

# **FINANCE INDUSTRY DELEGATION**

**Response to**

**ASIC**

## **Consultation Paper 313** **Product intervention power**

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**SUBMISSION TO ASIC  
CONSULTATION PAPER 313  
PRODUCT INTERVENTION POWER**

**Introduction**

This response is presented on behalf of the Finance Industry Delegation, a representative entity supported by 187 small, medium and large Australian Credit Licensees, both credit providers and lessors, across Australia, all of whom face an ever increasing and onerous burden of compliance regulation.

The Finance Industry Delegation is broadly of the view that the proposed Regulatory Guide 000 reflects the content of the legislation in Part 7.9A Corporations Act 2001.

However, we have a number of concerns with regard to the content of this Part 7.9A, which were presented to a Senate Economics Reference Committee by way of submission and evidence in 2018.

It would be inappropriate to canvass these again in this submission.

**Consultation Paper 313 - general comments**

The Finance Industry Delegation has a limited number of comments to make.

1. [Paragraph 15] We do not agree with the Financial System Inquiry concerning reverse approval, as mentioned in paragraph 15. ASIC should consider utilising the product intervention powers prior to the product being introduced to the market.

ASIC already has the power to consider possible or likely consumer detriment, in accordance with Section 103D Corporations Act, as recognised in paragraph 31(c).

To presume that this only applies after a product is launched, is to presume something that is not recognised in the legislation. It should be possible for ASIC to consider a proposed product before the promoting company has spend considerable amounts of money and time launching that product.

Significant consumer detriment will not be avoided if, after becoming aware of an impending product, ASIC allows the offending product to be placed on the market - and only then swoops. That could be construed as “entrapment”.

2. There are no case studies involving circumstances in which supporters of the Delegation might be involved (largely SACCs and MACCs, plus consumer leases). To that extent, the Consultation Paper is of limited assistance to Delegation supporters.

It is therefore unfortunate that ASIC should determine that it is not prepared to indicate additional benchmarks [paragraph 34]. In such circumstances, the publication of benchmarks relevant to supporters of the Delegation would be most constructive.

These benchmarks are required to present the relevant criteria that ASIC will apply to determine if someone is ‘reasonably likely’ to be affected and whether or not that determination will consider only the direct effects, or also include the ‘reasonably likely’ indirect effects.

3. There appears to be some confusion in regard to consultation.

Section 1023F, Corporations Act, appears to provide for consultation with those directly impacted and/or the general public. Paragraph 43 presumes consultation only with those directly impacted. It is to be hoped that ASIC will adopt the broader approach available (and permitted by the wording of the legislation) and consult with both those specifically affected (the stakeholders) and the general public. The former to ensure the stakeholders are involved in the process, the latter so that industry can comment, given the opportunity for any order directed at an individual company to become a precedent - with industry wide impact.

4. The commencement date of an order consideration in the Consultation Paper appears to be entirely from the consumers' perspective [e.g. paragraph 51]. However, appropriate warning or lead time should be available to credit providers, to adjust and realign their product, marketing, or whatever issue is of concern to ASIC.

The Delegation notes ASIC's consideration of the need for 'balance' in paragraph 52. While this is appreciated, the Delegation remains concerned to be able to see evidence of ASIC giving equal consideration to the competing interests from the outset, producing a result based on weighing the relevant factors and not starting the assessment from a position favouring one side.

### **Draft Regulatory Guide 000**

RG 000.2(c) - It is to be hoped that any attempt to reflect "*community expectations*" will only be carried out after public consultation. During these consultations it is to be hoped that ASIC will present an objective statement of what it considers to be 'community expectations' - and why. The latter is important because it may assist with inhibiting opportunities to present a statement concerning 'community expectations', while hiding issues that have been ignored in the process of preparing the statement.

The tendency to accept highly subjective consumer advocate assertions as a fact or series of facts, without any further inquiry, must be avoided.

