



ASIC

Australian Securities &
Investments Commission

CONSULTATION PAPER 313

Product intervention power

June 2019

About this paper

This paper sets out ASIC's proposals for guidance on exercising the product intervention power in Pt 7.9A of the Corporations Act and Pt 6-7A of the National Credit Act. We are seeking the views of interested stakeholders, including industry and consumers, on our proposals.

Note: The draft regulatory guide (draft RG 000), which is attached to this paper, is available on our website at www.asic.gov.au/cp under CP 313.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 26 June 2019 and is based on the Corporations Act and the National Credit Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on exercising the product intervention power. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section D, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 7 August 2019 to:

Ashley Brown, Senior Adviser
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: product.regulation@asic.gov.au

What will happen next?

Stage 1	26 June 2019	ASIC consultation paper released
Stage 2	7 August 2019	Comments due on the consultation paper
Stage 3	September 2019	Regulatory guide released

A Background to the proposals

Key points

This consultation paper and the draft regulatory guide attached to this paper (draft RG 000) relate to the product intervention power under Pt 7.9A of the *Corporations Act 2001* (Corporations Act) and Pt 6-7A of the *National Consumer Credit Protection Act 2009* (National Credit Act).

The Financial System Inquiry (FSI) recommended in its final report that ASIC be provided with a product intervention power. The FSI also recommended the introduction of principles-based design and distribution obligations, on which we will consult later this year.

Note: See the 'Key terms' in draft RG 000 for a list of terms and definitions used in this paper. Draft RG 000 is available on our website at www.asic.gov.au/cp under CP 313.

Introduction of a product intervention power for ASIC

- 1 The Australian Government introduced the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 (Product Regulation Bill) into Parliament in September 2018. The Product Regulation Bill introduced two key reforms in financial services:
 - (a) a product intervention power for ASIC; and
 - (b) a new governance regime for the design and distribution of financial products (design and distribution obligations).
- 2 These reforms were introduced following recommendations by the FSI in its final report. The FSI recommended that ASIC be provided with a product intervention power that would enhance its regulatory toolkit when there is a risk of significant consumer detriment. The FSI also recommended the introduction of principles-based design and distribution obligations, requiring financial product issuers and distributors to consider a range of factors when designing products and setting distribution strategies.

Note: See FSI, [Financial System Inquiry: Final report](#), November 2014.
- 3 The Product Regulation Bill passed Parliament on 3 April 2019. The product intervention power reforms, introduced by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Product Regulation Act), commenced on 6 April 2019.
- 4 This paper relates to the product intervention power in Pt 7.9A of the Corporations Act and Pt 6-7A of the National Credit Act. We will consider all submissions to this paper before finalising our position. Our final position will be published in a regulatory guide in September this year.

- 5 We may begin consulting on particular uses of the product intervention power before finalising and publishing the regulatory guide. However we will not make a final decision on exercising the power before the close of consultation on the regulatory guide.
- 6 We will consult separately on our approach to the design and distribution obligations. We expect to commence public consultation on regulatory guidance for the design and distribution obligations towards the end of the year.

Context of the product intervention power

- 7 The FSI recognised in its final report that there were limitations to ASIC's regulatory toolkit. In particular, it recognised that ASIC could only:
- (a) take action to rectify significant consumer detriment after a breach or suspected breach of the law by a firm; and
 - (b) take enforcement action against conduct causing significant consumer detriment on a firm-by-firm basis, even when the problem was industry-wide.
- 8 It also recognised that there had been:
- (a) cases where despite there being significant consumer detriment, ASIC had exhausted its regulatory toolkit and there was no clear basis to take enforcement action;
 - (b) cases where ASIC lacked a broad toolkit to respond effectively and in a timely way to an emerging risk of significant consumer detriment; and
 - (c) cases where consumers have failed to understand the risk/return trade-off involved in a product, even if disclosure and advice were compliant.
- 9 The FSI recommended in its final report that ASIC be provided with a product intervention power to enhance its regulatory toolkit. The new power would enable ASIC to take a more proactive approach to reducing the risk of significant consumer detriment and would allow for more timely and targeted intervention.

Product intervention powers in other jurisdictions

- 10 Globally, the use of product intervention powers as a regulatory tool is not a new concept. With passage of the Product Regulation Act, Australia has joined other international jurisdictions with established product intervention powers. These jurisdictions include the United States, the United Kingdom, the European Union, Hong Kong and Taiwan.

Note: See Treasury, [Design and distribution obligations and product intervention power](#), proposals paper, December 2016.

