

07 August 2019

Ashley Brown  
Senior Adviser, Strategic Policy  
Australian Securities and Investments Commission  
By email [product.regulation@asic.gov.au](mailto:product.regulation@asic.gov.au)

Dear Sir,

## Consultation Paper 313 – Product Intervention Power and draft Regulatory Guide

The ABA appreciates the opportunity to provide feedback on these matters.

### Key points

- We acknowledge The Australian Securities and Investments Commission's (**ASIC**) intention to provide 'high level' guidance, and to rely on the ordinary meaning of 'significant detriment'. However, for the efficient implementation of this measure, maximum clarity around the meaning of this term is desirable.
- Further clarification around the interaction between the Product Intervention Power and Design and Distribution Obligations would also be useful.
- We endorse ASIC's statement that the Product Intervention Power is not directed at eliminating all risk from the financial markets, but believe that the guidance would be improved by the inclusion of further examples demonstrating this point.
- The guidance should clarify whether individual entities or the industry more broadly will have an opportunity to respond to an intention of ASIC to commence the intervention process before a formal decision is made to do so.
- We endorse ASIC's view that it is appropriate that the length of any delay in commencement of an intervention order correlates with the extent of detriment, but note that, even in cases of serious consumer detriment, sufficient time should be allowed for appropriate preparation, including internal staff communication, instructions, process changes, and notification of customers as this is ultimately in the interest of consumers.

We outline these points in more detail against the headings and questions outlined in CP 313, below.

### Significant consumer detriment

We note the intention expressed in CP 313 to provide high-level guidance on the meaning of consumer detriment and how it can arise and 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. ASIC also recites in the draft guide the statutory matters it must take into account, i.e.:

- (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;

In addition, we note that RG000.50 outlines:



“In considering if a product is likely to result in significant consumer detriment, we will consider all of the circumstances, including whether some detriment has already occurred, the apparent causes of the detriment and whether there are particular factors that make significant consumer detriment more likely, including matters such as:

- a) the extent and operation of any conflicts of interest;
- b) the complexity or opacity of the product and the circumstances of its sale;
- c) evidence or risk of consumer confusion or misunderstanding;
- d) how choices and processes are presented to consumers that influence their take-up and use of the product (the choice architecture); and
- e) other obstacles that consumers face in using the product that are likely to lead to significant detriment.”

Finally, we note that Table 1 of the guidance expands somewhat on the matters outlined above.

**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?**

#### **Clarification on interaction with the Design and Distribution Obligations**

ASIC notes (at 313.25) that while there is an interplay between the design and distribution obligations (**DDOs**), compliance with the latter does not necessarily exclude the exercise of the product intervention power (**PIP**). Nevertheless, we believe it would be helpful to provide further clarification around the interaction of the two regimes.

We note that the draft guidance states that a product would be mis-sold if it is misaligned to a ‘consumer’s needs, understanding and expectations’ (RG000.41). Under the design and distribution obligations, a distributor is obliged to establish a consumer’s alignment to a suitable product target market before providing general information to that consumer in a manner sufficient for them to make their own informed decision that such a product meets their needs, understanding and expectations. Assuming that this obligation has been complied with, it would be helpful if the guidance clarified:

- In the context of a general advice sales conversation, does the reference to ‘misalignment to a consumer’s needs’ refer to a sale resulting from information offered by a distributor on a product outside the target market?
- Where a customer who fits a target market description receives all relevant information about that product, including a general advice warning that they will need to consider whether the product meets their particular needs and objectives, will significant customer detriment be possible if that customer were to subsequently determine that the product did not meet their needs, understanding and expectations?

Further, it would be helpful if the guidance clarified whether ASIC anticipates that significant consumer detriment would be likely to occur where, notwithstanding the provisions in subsection 766B(3) of the Corporations Act, a customer who is in the target market when the product was acquired perceives that personal advice was provided.

In paragraph 16 of CP 313, ASIC makes reference to the use of the PIP 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. Again, clarification on how this applies in relation to the DDO – i.e. whether assessing risk profile requires something more than determining whether the customer is within a target market – would be useful.

## Products operating within their risk range

ASIC acknowledges, in CP 313, that there will always be risk in financial markets, and the draft guide states that the PIP is not directed to eliminating all risk from the financial markets. We endorse these views. However, we believe that the guidance could benefit from further clarification or examples.

ASIC refers to the example of an investment product that has reduced in value and resulted in losses to consumers. This has been referred to as an example only - there are a variety of products falling within the scope of the PIP which are designed to manage risk; such as foreign exchange contracts and interest rate swaps. In the event of the risk not eventuating, the customer may experience a loss on the risk management product, but this should not constitute a consumer detriment because the product did achieve the objective of providing certainty of cash flows (assuming the client was within the target market for purposes of the DDO). Less complex products can also have financial risks and consequences – for example where a borrower cannot meet the payments under a loan due to financial hardship. Such circumstances should not, of themselves, be regarded as constituting significant detriment. We suggest that this could be useful information to include in the guidance.

## How ASIC will intervene

We note that ASIC proposes to give guidance that it will aim to design an intervention that it considers to be the most appropriate regulatory solution to reduce the likelihood of significant consumer detriment occurring; and will, when determining the type of intervention it will use, focus on:

- 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 to best reduce the likelihood of further significant consumer detriment occurring.

## B2Q2: Are there any other considerations that we should take into account in determining how we will intervene?

We note the reference in paragraph 41 of CP 313 to the requirement that ASIC, in exercising the power, consider the effects that the performance of ASIC's functions will have on competition on the financial system. We suggest that, in this regard, ASIC be consulting with the Australian Competition and Consumer Commission (**ACCC**) in considering any exercise of the PIP.

