

7 August 2019

Ashley Brown
Senior Adviser
Strategic Policy
Australian Securities and Investments Commission (ASIC)
GPO Box 9827
Brisbane QLD 4001

By email: product.regulation@asic.gov.au

Dear Ms Brown

AFA Submission – CP 313: Product Intervention Power

The Association of Financial Advisers Limited (**AFA**) has served the financial advice industry for over 70 years. Our objective is to achieve *Great Advice for More Australians* and we do this through:

- advocating for appropriate policy settings for financial advice
- enforcing a Code of Ethical Conduct
- investing in consumer-based research
- developing professional development pathways for financial advisers
- connecting key stakeholders within the financial advice community
- educating consumers around the importance of financial advice

The Board of the AFA is elected by the Membership and all Directors are currently practicing financial advisers. This ensures that the policy positions taken by the AFA are framed with practical, workable outcomes in mind, but are also aligned to achieving our vision of having the quality of relationships shared between advisers and their clients understood and valued throughout society. This will play a vital role in helping Australians reach their potential through building, managing and protecting their wealth.

Introduction

The AFA welcome the opportunity to make a submission in response to this consultation.

The AFA supports ASIC having access to a Product Intervention Power, however we expect that there will be very limited opportunities for this power to be used effectively to minimise the risk of significant client detriment. The term deposit example that was provided, where the power might have been used in the past, was of limited benefit, in the absence for an explanation of how it might have been used. The one key message that we took out of this term deposit example was the importance of clients having access to a financial adviser to assist them in avoiding ending up in a sub-optimal term deposit option. This example highlights the benefit in having access to an expert to assist clients to choose the best option. It also highlights the importance of a disciplined approach to

the management of important financial decisions. Something that many clients prefer to outsource to a financial adviser.

The overriding assumption with respect to this power, is that it would be used to prevent a product being on the market that could directly cause significant client detriment. It is our understanding that it is assumed that this power will prevent some of the product collapses that happened at the time of the Global Financial Crisis (GFC). We would certainly caution that thinking. Some of these issues, such as the collapse of the agribusiness schemes or the freezing of mortgage funds was not apparent until very late. In the case of the mortgage funds, this problem arose directly from a combination of the GFC and the Governments introduction of the bank guarantee. In the case of the agribusiness schemes, the problem came to a head as a result of a decline in new business. This was an issue also with respect to the mortgage funds as the lack of new business meant that insufficient funds were available to repay those choosing to exit.

We also think that there are potentially three issues in this area, being products that pose unacceptable risks for clients, products that do not deliver sufficient economic value to the clients and inappropriate distribution models and product features that result in suboptimal outcomes. These are three very different issues, and the difference has not been articulated. In terms of the issue of insufficient economic value, this poses a particular challenge for a regulator to decide what point provides the right balance between the value derived by the product provider versus the client.

We continue to believe that there remains a lack of clarity with how this power may be used and with whom it may be used upon. From a financial adviser perspective, to what extent does this power allow ASIC to take action against a party who is providing financial advice with respect to a product that might be the subject of a Product Intervention Order?

It seems that one key issue that has not been addressed in this consultation paper or in the draft Regulatory Guide is what impact such a Product Intervention Order may have on the existing investors in a product. It may make the problem noticeably worse for them. In the real world, the use of this power is likely to be a very challenging balancing act for ASIC, where numerous issues need to be taken into consideration. The investigation and consultation requirements will ultimately take a reasonable amount of time, which will limit the ability to swiftly address issues.

It may be that this power will be used in a more moderate manner, in modifying the way a product is sold, rather than to completely ban the product. Given the media coverage that would arise at the time of the initial consultation stage, on the possible use of this power, it would seem that the likely consequences would be that future sales would decline rapidly and drastically. Therefore, it would seem that the potential use of this power might be the required leverage for product providers to agree to changes that would directly address the regulatory concern without the need for the publicity that would come with a public Product Intervention Order. We are concerned that there is a risk that this power could be used as leverage to get product providers to make changes that might not be required.

We are conscious that the requirements for the use of this power imply a high level of knowledge with respect to the underlying issue and the impact that the issue might have on clients. In reality, ASIC does not have this knowledge until they go looking and issue notices to obtain the information. The trigger to commence an investigation may include the receipt of complaints or negative media coverage. This all takes time, however in the absence of an assessment of the actual or potential significant client detriment, it is not possible to proceed with a Product Intervention action. We also note throughout the document, commentary with respect to a product not being appropriate to particular clients. This assumes a level of knowledge that the product provider may not have, and therefore it is unclear how ASIC can obtain this information.

Response to Questions Raised in the Consultation Paper

1. 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?