- 11 In the United Kingdom, the product intervention powers of the Financial Conduct Authority (FCA) consist of temporary product intervention rules and general rule-making powers. The FCA is not required to consult before making temporary product intervention rules, but is required to consult before exercising its general rule-making powers to make permanent product intervention rules. Australia's product intervention power is more circumscribed than its UK counterpart. For example:
- (a) ASIC can only make temporary product intervention orders after a process of consultation; and
 - (b) ASIC does not have the power to make permanent rules without Ministerial approval.
- 12 The FCA has previously exercised its product intervention powers in relation to the sale of contingent convertible securities and binary options to retail consumers.
- 13 In the European Union, the European Securities and Markets Authority (ESMA) has adopted product intervention measures in relation to contracts for difference (CFDs) and binary options.

Overview of the product intervention power

- 14 The Product Regulation Act introduces a proactive power for ASIC to intervene when a product has resulted, will result or is likely to result in significant detriment to consumers. There does not need to be a breach of the law for ASIC to exercise the product intervention power.

Note 1: In this paper, the term 'consumer' means both a 'retail client' for a financial product and a 'consumer' for a credit product, unless otherwise specified.

Note 2: In this paper, the term 'product' means both a financial product and a credit product, unless otherwise specified.

- 15 The product intervention power is not intended to be used for pre-approval of products. The FSI explained that this would likely result in moral hazard—that is, the perception that if the regulator has not intervened this implies a low-risk product. The power is also not designed or intended to prevent all monetary losses or eliminate all risk from the financial markets (e.g. market risk). It is not a prudential tool and will not necessarily prevent product failures or firm collapses.
- 16 By their nature, there will always be risk in financial markets. However, the product intervention power may, for example, enable interventions to mitigate the significant detriment that can arise when consumers are marketed and sold investment products that are inappropriate for their risk profile or when they are unable to understand and/or assess the risk they are taking.

When we can and cannot intervene

- 17 We can intervene in relation to:
- (a) financial products, as defined by the Corporations Act;
 - (b) credit products, as defined by the National Credit Act;
 - (c) financial products, as defined by the *Australian Securities and Investments Commission Act 2001* (ASIC Act); and
 - (d) additional products prescribed by regulation.
- 18 We cannot intervene in relation to a financial product issued, or offered for regulated sale, by an exempt body or an exempt public authority: see s1023B of the Corporations Act.

Note: 'Regulated sale' is defined as a sale that needs disclosure to investors under Pt 6D.2, a sale in relation to which a Product Disclosure Statement (PDS) must be given, or a sale made in circumstances prescribed in the Corporations Regulations 2001 (Corporations Regulations): see s994A(1) of the Corporations Act.

Types of product intervention orders

- 19 There are two types of product intervention orders that we can make under the product intervention power:
- (a) an individual product intervention order, which applies to a specified person, or specified persons, in relation to a product; or
 - (b) a market-wide product intervention order, which applies to a person, in relation to a class of products.
- 20 There are specific limitations on the types of product intervention orders we can make. An order cannot:
- (a) require a person to satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person:
 - (i) for a financial product—by or under the Corporations Act; or
 - (ii) for a credit product—by or under the National Credit Act;
 - (b) require a person who is not required to hold an Australian financial services (AFS) licence or an Australian credit licence (credit licence) to join an external dispute resolution scheme; or
 - (c) 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 product. This does not prevent ASIC from intervening in relation to remuneration that is linked to the distribution of the product.

Intervention must be prospective

- 21 We may only intervene prospectively. This means that a product intervention order cannot apply to a product held by a person if the person acquired the product, or entered into a contract for the acquisition of the product, before the order came into force.

Duration of a product intervention order

- 22 We can make a product intervention order for an initial period of up to 18 months. This can be extended or made permanent with the approval of the Minister.

Procedural and accountability requirements

- 23 The product intervention power has been introduced with procedural and accountability requirements for ASIC, including requirements around consultation and the release of a statement by ASIC setting out, among other things, why the product intervention order is an appropriate way of reducing significant consumer detriment.

Interaction with the design and distribution obligations

- 24 We expect that the product intervention power will complement the design and distribution obligations in Pt 7.8A of the Corporations Act. When the design and distribution obligations commence, they will require firms to have appropriate financial product governance processes and controls in place. The design and distribution obligations will overcome gaps in the current regulatory regime across the lifecycle of financial products and promote fairer outcomes for consumers. The obligations will encourage:
- (a) the development of financial products that are appropriately designed for the consumers for whom they are intended;
 - (b) distribution processes and controls that reduce the chance that products will be issued to consumers for whom they are inappropriate; and
 - (c) a dynamic and responsive process where product design and distribution is reviewed and improved in response to feedback and experience.
- 25 When such systems are in place and are working effectively, we expect it will be less likely that we will be required to exercise the product intervention power. However, the scope of the product intervention power, which is focused on preventing significant consumer detriment, extends beyond the design and distribution obligations. When there is significant consumer detriment, the power can be exercised even when these obligations are being complied with.

