

Consultation Paper 313:

Product intervention power

Legal Aid NSW submission to Australian
Securities and Investments Commission

16 August 2019

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Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal

centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services.

Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Australian Securities and Investments Commission's (**ASIC**) consultation (Consultation Paper 313) and the draft Regulatory Guide 000 (**Guide**) on ASIC's proposed use of the product intervention power to ban financial products and credit products when there is a risk of significant consumer detriment.

ASIC's product intervention power has the potential to greatly improve outcomes for consumers, and in particular, consumers who experience vulnerability in their interaction with the financial system, who are often disproportionately affected by poorly designed products, and targeted with ill-suited products.

We broadly support ASIC's approach to using the product intervention power, as set out in the Guide. In particular, we support regulatory guidance on the product intervention power that:

- recognises that consumers who may face additional barriers to accessing adequate information about financial products and services, or experience vulnerability, are often disproportionately impacted by poor financial and credit products;
- allows ASIC to consider the circumstances of particular disadvantage experienced by consumers when deciding if significant detriment has, will or is likely to occur, and whether to make a product intervention order;
- takes into account the impact that delaying or immediately making a product intervention order is likely to have on consumers, and in particular, consumers who are experiencing vulnerability;
- allows ASIC to consult with stakeholders prior to making a product intervention order, including meaningfully engaging with the particular groups of consumers who may be adversely impacted by the product.

Proposal B1: Significant consumer detriment

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?

General comments

Legal Aid NSW supports ASIC's approach to consider all of the circumstances when determining whether a product is likely to result in significant consumer detriment, as set out in the Guide. This broad approach to the meaning of 'significant consumer detriment' is in line with the object of the enabling legislation, and will ensure that the scope of the product intervention power is not unduly narrowed.

We also agree with ASIC's proposal not to set benchmarks as to when it will exercise the product intervention power. Benchmarks would likely disadvantage consumers who may be experiencing vulnerability, as they are more likely to be significantly impacted by what might otherwise be considered a relatively small financial loss.

Additional guidance on detriment that impacts consumers experiencing vulnerability

We support ASIC taking into account the types of consumers that are likely to be affected, when considering if a product has resulted, will result or is likely to result in significant detriment. We note that the Guide includes, as an example, that ASIC may consider if the impact is greater for those who are at a socio-economic disadvantage (table 1)

We also support the guidance in table 1 of the Guide, which states that in assessing the impact of the detriment, ASIC will consider the vulnerabilities faced by consumers at particular times of their lives or in their engagement with the financial system. We suggest that this section of the Guide is expanded to include a non-exhaustive list of examples of groups of people that may experience vulnerability or particular barriers in their engagement with the financial system. This could include, for example, older people, young people, people living in rural, regional or remote areas, people from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander people, people with disability and people with low or limited literacy.

In our view, it is more likely that significant consumer detriment has, will or is likely to occur when consumers who experience vulnerability are, or are likely to be, targeted or impacted by the product. We suggest this risk is reflected in the Guide (paragraph 000.50)

For example, in some regional and remote Aboriginal communities, many people have funeral insurance products that are ill-suited to their needs. This was recognised by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which stated in its Final Report:

Both the ASIC Report and the evidence given in the Commission's fourth round of hearings indicated that Aboriginal and Torres Strait Islander people, especially those living regionally or remotely, may have been particularly likely to be sold funeral insurance policies in circumstances where those policies held little value for them.¹

In our view, any regulatory response regarding these products should take into account the cultural context, as well as the views and needs of the affected consumers. This could include, for example, considering the cultural significance of funerals to Indigenous consumers and the difficulty that some consumers living in regional or remote areas can experience in accessing mainstream financial products.

Products that circumvent existing consumer protections

We suggest that ASIC should also take into account whether a product seeks to avoid existing consumer protections, as a factor that makes significant consumer detriment more likely. We suggest that this consideration should also be added to the Guide.

We also submit that ASIC should also be more likely to intervene where a product has been designed in a way that is intended to take advantage of regulatory gaps. This consideration should be included in the Guide (paragraph 000.44).

We regularly assist consumers experiencing vulnerability who suffer detriment due to products that are designed to avoid protections under the *National Consumer Credit Protection Act 2009* (Cth). For example, our response to ASIC's consultation paper 316 – Using the product intervention power: Short term credit (attached), sets out our experience assisting clients who have suffered detriment due to the short term lending model that is used by some lenders.

In our experience, products that are designed to circumvent safeguards set out in existing laws are more likely to cause significant consumer detriment. In these circumstances, there are also few options for consumer claims or regulatory action.

Consideration of other forms of loss

We support ASIC considering both financial and non-financial harm to consumers, such as the effect on a consumer's credit rating, as set out in the Guide (paragraph 000.40). We suggest that ASIC also consider other forms of non-financial harm, such as the impact

¹ Kenneth Hayne, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report Volume 1, February 2019) 286.

of debt collection practices on consumers experiencing vulnerability, as well as the stress and anxiety that these consumers are likely to face as a result of the harmful products.