RG 000.5 - This paragraph includes the concern for product pre-approval, on which the Delegation has commented in point 1 above.

RG 000.11 - The diagram overlooks any inclusion of public consultation, as is offered by the legislation. The Delegation urges amendment. Public consultation should be included as a second step.

RG 000.13 - The opportunity for ASIC to use the product intervention power, even if there has not been any breach of the law, was a serious concern raised by the Delegation with the Senate Committee. It should not be overlooked that, as well as the legislation ASIC refers to in the Discussion Paper, there is the highly prescriptive National Consumer Credit Protection Act that might be 'over-ruled' by such ASIC action.

Further, there is a need for an acknowledgement from ASIC that the Commission will be more circumspect, requiring a higher bar when using ASIC's power in circumstances where there is no breach of any law, where the matter has been determined by a court in part or whole, or the licensee is apparently compliant with the other relevant aspects of the law (such as the circumstances described in sub-paragraphs (a) and (b) in RG 000.13).

The Delegation recognises that this opportunity is in fact an opportunity For ASIC to usurp the powers of the Parliament and even to effectively contradict the Parliament.

It is to be hoped that ASIC will be reluctant to use its power in such circumstances.

RG 000.29 - A product intervention order comprising multiple elements.

The Delegation considers that this paragraph supports ASIC demanding a lender apply responsible lending processes, as are imposed on most lenders by the National Credit Act, even if the lender in question claims to be exempt from part or all of the Act.

The Delegation is concerned that this provision has already been included in the draft RG 000. This appears most premature, when ASIC has declared that it will conduct separate consultation in regard to the matter of design and distribution (see page 16). It may be that this provision may have to be removed, or modified, following this promised consultation.

RG 000.34 and 000.35 and 000.70 - Commencement of an order.

It is to be hoped that ASIC will adopt a presumption of negotiating a reasonable period before an order comes into effect, to allow the credit provider (in the Delegation's case) to make the necessary business re-arrangements, including the cancellation of any

advertising and re-writing of contracts and associated documentation. We recognise that this presumption may be set aside if circumstances, e.g. significant current demand for the product, meant numerous consumers provided with the product in the immediate period could suffer significant detriment as a result.

RG 000.37 - Consultation process.

It is to be hoped that ASIC will provide a meaningful opportunity for the targeted lender to provide a submission countering what may be ASIC's unfounded concerns.

Ideologically driven, highly subjective and unreasonable advocacy, creating much 'noise', must not be allowed to drown out reality.

RG 000.45 - When is consumer detriment significant?

The Delegation notes that this paragraph is expressed in a circular fashion, which provides very little assistance or guidance to lenders.

It is important for ASIC to give some attention to the impact on the businesses. ASIC should be able and willing to conduct a comparative analysis, at least to avoid the definition applied for 'significant consumer detriment' creeping over time.

RG 000.51 - Intervention numbers

This paragraph in Table 1 includes 2 concepts that invite populist media and consumer advocate exaggeration - "the number and/or proportion of consumers affected or likely to be affected" and "the total amount of detriment incurred or likely to be incurred by all consumers affected". The Delegation would have more confidence in the process if information acquisition and verification details were included in this paragraph.

RG 000.63 - Consultation with who?

Section 1023F(2) of the Corporations Act effectively provides that consultation with those "*reasonably likely to be affected*" is an option, or in addition to, public consultation. Given that ASIC has this legislative discretion, it is to be hoped that this paragraph in the Regulatory Guide will be re-written to clearly reflect that, even if ASIC chooses to opt for public consultation, consultation with those directly affected will also continue. However, with consultation not including the suspected business, it is highly unlikely the consensus can be reached.

RG 000.65 - Nature of consultation.

The Delegation considers that it is inappropriate for ASIC to only rely on communication via its website. Given that it has email addresses for all companies, it should not be considered unrealistic for ASIC to adopt a dual communications effort, by emailing appropriate companies when the issue of product intervention arises.