Benefits of the product intervention power

- 26 We think that the product intervention power will help us to:
- (a) act more quickly and effectively to address the causes of significant consumer detriment in the market;
 - (b) reduce the number of consumers at risk of significant detriment and for whom the terms, features and risks of a product are inappropriate for their objectives, financial situation and needs; and
 - (c) ultimately, better enable ASIC to reduce significant detriment to consumers.
- 27 The ability to use the product intervention power on a market-wide basis enables us to:
- (a) address market-wide problems causing significant consumer detriment more quickly than law reform; and
 - (b) deal with ‘first-mover’ issues that may inhibit industry-led responses to products that are causing significant consumer detriment.

Case studies

- 28 The case studies below on the automatic rollover of term deposits and the practice of ‘flex commissions’ illustrate circumstances in which ASIC may have considered using the product intervention power (had the power been available to us) to address significant consumer detriment identified at the time.
- 29 These case studies are intended to be illustrative only and do not indicate a current intention by ASIC to exercise the product intervention power in relation to term deposits or flex commissions. Additionally, the analysis should not be interpreted as a binding, exhaustive or definitive indication of when ASIC will be satisfied that a product has resulted, will result or is likely to result in significant consumer detriment. We will undertake more detailed analysis when considering our use of the product intervention power, which we will consult on.

Automatic rollover of term deposits

Case study

In 2009, we became aware that some Australian deposit-taking institutions (ADIs) were engaging in a deliberate strategy to promote their term deposits by actively advertising the higher interest rates available on two or four deposit terms, while maintaining significantly lower interest rates for all other deposit terms (‘dual pricing’). The ADIs would also regularly change

which deposit terms would offer the higher interest rates and be advertised to investors.

Over time, these products were marketed as suitable for consumers, including retirees who wanted a safe investment with a steady return, requiring minimal management—and this is how they were perceived by the market. The dual pricing practice established by the ADIs, described above, meant that these products functioned in a way that was inconsistent with consumer expectations.

Because term deposits can roll over on a default basis (unless the investor intervenes) to a deposit of the same term, the practice of dual pricing was identified in 2010 by ASIC in [Report 185](#) *Review of term deposits* (REP 185) as creating a risk that retail investors could inadvertently roll over into, and remain in, low interest rate term deposits.

None of the ADIs reviewed in REP 185 disclosed the existence of dual pricing or the risk of rollover at a lower interest rate. Further, in our review of advertisements, we found certain representations about term deposit interest rates were made by ADIs that operated dual pricing that could give investors the impression that the interest rate on their investment would always be ‘high’ or would not change.

At this time, popular at-call accounts enjoyed relatively high interest rates. Therefore, the alternative to being rolled over into a low interest rate term deposit was that an investor could have their funds in an at-call account, with the benefits of:

- being able to withdraw their funds without penalty; and
- receiving a higher interest rate.

Without a product intervention power, ASIC made recommendations in REP 185 aimed at significantly reducing the incidence of investors inadvertently rolling over their term deposits from high to low interest rates. This included improvements to advertising, disclosure of interest rates, and standardisation and disclosure of grace periods.

A further review in 2013 found that industry largely adopted our recommendations, resulting in improved industry practices and better outcomes for investors: see [Report 353](#) *Further review of term deposits* (REP 353). REP 353 found that consumer outcomes on rollovers of term deposits improved by billions of dollars. For example, during the review period of REP 353:

- *there were fewer default rollovers from high to low interest rate term deposits*—in the seven months of the review, 11% of default rollovers, involving a total of \$1.9 billion, had rolled over into low interest rate term deposits. In comparison, the earlier review (which covered a period of 14 months) found that 47% of default rollovers, involving a total of \$7.88 billion, had rolled over into low interest rate term deposits; and
- *significant numbers of investors were making use of grace periods to make changes to their term deposit*—a total of \$97 billion of investors’ funds that had rolled over into low interest rate term deposits were relogged or cancelled during the grace period.

In this case, the significant consumer detriment was likely caused by a number of factors, including:

- the dual pricing itself;
- the 'choice architecture' (i.e. defaulting loyal consumers into the low interest rate term deposits);
- the frequency and timing of changes to which deposit periods attracted high interest rates; and
- the strategies used to market, inform and target consumers.