Proposal B2: Determining how we may intervene

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

We suggest that in designing an intervention aimed at reducing significant detriment to consumers, ASIC should take into account the period of time involved before any intervention takes effect, including the length of the consultation stage, and the impact on consumers of a prolonged process.

While we acknowledge that regulatory intervention takes time and proper consideration, and that consultation is an important part of this process, a prolonged process risks leaving consumers exposed to significant detriment. In our view, extensive consultation with companies that issue harmful products may create a risk of those companies using the prolonged consultation period as an opportunity to change their product to evade an intervention order.

We also submit that ASIC should take into account any relevant cultural sensitivities in determining how it should intervene, such as the impact that a proposed intervention order might have on a particular cultural group who are accustomed to using a particular product or service.

Proposal C1: Consulting with affected persons

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?

Legal Aid NSW agrees that the information ASIC proposes to include when consulting on a proposed product intervention order is relevant and appropriate. This includes information which:

- identifies the product and its availability to retail clients;
- describes the significant consumer detriment that has occurred, will or is likely to occur, and sets out the reasons for making the assessment;
- sets out the proposed intervention; and
- presents a range of options for intervening.

In addition, we suggest that where a product is considered detrimental to a particular class of consumers, particularly consumers experiencing vulnerability, ASIC should specifically address the ways in which detriment has or will be caused to those consumers.

We submit that ASIC should seek to engage with particular consumer groups who are affected by the product. Thorough and meaningful consultation will avoid the risk of further entrenching financial exclusion and disadvantage by limiting access to products that may be harmful, but which consumers may nevertheless choose. Meaningful consultation with affected groups will also allow ASIC to properly consider whether alternative intervention would be more effective.

In addition to publishing materials on its website, ASIC may need to take further steps to ensure that people that are reasonably likely to be affected by an order are properly consulted in other ways. For example, if a product intervention order is proposed in relation to a product that significantly impacts people in remote Aboriginal communities, many affected consumers may not be aware of the consultation process if it is only described on ASIC's website.

In these circumstances, we suggest that ASIC should consider how best to engage the affected consumer group. Depending on the nature of the product and intervention in question, this could involve reaching out to leaders and local Aboriginal organisations through culturally appropriate consultation practices. ASIC's Indigenous Outreach Program could play an important role in this process.

As part of this consultation process, we submit that ASIC should also require affected companies to notify consumers of the products that are the subject of the proposed product intervention order and the consultation process. This notification should also include information on the consumers' right to complain to the Australian Financial Complaints Authority (AFCA), where this option is available.

Proposal C2: Describing significant consumer detriment at consultation

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

Legal Aid NSW is supportive of how ASIC intends to describe the significant consumer detriment. We suggest that the following additional information should also be included in the Guide:

- The effect, if any, on consumer groups experiencing vulnerability.
- The non-financial impact of the detriment, including any relevant emotional impact, particularly in relation to consumers experiencing vulnerability. Our casework experience indicates that consumers who experience vulnerability are particularly impacted by poor products, and this often causes high stress, frustration and

disappointment. Research also demonstrates the negative impact of financial hardship on physical and mental health and overall quality of life.²

Proposal C3: Commencement date

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

Legal Aid NSW broadly agrees with ASIC's approach to determine whether to delay commencement of a product intervention order. However, we submit that there should be a presumption against delaying a product intervention order when significant consumer detriment may occur imminently. Alternatively, the nature, likelihood and extent of the significant consumer detriment should be the paramount consideration.

While we appreciate that exercising the discretion to delay commencement of a product intervention order involves balancing competing factors, in our view the impact on consumers should be given highest priority. The adverse impact on consumers, especially consumers experiencing vulnerability, as a result of exposure to a product (or class of products) that will or is likely to result in significant consumer detriment, is likely to be greater than the adverse impact on a financial firm that is required to comply with a product intervention order immediately.

We note that the Guide provides an example of where a delayed commencement may be appropriate—when compliance with the terms of a product intervention order will take time to implement. However, we consider that where ASIC is determining whether to delay commencement of a product intervention order, financial firms required to comply with the order will have already had the opportunity to provide input as part of the consultation phase. As such, before a product intervention order is made, relevant persons (such as financial firms) will already be on notice that a product intervention order is a possible outcome, and should therefore be in a position to prepare to comply with a product intervention order, if it is made.

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?

Subject to our comments in response to C3Q1 above, Legal Aid NSW broadly agrees with the examples of factors that should be considered when determining whether to delay

² Evgenia Bourova et al, 'The Experience of Financial Hardship in Australia: Causes, Impacts and Coping Strategies' (2019) Vol 42, No. 2, *The Journal of Consumer Policy*, 26.

commencement, or the length of any delay. We recommend that the following factors also be considered:

- The impact on consumers experiencing vulnerability.
- The length of time the financial firm has been on notice (from consumer, consumer advocates or regulators) that a product or class of products is causing consumer detriment. For example, if a financial firm has been aware that a product it is offering is, will or is likely to cause significant consumer detriment for a long period of time, ASIC should be less likely to delay commencement of a product intervention order.

Where delayed commencement of a product intervention order is to occur, ASIC should also describe the consumer harm that is likely to occur during the period of delay.