



Australian Finance Industry Association Limited
ABN 13 000 493 907
L11 130 Pitt Street Sydney NSW 2000
02 9231 5877 www.afia.asn.au

Ashley Brown
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001

7 August 2019

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

Dear Ashley

ASIC Consultation Paper 313: Product Intervention Power

The Australian Finance Industry Association [AFIA] welcomes the opportunity to comment on the exposure draft of Consultation Paper 313 Product Intervention Power [the **Consultation Paper**] and Regulatory Guide 000 Product Intervention [the **Regulatory Guide**].

AFIA Position

ASIC's product intervention power [PIP] is a significant addition to its suite of enforcement tools available to deliver its regulatory objectives, in particular to protect consumers from risk of financial harm. AFIA welcomes the opportunity for consultation to assist in shaping how ASIC seeks to utilise this power given the potential impacts it will have on a provider of consumer credit (or other regulated-entity). We acknowledge there is a particular matter before ASIC on which this guidance is being shaped. AFIA fully supports ASIC adopting a position to ensure an outcome to prevent risk of consumer financial harm for the overall benefit of all market participants. In framing our feedback we are also taking into account how the ASIC approach might work in situations where the risk is potentially less clear. Also how it may interface with ASIC's other new power to issue a Design and Distribution Order [DDO]. Our objective is to facilitate ASIC arriving at clear approach to its use of PIP for the benefit of compliance understanding of market participants. Key to this is enabling ASIC to have relevant information to fully assess the consumer risk to determine whether the potential is significant to warrant exercise of its PIP or whether another enforcement tool might be better in those circumstances.

AFIA Background

By way of background, AFIA is the voice of a diverse Australian finance industry. AFIA supports our Members to ensure a fair, equitable and competitive market for customers through representation, insights and connectivity.

AFIA is uniquely placed to respond given our broad and diverse Membership of over 100 financiers operating in the consumer and commercial markets (including small-medium business and agri-finance). AFIA Members:

- include banks (major, regional and mutual/community-owned) and non-banks;
- range from ASX-listed public companies through to small businesses providing finance;
- operate via a range of distribution channels including bricks and mortar premises, intermediaries (finance brokers, dealerships, suppliers) through to online / digital access
- collectively operate across all states and territories in Australia in capital cities through to regional and remote areas: the majority operating across at least one border;
- have customers from all demographics, all age groups (legally able to borrow) in support of Australia's diverse and multi-cultural community with:
 - consumers ranging from high to low-income earners (including some whose main income source may be government welfare); many with substantial assets, others with few; single borrowers through to blended families; covering the whole range of employment scenarios, full-time, part-time, seasonal or casual employment.
 - commercial entities ranging from sole traders and partnerships through to the more complex corporates (e.g. trusts, corporate group) and government-entities some with no employees through to others with hundreds (if not thousands) of employees.
- provide a broad range of products:
 - consumer: from personal unsecured loans, revolving products (including credit cards and interest free products coupled with lines of credit), loans secured by land or personal property; consumer leases of assets (including household/electrical/IT or cars) and buy-now, pay later solutions;
 - commercial: asset or equipment finance (finance/operating lease, secured loan or hire-purchase agreement or novated leases); working capital solutions (online unsecured loans; debtor and invoice finance; insurance premium funding; trade finance; overdrafts; commercial credit cards) together with more sophisticated and complex finance solutions.

AFIA Feedback Process

To examine this issue AFIA has engaged with our Members. Our submission focuses on sections in the Consultation Paper where Members had some commentary or were seeking greater clarification.

A large number of members have contributed to our feedback. We note, however, that while generally the position put by AFIA represents the general view, there may be variances at individual member level on specific matters. These will get captured through the relevant member's organisationally-targeted submission.

AFIA Key Issues

1. Clause 20 – Limitations on the types of product intervention orders ASIC can make

The Consultation Paper states that ASIC cannot exercise its PIP to make a product intervention order that imposes requirements in relation to a person's remuneration, except where it is related to the achievement of objectives directly related to the product. This is further supported by the Explanatory Memorandum and s301D(4) of the National Consumer Credit Protection Act (2009) and Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019.

AFIA notes that the Consultation Paper states that this does not prevent ASIC from intervening in relation to remuneration that is linked to the distribution of the product. However, we understand this would potentially see its other new power specifically focused on design and distribution [DDO]. Separate guidance on this to be developed by ASIC.

AFIA recommendation:

AFIA recommends that further case studies are developed and included showing the circumstances where ASIC will form the view that remuneration is linked to the achievement of objectives directly related to a product

2. Clause 22 – Duration of a product intervention order

AFIA notes that the Consultation Paper allows ASIC to make a product intervention order [PIO] for an initial period of up to 18 months. This can be extended or made permanent with the approval of the Minister.

Members seeks clarification on the process for extending the duration of the PIO as it is not clear if ASIC would consult with industry before this occurs

AFIA Recommendation:

AFIA recommends that ASIC should detail the process it proposes to follow in advance of a decision to extend a PIO. This should include a requirement to consult broadly with industry before seeking the Minister's approval to extend an order more than 18 months.