How we might have considered using a product intervention power

If there had been a product intervention power in 2009, we may have considered using it in these circumstances. To do so, we would need to have been satisfied that the affected term deposits had resulted, would result or would have been likely to result in significant consumer detriment.

Table 1 sets out the factors that we would have needed to consider in making this assessment.

Having regard to these factors, which go to the way term deposits were designed, marketed and renewed (including dual pricing and automatic rollover), it is likely that we would have been satisfied that the affected term deposits had resulted, would result or would have been likely to result in significant consumer detriment. There does not need to be a breach of the law for ASIC to exercise the product intervention power.

Table 1: Case study on automatic rollover of term deposits: Relevant factors

Factor	Analysis
<p>The nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product</p>	<p>In considering whether a financial product has resulted, will result or is likely to result in significant consumer detriment, ASIC must take into account the nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product: see s1023E(1)(a) and (b) of the Corporations Act.</p> <p>In this case, the detriment was that investors received, or were at risk of receiving, significantly lower interest on their term deposit funds, as a result of the automatic rollover of term deposits, combined with dual pricing. Had they been conscious of this practice, they would have been unlikely to have chosen to continue to keep their funds in the significantly lower interest rate term deposit. This is because better interest rates were available on other term deposits and at-call savings accounts offered by the same ADI. We consider that only in exceptional circumstances would a fully informed investor have consciously chosen the lower interest rate term deposit.</p>

Factor	Analysis
<p>The nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product—continued</p>	<p>The detriment predominantly comprised the financial loss suffered by consumers—being the lower than expected returns on term deposits. In taking into account the nature and extent of the detriment, including the actual or potential financial losses suffered, we could have considered:</p> <ul style="list-style-type: none"> • <i>the proportion of funds rolled over from high interest rate term deposits to low interest rate term deposits</i>—for the ADIs reviewed, 98% of the investor funds lodged in term deposits by consumers for the first time during the review period started in high interest rate term deposits. However, 47% of term deposits that rolled over for the first time during the review period were rolled over from high interest rate to low interest rate term deposits; • <i>the value of funds rolled over from high interest rate term deposits to low interest rate term deposits</i>—for the ADIs reviewed, a total of \$7.88 billion in funds were rolled over from high interest rate term deposits to low interest rate term deposits during the review period; • <i>the difference in returns between low interest rate term deposits and high interest rate term deposits</i>—for the ADIs reviewed, low interest rates were 42% lower than high interest rates for banks and 18% lower for credit unions and building societies; • <i>the difference in returns between low interest rate term deposits and at-call accounts</i>—for the ADIs reviewed, low interest rates were 37% lower than at-call interest rates for banks and 8% lower for credit unions and building societies; • <i>the average value of funds individual consumers had in the affected term deposits</i>—for the ADIs reviewed, the mean term deposit was approximately \$72,000, the median was approximately \$30,000 and the mode was approximately \$12,000; • <i>the number of times term deposits were being rolled over</i>—for the ADIs reviewed, investors rolled over their term deposit on average five times before withdrawing their money. This is relevant to the likelihood of detriment because if an investor was not rolled over from a high interest rate term deposit to a low interest rate term deposit the first time, it is likely they would roll over to a low interest rate in subsequent rollovers; and • <i>the potential for the financial losses to continue</i>—for the ADIs reviewed, term deposits increased by 20.4% between June 2008 and June 2009. The growth in term deposit funds suggests that the detriment was not one-off in nature, and was likely to have an ongoing impact on consumers.
<p>The impact that the detriment has had, will have or is likely to have on consumers</p>	<p>In determining whether a financial product has resulted, will result or is likely to result in significant consumer detriment, ASIC must also take into account the impact that the detriment has had, will have or is likely to have on consumers: see s1023E(1)(c) of the Corporations Act.</p> <p>In taking into account the ‘impact’ of the detriment on consumers, we could have considered the types of consumers who may be affected (e.g. consumers who relied on the income generated from high interest rate term deposits). We note that for the ADIs reviewed, 44.5% of term deposit accounts belonged to investors aged 65 or older. In cases where older consumers are more likely to have limited resources and a more limited ability to recover financially, the detriment could have had a greater impact on this demographic.</p>

Flex commissions in the car finance market

Case study

The practice of 'flex commissions'

In 2011, ASIC became aware of the practice of flex commissions in the car finance market. Flex commissions allowed car dealers to arrange car loans at a higher interest rate than the base rate that the financier was willing to offer (up to 700 basis points higher), and thereby earn a much higher commission.