We broadly agree with the factors that should be taken into consideration whether a product has or is likely to result in significant consumer detriment, however, the wording of this section is still ambiguous as to the extent and nature of the detriment and unclear how this will be implemented practically. There are no specific guidelines around what will be classified as significant detriment. We also believe that this section of the Regulatory Guide on detriment and significant detriment needs to include examples.

With respect to Table 1 on the factors to be taken into account, we are uncertain with respect to the suggestion of the relevance of socio-economic disadvantage. For a product that is broadly targeted, we cannot see how the product provider would be aware of the socio-economic position of the clients. We are also uncertain as to whether this should be a separate factor, unless there is clear evidence that a product is being targeted at a specific disadvantaged segment of the market.

In terms of mis-selling, how will the implementation of this power distinguish between the role of the product provider and any intermediary involved in the sale or recommendation of that product? Presumably if the mis-selling is being done by specific intermediaries, then the issue could be dealt with by direct action against the intermediaries, rather than a broader Product Intervention Order.

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

We do not feel that there is sufficient clarity with respect to how ASIC might intervene.

We agree that in certain circumstances, ASIC should have the power to intervene to ensure that detriment to clients is limited, however, as discussed above, we are concerned that there appears to be little reflection on the impact of an intervention on existing clients. We believe that an assessment of the impact of an intervention on existing clients should be a key part of this process. That might include both existing clients in the specific product and clients in other related products. It is our view that the receipt of a Product Intervention Order could be a terminal event for many smaller businesses.

As discussed above, we would like to see a lot more clarity in terms of how ASIC may intervene with product providers and with respect to any intermediaries. We would specifically like to know what actions ASIC might take with respect to financial advisers as a result of a Product Intervention Order. We would also like to see more explanation of the types of interventions and in which circumstances each type may be used.

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

We ask the question as to whether the information that is provided as part of this consultation process will include the background on how the concern emerged, and whether there has been any recent change in circumstances that might have made this issue more significant? Otherwise, we consider that the information that ASIC proposes to provide in the Product Intervention Order consultation process appears appropriate.

It is important that the impacted product and product provider is very clearly identified, along with any other circumstances that might help to clarify the impact. We would also recommend that

details on the expected timeframe for intervention should be included in the consultation documents. Where a range of intervention options are available, then it should be clearly set out whether more than one possible intervention will be put in place or whether just one is to be selected after the consultation process is completed.

We think that a template of how this consultation documentation would be set out would be useful.

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

We are very conscious that even with the announcement of consultation on a potential Product Intervention Order that this will cause a great deal of concern amongst clients, advisers and other stakeholders. We are most concerned about the potential impact upon existing clients and therefore feel that any consultation should address the likely impact upon existing clients and the options to minimise any potential additional detriment to existing clients.

We would also recommend that the information should include some explanation of why ASIC believes that the intervention will reduce the prospect of future detriment.

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

To the extent that the detriment is dependent upon contingent factors or is subject to change, we believe that this should be carefully and clearly explained.

We believe that particular care needs to be taken where the detriment has not yet occurred, however, there is a recognised risk that it might occur in the future. Identifying detriment that has not yet occurred and identifying products and individuals involved in this, may cause unnecessary panic and contribute to the crystallisation of actual losses. It is important to be conscious that as soon as a product is subject to a potential product intervention order then it will most probably be removed from virtually all advice licensees' Approved Product Lists. This will turn off new business flow, including any new business that is currently in the process of being finalised. We believe that this needs to be considered very carefully in circumstances where only a potential detriment is identified or is likely to occur.

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

We accept that it is appropriate for ASIC to have the power to permit a delayed commencement, however we do wonder the extent to which a willingness to accept a delayed commencement may actually suggest that the consumer detriment is not actually significant. It seems strange to consider that a delay, that might allow greater consumer detriment to occur, would be considered appropriate in many circumstances.

7. 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?

We agree that in some cases a product intervention might need to be delayed. The reason for this may include:

- Required IT and system changes which cannot happen quickly and, in some cases, may require new IT infrastructure to be built.

- Requiring changes to other internal processes and procedures which will require significant staff training. It takes time to train, mentor and coach staff around new procedures and processes.

We believe that the full impact of each proposed product intervention needs to be included as part of the consultation process including the potential time frame of the delay or proposed effective date.

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

We believe that where a delay is being considered, this should be the subject of consultation to ensure that the full consequences of a delay are taken into account in the decision making process.

Concluding Remarks

The AFA is supportive of the ability for ASIC to undertake product intervention, provided it is done in a careful and considered fashion that takes into account the risk of increasing the extent of detriment for existing clients. We believe that there is a need of greater clarity with respect to how this power will be implemented, the nature of such intervention orders and the parties that might be impacted.

The AFA welcomes further consultation with ASIC should clarification of anything in this submission be required. Please contact us on 02 9267 4003.

Yours sincerely,

Phil Anderson
General manager Policy and Professionalism
Association of Financial Advisers Ltd