to notify of significant dealings: see s994F(2) of the *Corporations Act 2001*, as inserted by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019*.

Similar considerations would be applicable when considering comparison websites. As a general rule, the more a distributor is involved in a consumer acquiring a choice superannuation product, the more trustees will need to actively engage and work with the distributor to fulfill their DDOs. However, this depends on the activities undertaken by these types of entities.

1.7. Are employers considered distributors?

Employers undertake a range of activities that involve superannuation. Some of these activities fall within conduct that would normally require an AFS licence. However, employers are exempt from the requirement to hold an AFS licence when:

- paying superannuation guarantee (SG) contributions on behalf of an employee into a superannuation product; and
- arranging for the issue of a superannuation product to an employee.

Employers are not subject to the distribution obligations when carrying out these activities, which could be considered engaging in retail product distribution conduct. Further, employers are not considered to be engaged in this conduct when giving an employee a PDS for a default fund product of the employer and employee.

As the [explanatory statement](#) for Regulation 7.8A.25 notes:

Regulation 7.8A.25 provides that an employer is not subject to the design and distribution obligations in engaging in a transaction that involves specified retail product distribution conduct that relates to a financial product that is, or will be, an interest in the chosen fund of the employee or the employer's default fund (i.e. an interest in a fund to which paragraph 32C(2)(ba) of the *Superannuation Guarantee (Administration) Act 1992* applies).

The exempted conduct is:

- an employer giving the employee a Product Disclosure Statement for a product that is a default fund product for the employer and employee;
- an employer paying contributions on behalf of the employee into a product that is a default fund product for the employer and employee or a chosen fund product for the employee; and

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- a dealing in a financial product that consists only of the employer arranging for the issue to the employee of a product that is a default fund product for the employer and employee or a chosen fund product for the employee.

Absent this Regulation, employers would be brought into the DDO regime as a regulated person because the definition of regulated person (see section 994A and section 1011B of the *Corporations Act*) includes a person who is exempt from the obligation to hold an Australian financial services licence because of paragraph 911A(2)(k) of the *Corporations Act*. Employers utilise exemptions made under paragraph 911A(2)(k) in relation to dealings with their employees superannuation arrangements.

2. Insurance

2.1. In relation to insurance, is an approach to assess / document the insurance offering and how it applies for the Target Market overall, rather than trying to link the insurance to each submarket / investment option. So we consider the insurance feature separately rather than trying to also relate it to the investment options.

There is the potential to assess consistency of the insurance offering with the likely objectives, financial situation and needs of the target market for a superannuation product as a whole but this is unlikely to be appropriate where the target market comprises sub-markets for different investment options. This is because it may be anticipated that sub-markets will have different insurance needs.

Importantly, issuers must recognise that insurance offered through superannuation is a key attribute of the superannuation product rather than a separate product.

2.2. If the insurance offered through a super product is unlikely to be appropriate for a certain class of consumers e.g., casual employees, based on the guidance provided in RG 274, example 9, it is not entirely clear if this class of consumer will be considered outside the target market for the entire super product or only outside the target market for the sub-market for the insurance option. If it is the former, this would likely mean that most, if not all, super products that offer insurance will be considered unsuitable for casual employees thereby considerably limiting the ability for these consumers to select a suitable super fund.

If a key attribute of a superannuation product, such as its insurance component, is not appropriate for a class of consumers, issuers should give thought to whether that attribute or the product should be redesigned. For example, it may be better for a superannuation

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trustee to issue a choice product without insurance, with default insurance appropriate to casual employees, or with optional insurance that can be tailored by consumers to their own circumstances.

3. Reasonable steps obligation

3.1. What does the reasonable steps obligation entail?

Issuers must take reasonable steps that will, or are reasonably likely to, result in distribution being consistent with the TMD, unless personal advice has been provided.

It does not automatically follow that, because a client terminates their advice relationship, trustees must restrict investment switches and / or available investments.

What are reasonable steps will depend on the circumstances and should be determined objectively i.e., the distributor must meet the standard of behaviour expected of a reasonable person in their position that is offering the same product and subject to the same legal obligations.

There is no requirement that reasonable steps be consistent across distribution channels.

A trustee will not necessarily fail to meet the reasonable steps obligation if a consumer outside the target market acquires the product.

3.2. Where a client terminates an advice arrangement should the superannuation fund restrict switches and new investments?

Depends on the circumstances. It depends, for example, what investments are actually available to the consumer. If it is a product that relies on financial advisors as a distribution channel, need to consider whether those who are no longer advised will end up in the appropriate product.

3.3. How are issuers and distributors able to satisfy reasonable steps in situations where a member acquires a superannuation interest but does not apply themselves to become a member of the superannuation product e.g. default fund members, SFTs, reversionary beneficiaries, family law splits?