There were no criteria used to set the interest rate. As a result, some consumers ended up paying thousands of dollars more in interest charges over the life of the car loan.

When ASIC identified the practice, there was a broad recognition by industry that flex commissions created poor consumer outcomes.

We undertook a consultation process in 2015, proposing to address the practice of flex commissions on an individual basis by applying conditions to the licences of lenders. However, stakeholders indicated a preference for changes to be implemented uniformly and consistently. This would ensure there was no competitive disadvantage resulting from a 'first mover' situation.

Without a product intervention power and with industry support, we implemented a ban on flex commissions in the car finance market by making [ASIC Credit \(Flexible Credit Cost Arrangements\) Instrument 2017/780](#). The ban commenced on 1 November 2018.

How we might have considered using a product intervention power

If there had been a product intervention power in 2011, we may have considered using it in these circumstances. To do so, we would need to have been satisfied that the flex commissions had resulted, would result or would have been likely to result in significant consumer detriment.

Table 2 sets out the factors that would have been relevant in making this assessment. Relevant factors include:

- flex commission arrangements were a remuneration structure that, by design, incentivised a higher cost of credit to the consumer;
- a lack of transparency around flex commission arrangements; and
- the potential for flex commission arrangements to operate unfairly in any individual transaction, taking advantage of a consumer's degree of financial sophistication and financial literacy, and their capacity to negotiate to protect their interests.

Having regard to these factors, it is likely that we would have been satisfied that the conduct had resulted, would result or would have been likely to result in significant consumer detriment. There does not need to be a breach of the law for ASIC to exercise the product intervention power.

Table 2: Case study on the practice of flex commissions: Relevant factors

Factor	Analysis
The nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product	<p>In considering whether a credit product has resulted, will result or is likely to result in significant consumer detriment, ASIC must take into account the nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product: see s301E(1)(a) and (b) of the National Credit Act.</p> <p>In this case, the detriment was that consumers were charged excessive interest rates due to flex commission arrangements between lenders and their distribution network. The rates were higher because the interest rate charged to the consumer was not related to their credit rating or the risk of default, but rather took advantage of the imbalance in power and relevant knowledge, skills and experience between the parties.</p> <p>The increased risk of default associated with a higher interest rate also added to the detriment to consumers. This is because, as a result of the higher interest rate, consumers would have to pay more interest—with longer loan terms or higher monthly repayments.</p> <p>Further, if a consumer defaulted, they could be disadvantaged by the loss of the car (and any equity in it), and possible difficulties in obtaining a replacement.</p> <p>The detriment predominantly comprised the financial loss suffered by consumers—being the higher interest incurred by consumers. In taking into account the nature and extent of the detriment, including the actual or potential financial losses suffered, we could have considered:</p> <ul style="list-style-type: none"> • <i>the number and proportion of consumers likely to be affected by flex commission arrangements</i>—our review suggested that a significant number of consumers purchased cars through car dealership finance, and therefore would be likely to be affected by flex commission arrangements. Our review found that 90% of all car sales were arranged through finance. Of these sales, about 39% (or approximately 480,000 sales a year) were financed through car dealerships; • <i>the number and proportion of consumers affected by higher interest rates under a flex commission arrangement</i>—for the arrangements reviewed, our research found that about 15% of consumers (or about 3,800 people a month) were charged an interest rate of 700 basis points (7%) above the rate the financier was willing to offer; • <i>the higher interest charges that could be incurred at an individual level</i>—we found that the additional interest payable by consumers in six of the transactions we reviewed (compared to the interest payable if the contracts were written at the base rate) was between \$1,648 and \$6,922; and <p style="margin-left: 40px;">Note: Our review found that the commission paid to the intermediaries as a percentage of the additional interest was between 45.8% and 54.4%. The analysis shows that a significant amount of the increase in interest incurred by the consumer is effectively used to pay higher commissions to the car dealer.</p> <ul style="list-style-type: none"> • <i>the total amount of higher interest incurred by all affected consumers</i>—we estimated a total cost to consumers of between \$18.1 million and \$44.9 million a year in higher interest, based on an average loan of \$25,000 over five years with a difference in interest rates of 200 basis points and 500 basis points respectively. <p style="margin-left: 40px;">Note: For the assumptions and full methodology underlying these estimates, see paragraphs 200–210 of the Regulation Impact Statement for flex commission arrangements in the car finance market (March 2017), attached to Consultation Paper 279 <i>Flex commission arrangements in the car finance industry</i> (CP 279).</p>