In addition, while we note ASIC's examples of instances when it may intervene, we query whether it would be helpful for additional guidance to be provided on the types of circumstances in which ASIC envisages that it would exercise its discretion not to make an order, noting that section 1023D does not mandate that an order be made.

For example, if ASIC becomes aware of consumer detriment via a notification under s912D or other discussions with or surveillance of an individual, and it is apparent that the cause of the consumer detriment has been investigated and a plan for timely rectification is in place including for any appropriate customer remediation, or, the customer detriment was the result of unintended operation of the product, such as due to system errors as opposed to any conduct preferring commercial interests over consumer interests, these issues could be considered to indicate that an intervention order is not appropriate.

## 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?

We note ASIC's proposal that, as part of its 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.”

We endorse these factors as an appropriate starting point.

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

In relation to paragraph (b) above, ASIC should also set out the process which it has adopted to draw the conclusion there has been significant consumer detriment.

When ASIC sets out the description of the proposed intervention, it should include the period for which it is proposed the order remain in effect. In this regard, ASIC rightly points out at CP313.22 that an intervention order can be made for an initial period of up to 18 months. However in RG000.11, Figure 1. The assumption appears to be that an order will generally be made for an initial period of 18 months. We seek clarification as to whether this is the intention. Given that ASIC has emphasised that design of the order will be decided on a case by case basis, we query whether it is appropriate for ASIC to default to the maximum period - See RG000.55-56.

### **Consultation prior to formal proposal to make an order**

While the proposed RG discusses the process for the mandatory consultation prior to making any order, it does not touch on what may occur ahead of this. For example:

- Before forming a view on whether a particular individual order is appropriate, will ASIC have undertaken a surveillance of the relevant entity?
- Will any individual entity have an opportunity to make submissions prior to formal decision or consultation on an intervention?
- In the case of proposed industry-wide intervention, will ASIC ensure, prior to consulting on formal action, that it gathers evidence from all or at least major market participants?

In our view, there may be circumstances where it is appropriate (on fairness and efficiency grounds) to consult with a relevant entity or entities prior to any formal decision to make or to propose to make an intervention order. This may result, for example, in relevant entities taking immediate action to address ASIC's concern.

### **Time in which to respond to consultation**

ASIC notes that as the power allows ASIC to be more agile in responding to consumer detriment, the time allowed for stakeholders to respond to its consultation will depend on the circumstances of the significant consumer detriment.

We note that it will be important that industry have an appropriate amount of time to respond to consultations so that ASIC can obtain the best possible information to inform its decision. Particularly as ASIC states at CP313.45 that they expect submissions to be supported by evidence and data which can take time to collate.

### **Publication of consultation and orders on ASIC website**

We note that the information contained in intervention orders could be market sensitive and suggest that ASIC consider this when setting the timing for publication, and that it consider any commercial sensitivity of the information in determining the content of the notice.



## Describing significant consumer detriment at consultation

We note ASIC's proposal to provide guidance that, when it consults on making a product intervention order, it will describe the type of order it proposes to make and the significant consumer detriment that has resulted, will result or is likely to result from the product, and 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?

We support this proposal for the description of consumer detriment at consultation.

## 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?

We endorse ASIC's view that it may be appropriate to delay commencement of an order in circumstances where compliance with the terms of an order will take time to implement. A prime example of this is where technology solutions are required, as these can take many months to design, test and implement. We also acknowledge, however, that it is appropriate that the length of delay correlates with the extent of detriment, although even in cases of serious consumer detriment, sufficient time should be allowed for appropriate preparation, including internal staff communication, instructions, process changes, and notification of customers.

### 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 note ASIC's proposal to consider whether delayed commencement (and the length of any delay) is appropriate for a product intervention order on a case-by-case basis, and that in doing so it 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.

We endorse these factors as an appropriate starting point.

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

It will be important that industry has sufficient time, prior to the commencement of an intervention, to assess and mitigate any flow-on or unintended consequences. This may include assessment of any potential impact in relation to existing customers holding the product. In this regard we note that the Financial Conduct Authority (**FCA**), in a Policy Statement titled "Restrictions on the retail distribution of unregulated collective investment schemes and close substitutes" (PS 13/3) acknowledged that a rule could bring attention to problems with a particular product which could lead to a loss of consumer

confidence in the product with flow on business impacts and negative impacts to issuers and potential loss to existing customers.

## Other issues

### **Guidance on the circumstances in which ASIC anticipates an order may be revoked or amended during the initial period (1023K / 1023J)**

We note that ASIC has not provided guidance on any circumstances in which an order may be revoked under section 1023K. For example, if an individual order banning the issue of a product or class of products is made for a particular period of time, and ahead of expiry, the issuer rectifies the cause of the significant consumer detriment, it may be appropriate to revoke the order, or, in the case of an industry-wide order, that it be amended.

We note also, the absence of guidance on circumstances in which amendment of an order may be made under section 1023J. It appears to be implied that consultation will occur before amendment.

### **Minister's agreement to make an order permanent (section 1023H)**

We note that the guidance could benefit by including more information on the process by which ASIC will seek the approval of the Minister to extend or make an order permanent under section 1023H. For example, in preparing the report as to whether the Minister should approve, will a consultation process similar to that required for the initial order take place, as is the case in the UK when permanent rules are made?

### **Post implementation reviews**

We note that CP 313 and the draft guidance are silent in relation to whether ASIC will pro-actively review orders during their term. For the UK perspective, see [PS13/3 – The FCA's use of temporary product intervention rules](#) – see especially page 37. In essence, the FCA flags the possibility of conducting post-implementation reviews of temporary intervention orders. In our view, ASIC should consider adopting the same approach.

Please do not hesitate to contact us if you require any clarification of the matters raised above.

Yours faithfully



Jerome Davidson  
Policy Director

