



Min-it Software



Joint Submission –

ASIC CP313: Use of product intervention power

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Background Information

This submission is made on behalf of the Financiers Association of Australia (“FAA”) and Min-It Software (“Min-It”) clients.

We welcome the opportunity to submit this submission on Treasury’s consultation on the design, distribution obligations and product intervention powers of financial and credit products in regard to short term credit products.

The FAA, having been established since the 1930’s, is an organisation for individuals and companies involved in the fields of finance and credit provision. The FAA’s members are either non-ADI credit providers, providing loans up to \$5,000 over terms of up to 2 years, mortgage financiers or business financiers.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-IT Software is a leading loan management software supplier to the micro-lending sector of the Australian market. Additionally, it has a number of clients providing motor vehicle finance as well business loans and consumer leases.

The vast majority of Min-It’s clients are not affiliated with any industry association.

Introduction

We have previously expressed concern about the possible mis-use of both of these powers, both to Treasury in its consultations and to the Senate Economics Reference Committee’s inquiry, and we do not propose to reiterate them generally.

The Consultation Paper (“CP”) states it is limited to product invention. Draft Regulatory Guide RG 000, however, is a draft ‘full’ version and contains guidance pertaining to design and distribution obligations. For example, RG 000.29. At point 6, we note that ASIC will consult separately on the design and distribution obligations contained within the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (“Product Regulation Act”).

Consequently, we will not comment on any aspect of the draft Regulatory Guide that pertains to the upcoming consultation on these powers.

Proposed use of powers

We are concerned, however, that ASIC, having ardently pressing for these legislative powers proposes:

- i. not to stop any product from being introduced into the market (at paragraph 15 of the CP) due to moral hazard; and
- ii. to determine “whether to delay commencement, and for what period, is appropriate.” (paragraph 51 of the CP). One reason provided is because the product intervention order may take time to be implemented.

In regard to point (i), if ASIC believes a product may or is likely to cause significant consumer detriment from the start, when, exactly, would ASIC take action? Whilst we appreciate the moral hazard argument, given the two examples provided in the CP (neither of which would affect our members and clients), public perception could argue it’s possibly going to take years, if at all and regard this as unacceptable conduct by the regulator.

In respect of point (ii), if ASIC issues a CP on its intention to take action under these powers, the Australian Financial Service Licence (“AFSL”) or Australian Credit Licence (ACL”) holders with the particular product will be aware of the regulator’s concerns immediately. As the consultation process may take a month or more, these licence holders are already ‘on notice’ and should be considering what steps to take to remove the product from the market at once. Again, failure to act and allow more detriment to be created will be seen publicly as unacceptable conduct by the regulator.

If ASIC is aware and fails to act quickly about such products, basing its decision to take action only when the problem has grown to significant proportions or simply fails to act for an extended period, we suggest there may be arguments:

- a) the regulator has entrapped the offender; and

- b) that ASIC itself may be the subject of a Class Action by the ‘victims’ of the significant consumer detriment. Assuming that significant consumer detriment was proven, by allowing it to continue, we contend willful blindness would rank above moral hazard.

We take this opportunity of reminding ASIC of comments we made in our submission to an earlier ASIC Consultation in respect of updating RG165 in May. “According to a Sydney Morning Herald article¹ of 18 October 2017, James Shipton, chairman of ASIC said “success for him will be a nimble, proactive and inquisitive corporate regulator”. In our view, public opinion will likely see ASIC as not being ‘successful’ if it isn’t nimble and proactive. For these reasons, we argue ASIC should re-consider its stance.

We also note at paragraph 15 of the CP that the “power is also not designed or intended to prevent all monetary losses or eliminate all risk from the financial markets (e.g. market risk). It is not a prudential tool and will not necessarily prevent product failures or firm collapses.” This is heartening as ultimately, these powers should be driven by reasoned argument and not by the public clamour of those affected. We do not deny those that shout the loudest might have been affected but they may represent a small section of an otherwise silent majority or have been driven by other factors, such as greed.

Conflicting legislation

One point that does remain unclear in this CP and draft guidance is where ASIC stands in regard to these new powers and Unfair Contract legislation in standard form consumer contracts for financial products and services as contained in the *Australian Securities and Investments Commission Act 2001* (“ASIC Act”). These powers give ASIC the ability to act even where the product meets the terms of a valid exemption under the National Credit Code, for example.

¹ Ferguson, A, 2017. “*New ASIC boss wants to be nimble and inquisitive*”, Sydney Morning Herald, 18 October 2017. Available online <https://www.smh.com.au/business/new-asic-boss-wants-to-be-nimble-and-inquisitive-20171017-gz2o1s.html> viewed 13 May 2019.

As the Court² found Teleloans Pty Ltd, on whose model Cigno and GSSF rely, to be merely a ‘helper’, there may be conflict with how the Australian Competition and Consumer Commission deals with an entity not covered by either the National Consumer Credit Protection Act (“NCCP”) or ASIC Act. The Court was not asked to consider whether Teleloans was itself covered by the ASIC Act. Unless ASIC is to always use its powers under the Corporations Regulations 2001 (“Corporations Regulations”) to declare what such entities do, we see this as an area of concern.