Factor	Analysis
The impact that the detriment has had, will have or is likely to have on consumers	<p>In determining whether a credit product has resulted, will result or is likely to result in significant consumer detriment, ASIC must also take into account the impact that the detriment has had, will have or is likely to have on consumers: see s301E(1)(c) of the National Credit Act.</p> <p>To consider the 'impact' of the detriment on consumers, we could have looked to the types of consumers affected. For example, we could look at the impact of this practice on consumers who are financially vulnerable and less able to protect their interests. These consumers may have had limited resources and therefore would be significantly affected by the higher overall cost resulting from the higher overall interest charges (noted above) and longer loan terms and higher monthly repayment, and be more susceptible to the risk of default.</p>

B Proposed guidance on when and how ASIC may exercise the product intervention power

Key points

This section explains our proposals relating to our guidance on when and how ASIC may exercise the product intervention power.

Significant consumer detriment

- 30 We can make a product intervention order when we are satisfied that a product (or class of product) has resulted, will result or is likely to result in significant consumer detriment: see s1023D(1)(b) of the Corporations Act and s301D(1)(b) of the National Credit Act.
- 31 The legislation sets out the criteria that we are required to take into account in considering whether a product has resulted, will result or is likely to result in significant consumer detriment. These are:
- (a) the nature and extent of the detriment;
 - (b) without limiting paragraph (a), the actual or potential financial loss to consumers resulting from the product;
 - (c) the impact that the detriment has had, will have or is likely to have on consumers; and
 - (d) any other matter prescribed by regulations (see s1023E(1) of the Corporations Act and s301E(1) of the National Credit Act).
- 32 In addition, we may consider other factors: see s1023E(2) of the Corporations Act and s301E(2) of the National Credit Act.

Proposal

- B1** We propose to provide high-level guidance on:
- (a) the meaning of consumer detriment and how it can arise; and
 - (b) the factors that we are required to take into account in considering whether a product has resulted, will result or is likely to result in significant consumer detriment (see draft RG 000 at RG 000.37–RG 000.54).

Note: We do not propose to set benchmarks or thresholds as to when we will exercise the product intervention power.

Your feedback

- B1Q1** Are there additional factors that ASIC might take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment?

Rationale

- 33 The product intervention power is a broad and flexible power—it can be exercised when significant consumer detriment occurs or is at risk of occurring. Given its breadth and flexibility, we intend to provide high-level guidance only on when and how ASIC may exercise the power. When we propose to use the power in a particular instance, we must first consult on that exercise. In doing so, we will describe the significant consumer detriment that has occurred, or that is at risk of occurring, and the type of intervention we are proposing.
- 34 We do not intend to provide additional benchmarks for when we will exercise the product intervention power because we think this will unduly limit the scope of the power, which is intended to be able to address a broad range of harm or damage that may flow from a product. Limiting the scope of the power would limit our ability to improve consumer outcomes. For example, imposing a benchmark may restrict our ability to take action when certain groups of consumers incur detriment that is significant relative to their circumstances.

Determining how we may intervene

- 35 There are two types of product intervention orders that we can make under the product intervention power:
- (a) an individual product intervention order, which applies to a specified person, or specified persons, in relation to a product; or
 - (b) a market-wide product intervention order, which applies to a person, in relation to a class of products.
- 36 We can make an order that a person not engage in specified conduct in relation to a product (or class of products):
- (a) entirely; or
 - (b) except in accordance with certain conditions.
- 37 This allows ASIC to make a wide range of interventions in relation to a product (or class of products). Examples of specific interventions we can make under the product intervention power are set out in draft RG 000 at RG 000.27.

Proposal

B2 We propose to:

- (a) give guidance that ASIC will aim to design an intervention that we consider to be the most appropriate regulatory solution to reduce the likelihood of significant consumer detriment occurring; and

- (b) focus on the following when determining the type of intervention we will use:
 - (i) understanding the range of product features, conduct or other factors that have contributed to the significant consumer detriment or likely significant consumer detriment; and
 - (ii) how we can best reduce the likelihood of further significant consumer detriment occurring (see draft RG 000 at RG 000.55–RG 000.56).

Your feedback

B2Q1 Are there any other considerations that we should take into account in determining how we will intervene?

