

ASIC Consultation Paper 313 – Product Intervention Power

Submission by Legal Aid Queensland



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Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to ASIC Consultation Paper 313 – Product Intervention Power.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals.

LAQ's Civil Justice Services Unit lawyers provide advice and assistance in relation to insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications and unsolicited consumer agreements. LAQ assists clients who have suffered detriment caused by particular financial products.

LAQ welcomes the introduction of a Product Intervention Power (PIP) for ASIC to deal with financial products that cause or are likely to result in significant consumer detriment.

In LAQ's experience, products which have caused significant consumer detriment to vulnerable consumers and which may require the use of ASIC's PIP, have included:

- (a) the provision of short term credit;
- (b) consumer leases;
- (c) timeshares;
- (d) funeral insurance;
- (e) add-on Insurance sold when consumers are buying cars;
- (f) consumer credit insurance;
- (g) buy now/pay later schemes.

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.

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?

It is important that as part of ASIC's power under RG000.51 to consider the impact that the detriment has had, or is likely to have on consumers, that non-monetary detriment. The additional considerations that are relevant to determining significant consumer detriment include distress and anxiety attributable to the

financial detriment caused by the product and a financial services market in which financially disadvantaged people are particularly vulnerable.

Also, the implementation of the Financial Services Royal Commission's recommendation to establish a compensation scheme of last resort is an important part of ensuring appropriate remedies for consumers for the past harm that has been caused to them.

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).

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

Additional important considerations are:

- (a) where practical, the PIP should be used proactively prevent harm before it has occurred;
- (b) the PIP should not be used as a last resort;
- (c) any intervention should have a practical outcome that benefits consumers. For example, if a significant consumer detriment has been identified, an intervention that involves the status quo being maintained is not an appropriate use of the PIP power;
- (d) as stated in the findings of the Financial Services Royal Commission, community expectations should be an important consideration of whether to exercise the PIP; and
- (e) the PIP should be used to complement ASIC's other regulatory tools such as legal action against the product provider if they have breached relevant legislative provisions.

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).

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

LAQ supports the information that ASIC proposes to include in its PIP. However, LAQ notes that it is important that when ASIC is presenting a range of options for intervening that meaningful outcomes for consumers are considered.

For example, if ASIC is exercising its PIP because it has identified a product or market that is causing a significant consumer detriment to consumers, it would not be reasonable for ASIC to have an option of doing nothing, as it would not address the significant consumer detriment that has been identified or meet the community's expectations that products which cause or are likely to cause significant consumer detriment be removed from the market.

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

It is important to clarify what type of evidence about a product or market would be required before ASIC would consider not exercising its PIP.

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.

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

LAQ supports the factors set out in RG000.68-RG000.69 of the draft Regulatory Guide.

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).

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?

LAQ supports consideration of the delayed commencement of a product intervention order on a case by case basis. However, for ASIC to be using a product intervention order, it must have concluded that a product **or market** is causing significant consumer detriment. Consequently, any delay should not be at the risk of further significant consumer detriment.

Other issues

What happens after the exercise of the Product Intervention Power expires?

There is a need to clarify what happens when the term of ASIC's PIP ends. In our view a PIP should remain in place until the product **or market** that is subject to the PIP is able to satisfy ASIC that either the product is no longer being sold or has been changed and no longer caused significant consumer detriment.

When is satisfied that a product no longer causes significant consumer detriment it should issue a public statement about the changes to product and how those changes have eliminated the significant consumer detriment.