Based on ASIC’s proposed action against Cigno Pty Ltd (“Cigno”) and its associate lender, Gold-Silver Standard Finance Pty Ltd (“GSSF”) (see CP 316), in that instance, it could be argued the detriment stemmed primarily from the excessive unascertainable fees and charges Cigno levied on consumers. As ASIC is the regulator for both pieces of legislation in both instances and only a Court can find a contract term unfair, there may be a conflict in how ASIC decides to act.

We believe this point should be explored with stakeholders and the regulator’s position made clear in its final Regulatory Guide.

DRAFT Regulatory Guide comments

We make the following comments on the draft Regulatory Guide:

RG 000.2(c) We note the comment “we can better uphold community expectations on the conduct of firms that issue or distribute products”. The Courts make decisions based on legislation, not community expectations. Community expectations ebb and flow and may change over time. We maintain Parliament is the sole entity that may take such expectations into account when enacting legislation and the regulator should be then one ensuring the legislative requirements are met, not setting them. As we have stated earlier, those that make most noise may not be reflective of the true situation.

RG 000.5 As we have stated earlier, we disagree with this for the reasons stated.

RG 000.8(a) The product intervention power will only work if ASIC does act quickly. As we have stated earlier, we have concerns with this statement and the one at paragraph 51 of the CP.

² Australian Securities and Investments Commission v Teleloans Pty Ltd [2015] FCA 648

- RG 000.11 It is unclear whether the second workflow point in Table 1 of “ASIC consults with persons who are reasonably likely to be affected by the proposed product intervention order” actually meets the legislative requirement for public consultation. It assumes that those consulted will be those affected whereas they may not be. In our view, the wording should be changed to more accurately reflect the legislation.
- RG 000.13 We raised significant concern at ASIC’s ability to intervene in product design and/or distribution regardless of whether or not any legislation was breached. In our view, it still raises concerns as to whether any entity can rely on the legislation as passed. We remain of the view Parliament should amend legislation rather than provide this type of power as it leads to uncertainty.
- We note ASIC believes it will rarely use these powers; we certainly hope so.
- RG 000.17 We remain concerned at ASIC’s ability to specify that “anything” is a financial product under the (Corporations Regulations) as it sees fit. Our view is such decisions should be challengeable to the Administrative Appeals Tribunal and if this is the case, the draft Regulatory Guide should state it.
- RG 000.24 We note the intervention will be by way of a legislative instrument which effectively usurps Parliament’s intent. As such, any negotiated market-wide interventions on established products that have, for example, maximum rates (as in the Annual Cost Rate) or the maximum amount certain fees may be (such as those applying to Small Amount Credit Contracts) must not be interfered with under these powers. It is totally inappropriate in such circumstances for the regulator to be judge, jury and executioner.
- RG 000.34 By having a product intervention order notice published on ASIC’s website and it come into effect the day after, it may leave insufficient time to be made aware of it. We suggest that prior to this coming into effect, those entities ASIC knows will be affected along with industry representatives are given one day’s prior notice of publication, the latter so that they may communicate with their members and advise of the impending and immediate change.
- RG 000.35 Even if the licence holder stops distributing or marketing the product the day after publication, given long lead times for advertising, there may be advertisements running that cannot be stopped ‘instantly’. It is to be hoped that any product intervention order regarding distribution of marketing material takes this into account

rather than applying a long lead time for commencement generally as it appears it may be from the draft wording. If this is not what is intended, the draft Regulatory Guide should be amended to provide clarity.

- RG 000.37 The dictionary definition of “Consultation”³ is “the action or process of formally consulting or discussing”. It is to be hoped that any ‘consultation’ adheres to this process and is not the regulator adhering to a process simply to invoke its predetermined conclusion.
- RG 000.40 In regard to non-financial harm, we suggest ASIC needs to apply caution. For example, notwithstanding all the issues surrounding the collapse of Storm Financial, almost all of the investors invested in products that offered returns well above market rates due to avarice. When the affected consumers started to dishonour, their credit ratings were affected. Had the returns eventuated as they expected, these same consumers would have been jumping for joy. That was their risk. Unless the harm can be solely attributable to the product’s features or mis-information, we would expect any action in regard to non-financial harm ought to be minimal.
- RG 000.45 We are confused by ASIC’s attempt to define ‘significant consumer detriment’. We believe it needs clarification as it’s unsuccessful.
- RG 000.51 Table 1 includes considering “the number and/or proportion of consumers affected or likely to be affected” and “the total amount of detriment incurred or likely to be incurred by all consumers affected”. If this is a market-wide intervention, it is unclear as to how ASIC will determine these numbers. We would welcome some enlightenment.

ASIC should not consider the numbers provided by any consumer advocacy group as fact because, based on their examples presented to the Senate Economics References Committee Inquiry into credit and financial services targeted at Australians at risk of financial hardship who reported earlier this year, their examples were very inaccurate. Any examples or evidence produced needs to be current and unbiased and ASIC must verify this is the case before considering taking any action.