Rationale

- 38 Our main aim in exercising the product intervention power will be to implement a regulatory solution that effectively reduces the risk of significant consumer detriment (or further detriment) that we have identified. This is consistent with the object of the power: see s1023A of the Corporations Act and s301A of the National Credit Act.
- 39 The response that we decide to take will largely turn on the nature and causes of the significant consumer detriment. We will aim to develop an intervention that represents the most effective solution to address the cause of the detriment—having regard to the regulatory impact of any intervention we propose.
- 40 In exercising the product intervention power, we will also consider our regulatory objectives set out in s1(2) of the ASIC Act: see draft RG 000 at RG 000.57–RG 000.59. Of particular relevance are our obligations to:
- (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
 - (b) promote the confident and informed participation of investors and consumers in the financial system.
- 41 We must also consider the effects that the performance of our functions and the exercise of our powers will have on competition in the financial system.
- 42 To the extent that these are competing objectives, we will make a judgement about how they are to be balanced in any particular case, having regard to the policy underlying the product intervention power.

C Proposed guidance on engagement and consultation on a product intervention order

Key points

Before making a product intervention order, we must consult persons who are reasonably likely to be affected by the order.

We may satisfy the consultation requirements for making a product intervention order by publishing materials on our website.

Consulting with affected persons

- 43 Before making a product intervention order, we must consult persons who are reasonably likely to be affected by the order. If a proposed order will apply to a body that is regulated by the Australian Prudential Regulation Authority (APRA), we must also consult APRA: see s1023F of the Corporations Act and s301F of the National Credit Act.
- 44 ASIC is taken to have complied with the requirement to consult affected persons if we make the proposed product intervention order, or a description of its content, available on our website and invite the public to comment on the proposed order: see s1023F(2) of the Corporations Act and s301F(2) of the National Credit Act.

Proposal

- c1 We propose that as part of our formal consultation process:
- (a) we will identify the product and its availability to retail clients;
 - (b) we will describe the significant consumer detriment that we consider has occurred, will occur or is likely to occur, and set out our reasons for making this assessment;
 - (c) we will set out our proposed intervention or a description of our proposed intervention; and
 - (d) in some circumstances, we will present a range of options for intervening (see draft RG 000 at RG 000.63).

Your feedback

C1Q1 Do you have any feedback on the information we propose to include in our consultation on a proposed product intervention order?

C1Q2 Is there any other information that we should include when we consult on a proposed product intervention order?

Rationale

- 45 We see consultation as a particularly important step in developing an effective regulatory solution to address a particular problem. Consultation will likely allow us to better understand the problem and assess the impact of our proposed product intervention order. This could lead to us using an alternative intervention that is more effective. We will invite broad feedback, including in relation to the significant consumer detriment we have identified. However, we will expect submissions to be supported by evidence and data.
- 46 We will generally consult on a product intervention order (whether market-wide or individual) publicly on our website. This will allow affected parties and interested stakeholders the opportunity to comment on the proposed intervention.
- 47 We will consider the responses and make a final decision on the product intervention order at the conclusion of that process.
- 48 We must publish the final product intervention order on our website, together with a notice that:
- (a) describes the significant consumer detriment that has resulted, will result or is likely to result from the product (or class of products) to which the order relates;
 - (b) sets out why the order is an appropriate way of reducing the significant consumer detriment;
 - (c) describes the consultation that ASIC undertook in relation to the order; and
 - (d) if the order comes into force after it is published—specifies the day it comes into force (see s1023L of the Corporations Act and s301L of the National Credit Act).

Describing significant consumer detriment at consultation

Proposal

- c2 We propose to provide guidance in draft RG 000 at RG 000.68–RG 000.69 that, when we consult on making a product intervention order, we will describe the type of order we propose to make and the significant consumer detriment that has resulted, will result or is likely to result from the product. In describing the significant consumer detriment, we may refer to:
- (a) the nature of the product and its distribution; and
 - (b) the circumstances of the significant consumer detriment, including:
 - (i) whether the significant consumer detriment has already occurred;

- (ii) the nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product; and
- (iii) the impact that the detriment has had, will have or is likely to have on consumers.

Your feedback

C2Q1 Do you have any feedback on how we intend to describe the significant consumer detriment?

Rationale

- 49 We think it is important to be transparent about how we are satisfied of significant consumer detriment for every exercise of the product intervention power.

Commencement date

- 50 In making a product intervention order, we can specify that the order comes into force on a later day: see s1023G of the Corporations Act and s301G of the National Credit Act.

Proposal

- c3** We propose to consider whether delayed commencement (and the length of any delay) is appropriate for a product intervention order on a case-by-case basis. We propose to provide guidance that we will consider the circumstances of the case, including:
- (a) the nature of the order, including the extent of any changes it requires or any consequential impacts; and
 - (b) the nature, likelihood and extent of the significant consumer detriment (see draft RG 000 at RG 000.70–RG 000.73).