3. Clause 24 - Interaction with the design and distribution obligations

AFIA Recommendation:

AFIA recommends that ASIC provide case studies, to illustrate the circumstances where a regulated entity has appropriately complied with its design and distribution obligations, but there may nevertheless be the potential for risk of consumer harm that would warrant ASIC exercising its PIP.

4. Clause 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?

AFIA Request for Clarification

AFIA seeks clarification on the following:

- How will ASIC conduct its market research when deciding if there has been significant consumer detriment or not? For example, will ASIC use customer surveys to assess significant consumer detriment?
- How will ASIC verify the information that it collects when assessing a product?

AFIA Recommendation:

AFIA recommends that ASIC provide clarification that it will provide entities with the chance to affirm data or provide counter-data before making a determination.

- What weighting will be given to non-financial matters when ASIC is using this as a factor in determining if there has been any detriment. Members are concerned that by extending the meaning of “significant consumer detriment” to include non-financial issues, it may result in a more subjective view being taken when determining a result, rather than an objective one.
- How will ASIC manage unsolicited submissions outside of a formal consultation process, particularly from third parties and / or in times of intense media or political pressure?

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

AFIA Request for Clarification

Members seek clarification on the following points:

- What factors will ASIC consider when deciding on the appropriate period of time before implementation of a PIO? Members understand that a decision by ASIC to issue a PIO needs priority to action to prevent consumer risk but may need to enable time for compliance transition.

AFIA Recommendation:

AFIA recommends a further case study be included in the Consultation Paper addressing the rationale of choosing the amount of time provided before implementation of an order. We also recommend that when ASIC is consulting on a PIO, a clear commencement date and transition period forms part of its

consultation.

- Will ASIC allow for entities to make an application for relief (application of RG 51) from complying with an order?

AFIA Recommendation:

AFIA recommends that ASIC includes a clause stating that entities can apply for relief from an order as per RG 51.

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

AFIA Request for Clarification

AFIA seeks clarification on the following:

- How will the definition of 'retail clients' be applied to credit products? Members note that the definition of 'retail clients' in Chapter 7 of the Corporations Act does not clearly fit with credit products (as this Chapter was not developed for those products), and further note that the Consultation Paper interchangeably uses "consumers" and "retail clients" and that there is no clear distinction between the two categories.

AFIA Recommendation:

AFIA recommends that ASIC clearly define 'consumer' and 'retail clients' in the Consultation Paper, and for ASIC to consider further how its definition of "retail clients" will be applied to credit products with the potential for revision of the definition or the issue of further guidance.

- Whether ASIC will exercise its PIP on 'wholesale clients'?

AFIA Recommendation:

AFIA recommends that ASIC clarifies in its guidance whether it proposes to exercise its PIP for products issued to wholesale clients. If so, further detail would be useful to clarify ASIC's approach.

- How will ASIC differentiate its approach when considering exercising its PIP for consumer finance products vs. business products?

AFIA Recommendation:

Reflecting there are key differences in customer risk for consumer and commercial finance, AFIA recommends that ASIC clarifies how it will differentiate its approach when considering exercising its PIP for consumer finance products vs. business products. There are significant legal and operational differences as consumer finance is subject to the NCCP Act and the responsible lending requirements under that Act, but these requirements do not apply to business lending. Business lenders do not differentiate between retail and wholesale clients since those concepts do not apply to business finance. Treating consumer lending and business lending to retail clients in the same way is out of step with lenders' legal obligations and

operational practices. Members (in particular small business lenders that only operate in the commercial market segment) are concerned that there has been inadequate attention paid to this aspect of the new legislation and seek a more detailed consideration of this matter. AFIA and interested Members would be pleased to consult further on this matter to help guide ASIC's deliberations. We understand this is a policy matter and will also be raising with Treasury and the Government directly.

- Whether ASIC will consult with entities privately before it goes to public consultation?

AFIA Recommendation:

AFIA notes the potential significant outcomes in reputational damage that flow from media or other attention to ASIC action naming the entity even where the investigation may be in an early stage and the eventual outcome is no issue is found and no enforcement action will be taken. By then, the damage to brand has been done. To minimise this potential, AFIA recommends that ASIC include a clause in Section C clarifying that there will be a preliminary and private consultation with an affected entity. This would help ASIC to obtain data to be in a position to assess and determine that there is sufficient evidence of "significant consumer detriment" before any public consultation takes place thereby achieving the objective of the PIP while minimising any unintended outcomes (eg brand damage for regulated entities determined in the initial investigation not to have offered a product to warrant ASIC using its PIP).

- Whether there will be opportunity for further consultation in the event ASIC is to amend an order following consultation.

AFIA Recommendation:

AFIA recommends that ASIC outline the process for subsequent consultation where ASIC makes amendments to an order following public consultation.

Next steps

We would welcome the opportunity to discuss our feedback further, or provide additional information. Please contact me at [REDACTED] or Chalisa Parekowhai, Associate Director, Policy at [REDACTED] or both via [REDACTED].

Kind regards



Helen Gordon
Chief Executive Officer