It is unrealistic to presume that every lender and lessor supporter of the Delegation - big and very small - will start their every day by accessing the ASIC website.

RG 000.75 and 000.76 - Public notification.

A similar use of email addresses should be employed for other public notification communications.

RG 000.87 to 000.90 - Rights for review

It is pleasing that ASIC has noted opportunities for review of an ASIC product intervention decision, for a single or few lenders or lessors, which Treasury did not recognise in its documentation associated with the legislation, was not recognised in the draft legislation, nor during the Senate Committee review. We note that Part 7.9A of the Corporations Act, which deals with product intervention, is silent on the opportunities for review.

However, the limitation to parliamentary oversight for market-wide product intervention is unfortunate, albeit outside ASIC's control. The Delegation has limited confidence in the process by which the Parliament reviews legislative instruments.

## Responding to CP 313 questions

The Finance Industry Delegation's fundamental concern is that the Consultation Paper has been written from a consumer perspective and, as demonstrated by the content of the answers to ASIC's questions below, we encourage greater consideration from the lenders' or lessors' perspective.

In finalising the new Regulatory Guide 000, it cannot be overlooked that the legislation provides the opportunity for ASIC to exercise product intervention power - even when the lender or lessor is obeying all relevant law.

Such a lack of certainty for business entities must at least generate a concern for the practical challenges of responding to ASIC's demanded action. There could be many occasions where the company targeted does not deserve to face insolvency, or immediate major disruption of its business, as a result of ASIC using its product intervention powers. In such circumstances, these powers could very easily be misused.

**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"?*

The Delegation recommends the following should be taken into account:

1. the financial sophistication of the consumers involved;
2. the opportunity the consumers had to seek professional advice;
3. the age (maturity) of the majority of the consumer purchasers;
4. what vested interests are encouraging ASIC involvement;
5. comparable products on the market;
6. the impact of post-purchase decision changes/changing circumstances;
7. circumstances where the impact on consumers is out of the product provider's control;
8. where only a segment of consumers suffer detriment and the majority are unaffected; and
9. whether the product has been designed or implemented in a particular way to satisfy specific regulation, or practical business concerns, contrary to what ASIC's more preferred approach.

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

The Delegation considers that the same set of factors are equally relevant when ASIC is determining intervention -

1. the financial sophistication of the consumers involved;
2. the opportunity the consumers had to seek professional advice;
3. the age (maturity) of the majority of the consumer purchasers;
4. what vested interests are encouraging ASIC involvement;
5. comparable products on the market; and
6. the impact of post-purchase decision changes/changing circumstances.

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

Again, the same set of factors are equally relevant, but in particular, identify the consumer demographics, including financial experience.

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

The Delegation requests at least one addition -

- Generic explanation - how the information was sourced.

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

The Delegation remains concerned that, unless ASIC uses robust research and analysis and refers to objective criteria, including benchmarks, the opportunity for subjective “we think”, “it appears” and “we don’t like” decisions will emerge.

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

As discussed earlier, it is to be hoped that the approach will begin with a presumption that some delay will be anticipated, to assist the targeted lender or lessor to transition.

The targeted lender must be given the opportunity to communicate with ASIC in a manner that enables a full explanation of the transition challenges that will be faced by the lender, including a timetable for adjustment.

**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?*

Those factors listed in the Consultation Paper are too limited and ignore a number of important issues that require attention for a balanced decision (See C3Q3).

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

As previously mentioned, these should include:

1. the financial sophistication of the consumers involved;
2. the opportunity the consumers had to seek professional advice;
3. the age (maturity) of the majority of the consumer purchasers;
4. what vested interests are encouraging ASIC involvement;
5. comparable products on the market;
6. the impact of post-purchase decision changes/changing circumstances; and
7. we add - comparable distribution methodologies employed in the market.

We thank you for your consideration of this response.

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