Your feedback

C3Q1 Do you agree with our proposed approach to determining whether to delay commencement of a product intervention order? If not, why not?

C3Q2 Do you agree with the examples of factors that we should consider when determining whether to delay commencement, and the length of any delay? If not, why not?

C3Q3 Are there any other factors that we should consider when determining whether to delay commencement, or the length of any delay?

Rationale

- 51 A product intervention order could take many forms and can be made under varying circumstances. We think a case-by-case approach to determining whether to delay commencement, and for what period, is appropriate.
- 52 We may delay commencement of the product intervention order when compliance with the order would take time to implement. However, this must be balanced against other factors, such as the nature of the significant consumer detriment. For example, if we are concerned that significant consumer detriment may occur imminently, then a shorter delay or immediate commencement may be appropriate.

D Regulatory and financial impact

53 In this paper we are proposing to provide guidance on our approach to exercising the product intervention power, introduced by the Product Regulation Act. Treasury prepared a Regulation Impact Statement (RIS) for the Product Intervention Bill. This is contained in the Revised Explanatory Memorandum to the Product Regulation Bill.

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to provide high-level guidance on:</p> <ul style="list-style-type: none"> (a) the meaning of consumer detriment and how it can arise; and (b) the factors that we are required to take into account in considering whether a product has resulted, will result or is likely to result in significant consumer detriment (see draft RG 000 at RG 000.37–RG 000.54). <p>Note: We do not propose to set benchmarks or thresholds as to when we will exercise the product intervention power.</p>	<p>B1Q1 Are there additional factors that ASIC might take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment?</p>
<p>B2 We propose to:</p> <ul style="list-style-type: none"> (a) give guidance that ASIC will aim to design an intervention that we consider to be the most appropriate regulatory solution to reduce the likelihood of significant consumer detriment occurring; and (b) focus on the following when determining the type of intervention we will use: <ul style="list-style-type: none"> (i) understanding the range of product features, conduct or other factors that have contributed to the significant consumer detriment or likely significant consumer detriment; and (ii) how we can best reduce the likelihood of further significant consumer detriment occurring (see draft RG 000 at RG 000.55–RG 000.56). 	<p>B2Q1 Are there any other considerations that we should take into account in determining how we will intervene?</p>
<p>C1 We propose that as part of our formal consultation process:</p> <ul style="list-style-type: none"> (a) we will identify the product and its availability to retail clients; (b) we will describe the significant consumer detriment that we consider has occurred, will occur or is likely to occur, and set out our reasons for making this assessment; (c) we will set out our proposed intervention or a description of our proposed intervention; and (d) in some circumstances, we will present a range of options for intervening (see draft RG 000 at RG 000.63). 	<p>C1Q1 Do you have any feedback on the information we propose to include in our consultation on a proposed product intervention order?</p> <p>C1Q2 Is there any other information that we should include when we consult on a proposed product intervention order?</p>

Proposal	Your feedback
<p>C2 We propose to provide guidance in draft RG 000 at RG 000.68–RG 000.69 that, when we consult on making a product intervention order, we will describe the type of order we propose to make and the significant consumer detriment that has resulted, will result or is likely to result from the product. In describing the significant consumer detriment, we may refer to:</p> <ul style="list-style-type: none"> (a) the nature of the product and its distribution; and (b) the circumstances of the significant consumer detriment, including: <ul style="list-style-type: none"> (i) whether the significant consumer detriment has already occurred; (ii) the nature and extent of the detriment, including the actual or potential financial loss to consumers resulting from the product; and (iii) the impact that the detriment has had, will have or is likely to have on consumers. 	<p>C2Q1 Do you have any feedback on how we intend to describe the significant consumer detriment?</p>
<p>C3 We propose to consider whether delayed commencement (and the length of any delay) is appropriate for a product intervention order on a case-by-case basis. We propose to provide guidance that we will consider the circumstances of the case, including:</p> <ul style="list-style-type: none"> (a) the nature of the order, including the extent of any changes it requires or any consequential impacts; and (b) the nature, likelihood and extent of the significant consumer detriment (see draft RG 000 at RG 000.70–RG 000.73). 	<p>C3Q1 Do you agree with our proposed approach to determining whether to delay commencement of a product intervention order? If not, why not?</p> <p>C3Q2 Do you agree with the examples of factors that we should consider when determining whether to delay commencement, and the length of any delay? If not, why not?</p> <p>C3Q3 Are there any other factors that we should consider when determining whether to delay commencement, or the length of any delay?</p>