³ Cambridge Dictionary, 2019. Meaning of consultation. Available online <https://dictionary.cambridge.org/dictionary/english/consultation> viewed 03 August 2019.

- RG 000.63 The draft wording states “[b]efore making a product intervention order, we must consult persons who are reasonably likely to be affected by the order”. The section does not contain any guidance as to how ASIC will determine who these people are. If ASIC elects to use a general public consultation process as well as, rather than, targeting those “reasonably likely to be affected”, it is to be hoped that sufficient time is given to the general public to respond if they desire to do so. Consequently, we suggest this section needs additional clarification.
- RG 000.64 This section notes ASIC’s expectations of “submissions supported by evidence and data”. After what was presented to the Senate Economics References Committee Inquiry into credit and financial services targeted at Australians at risk of financial hardship, we suggest this be re-worded to “submissions supported by recent evidence and current data”. Arguments based on historic evidence or innuendo should be classified by irrelevant.
- RG 000.65 In our view, in this age of communication, ASIC should be proactive and additionally email those it believes likely to be affected by a product intervention order and all stakeholder representative bodies in addition to making the proposed order available on its website. We consider it unrealistic to expect every licence holder to visit ASIC’s website daily.
- RG 000.70 We have already made comment on this above.
- RG 000.74 Similar to our comment above in respect of RG 000.65, we suggest ASIC should be proactive and additionally email those it believes likely to be affected by a product intervention order, those that made submissions and all stakeholder representative bodies in addition to making the proposed order available on its website.
- RG 000.76 See the comment above in respect of RG 000.74.
- RG 000.81 Similar to our comment above in respect of RG 000.65 and RG 000.74, we suggest ASIC should be “proactive and nimble” by additionally emailing those:
- i. it knows are or likely to be affected by a product intervention order extension;
 - ii. those that made submissions to ASIC’s consultations; and
 - iii. all stakeholder representative bodies;
- in addition to making the extended order available on its website.
- RG 000.87 We were pleased that when the Product Regulation Act was passed, it contained the ability to have ASIC’s decision reviewed in certain circumstances as this wasn’t in the original draft legislation circulated for comment. For market-wide product invention,

the dis-allowance process to review legislative instruments through Parliamentary action is likely to be limited, if not negligible at best and we must hope ASIC takes sufficient care when implementing these.

Responses to questions raised

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?

In addition to the reasons contained in the various legislations, we consider the following additional criteria should be taken into account:

- a) whether there was any opportunity for the consumer to seek professional legal and financial advice;
- b) how financial literate or sophisticated the affected consumers are or might be; and
- c) the relevant demographics (e.g. location, ethnicity, age, etc.) of those that are or might be affected.

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

We appreciate that a marketwide order is probably ASIC's first choice because it ties everyone down at once and stops any other participants in the market from utilising the product feature. In our opinion, however, ASIC should consider whether it is more appropriate to limit the scope of the product intervention order from being market-wide to specific licence-holder(s) as its first option, in the event that there are relatively few licence holders involved.

If it is made known these licence holders have been affected by the product intervention order, it ought to be sufficient deterrent to minimise the risk of others following suit by publishing the details. If ASIC then became aware others doing so, however, then a market-wide intervention would be in order and the regulator could impose far more serious penalties on these other late players.

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

We consider that ASIC should, at the very least, obtain and include the following additional information in any consultation on a proposed product intervention order:

- a) how financial literate or sophisticated the affected consumers are or might be; and
- b) the relevant demographics (e.g. location, ethnicity, age, etc.) of those that are or might be affected.

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

It would be useful for affected licence holders to know from whom or where ASIC sourced its information so that any response the licence holder or other stakeholder can properly address this in its or their submissions.

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

For many years, our members and clients have advised us they received formal notifications or verbal information from ASIC or its officers that have been highly subjective. Any description of

significant consumer detriment must be based on properly quantified rather than qualified research.

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

As we have stated earlier, we are concerned with any delay in implementing a product order if it causing significant consumer detriment. The only time we can see a possible reason for slight delay is in regard to advertising where product information must be recalled or advertisements stopped.

The second step in Table 1 of draft Regulatory Guide 000 must allow for a reasonable opportunity to advise ASIC of any difficulties, including timelines that may be faced by the licence holder in meeting the terms of a product invention order. This would be particularly relevant in the event ASIC were to use its Corporations Regulations' powers.

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?*

The factors listed at RG 000.71 are, by their very nature, extremely general. There is nothing contained within the draft Regulatory Guide as far as can see that provides any real elaboration as to what factors ASIC might take into account in delaying the commencement date of a product intervention order.

In our view, this requires further elaboration.

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

In our opinion, we consider the following additional criteria should be taken into account on whether to delay commencement or to determine the length of any delay:

- a) whether there was any opportunity for the consumer to seek professional legal and financial advice and if this was taken up by the affected consumers;
- b) how financial literate or sophisticated the affected consumers are or might be; and
- c) the relevant demographics (e.g. location, ethnicity, age, etc.) of those that are or might be affected; and
- d) the product distribution methodologies used. Note: we will comment on this further in the proposed additional consultation on product distribution.