As stated in ASIC [Report 674](#), ASIC considers that guidance on the reasonable steps obligation for issuers and distributors in [RG 274](#), including the risk management principles, is sufficient for industry to consider what steps are appropriate when exercising the design and distribution obligations in relation to interests such as reversionary pension interests.

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If a consumer does not apply to acquire a product through the product issuer, the issuer should consider other mechanisms by which they acquire information about the consumer. RG 274.177, for example, suggests distributors may analyse data on a class of similar consumers. Example 19, in the context of exchange traded funds, refers to website content, marketing strategy and materials; and call centre scripts. RG 274.187 refers to application forms which, in the context of a reversionary beneficiary, may include the application form of the member that nominated the beneficiary.

4. Significant dealings

4.1. What does significant dealings mean?

There is no significant dealings definition. Whether a dealing is significant is a matter to be determined in the circumstances of each case. RG 274.159 outlines factors that issuers can consider whether a significant dealing exists.

ASIC recommends issuers set an objective criteria for a significant dealing based on the nature and risk profile of their product. ASIC does not propose to provide a 'ball-park' proportion of clients outside the target market that represents a significant dealing.

It is not solely quantum of clients invested outside the target market relevant. Concentration may matter. For example, higher risk products may have a narrower target market, which may point to a smaller proportion of consumers being outside of the target market being of concern. The reason a client is outside the target market may impact why distribution to them represents a significant dealing.

5. Target Market Determinations (TMDs)

5.1. Some key TMD points to note

A TMD is at the product level. A trustee may elect to make a TMD for an investment option.

If investment options are likely to be consistent with the likely objectives, financial situation and needs of different groups of members, the TMD for the product should:

- describe multiple sub-markets in relation to investment options or groups of investment options offered, as well as describing the target market for the product taken as a whole; and
- specify distribution conditions in relation to the investment options or groups of investment options offered, as well as describing distribution conditions for the product as a whole.

Grouping investment options based on a risk basis and/or investment time horizons would be effective, although these are not exhaustive ways to group investment options.

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The TMD must describe the class of consumers that comprise the target market for the product: see s994B(5)(b).

Issuers need to implement effective arrangements that are likely to direct distribution of the product to the target market. Provided they are reasonable in the circumstances, issuers may rely upon assumptions:

- about likely objectives, financial situation and needs of a consumer when determining if they are in the target market; and
- in their assessment of factors relevant to whether a significant dealing has occurred.

There is no need to survey every consumer in order to determine whether they are in the target market. The issuer can rely on particular characteristics (e.g. age, balance size).

A TMD is not required for the MySuper product. However, one way to acquire a choice superannuation product may be by switching from a MySuper product. Trustees will need to consider this when drafting the TMD for the choice superannuation product and take reasonable steps to ensure that distribution of the choice superannuation product is consistent with that TMD.

5.2. Review of the TMD

The DDO regime includes an obligation to review the TMD: see s994C.

Periodic review of a TMD represents an opportunity to assess whether the class of consumers that hold the product is consistent with the target market.

Trustees should satisfy their review obligations as part of the DDOs and their Member Outcomes obligations in tandem to ensure that both sets of obligations are implemented efficiently and draw insights. The joint [ASIC-APRA December 2020 letter](#) provides more information on this.

Intel gained through the DDO regime can assist with compliance with Member Outcomes.

5.3. When an issuer receives a complaints report from their distributor, is the issuer required to follow up each complaint or follow a risk-based approach?

A risk-based approach should be appropriate. However, this might vary where, for example, there may be a lower number of complaints but the complaints themselves reflect significant consumer detriment.

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6. Employer sub-plans

The trustee of a fund with multiple sub-plans for individual employers may choose whether to prepare a single TMD or separate TMDs for each sub-plan.

Note: Change in membership between sub-plans is taken to be issue of a new super product: see Corps reg 7.9.02(4).

Irrespective of whether a trustee prepares a single TMD or separate TMDs for each sub-plan, they must comply with the content and appropriateness TMD requirements.

If a trustee prepares a PDS for a sub-plan, it is expected that a TMD would be prepared for the sub-plan.

7. Miscellaneous Q&A

7.1. Does ASIC view the AFS licence authorisations of 'arranging' and 'general product advice' for retail clients as an indication that an entity is definitely conducting retail product distribution under DDO?

AFS licence authorisations of 'arranging' and 'general product advice' are not evidence, by themselves, of retail product distribution conduct.

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Our membership is across all parts of the industry, including corporate, public sector, industry and retail superannuation funds, and associated service providers, representing over 90 per cent of the 16.5 million Australians with superannuation.

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