



FINANCIAL
SERVICES
COUNCIL

FSC Submission

ASIC Draft Product Intervention Power
Regulatory Guide

6 August 2019



Executive Summary

The Financial Service Council (**FSC**) welcomes the opportunity to provide a submission to the ASIC consultation on the draft Product Intervention Power.

The FSC is supportive of the policy intent of the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2019, however, the industry wants to ensure that the application of the regime does not result in unintended consequences for consumers and does not stifle industry innovation and competition.

When ASIC's Regulatory Guide for the Product Intervention Power has been finalised, we recommend a review of the guide be undertaken after two years to ensure it is not impacting consumers and industry innovation or competition negatively.

Our submission is divided in three parts. The first part of our submission responds to the specific consultation questions in CP313. The second part responds specifically to the draft ASIC Regulatory Guide – Product Intervention Power. The third part of our submission focuses on other matters that we believe need to be addressed.

About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies.

Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses. The financial services industry is responsible for investing almost \$3 trillion on behalf of more than 14.8 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

Part 1: feedback on consultation paper 313 questions

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 order to form the view reasonably that a product has resulted, or may result in, significant consumer detriment, ASIC should ensure that the factors used by it are evidence-based and verified.

Where ASIC relies on data it has collected, it should ensure that the data is adequately verified, and that the issuer has the opportunity to check the accuracy of the data and comment on ASIC's interpretation of the data prior to the issue of a proposed Product Intervention Power order.

ASIC should also take into consideration any action taken by the issuer to address the concerns.

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

Given that the Product Intervention Power is intended to be a protective power, rather than a punitive power, ASIC should have regard to the principle that the remedy should be tailored to what is reasonably necessary to achieve the appropriate regulatory outcome. This is consistent with the accepted interpretation of ASIC's other powers, such as banning orders.

We acknowledge that the legislation requires ASIC to consult with affected parties before it issues a product intervention order and that the legislation further provides that ASIC is taken to have complied with these obligations by publishing the proposed product intervention order on ASIC's website. We also note that the parties affected by a product intervention order may include, not only the product issuers and developers, but also distributors and consumers. Accordingly, all of these parties must be consulted before ASIC may make a product intervention order.

There is, however, nothing in the legislation that prevents ASIC from implementing its consultations in different stages or from consulting certain affected parties before consulting other parties that may be affected. In particular, in those cases where ASIC has determined that the requisite significant consumer detriment may arise only in the future but does not exist at the time that that ASIC exercises its powers, it is appropriate that ASIC give issuers and product developers prior notice of ASIC's concerns with the product. We, therefore, request that ASIC's approach to exercising these powers be implemented so that product issuer(s) are first notified of ASIC's proposal to exercise these powers and the reasons why. We also request that the affected product issuer(s) be given the opportunity to amend or withdraw the product before ASIC makes any public announcement.

If, in response to a notification, product issuers have amended the product to address ASIC's concerns or ceased to make them available, the objective of legislation will have been achieved. Exercising these powers in this manner will have the salutary effect of minimising the harm that could be imposed on the product issuers themselves, as well as consumers that may hold other products issued by the affected issuers. This approach is also consistent with these powers being

aimed at products, not regulated entities. To the extent that ASIC's concerns are with one or more regulated entities, ASIC has powers under the licensing regime and otherwise that are more appropriate to be used in those circumstances.

Using the product intervention powers to regulate one or more entities, as opposed to the product, could impact not only the products that ASIC has determined may cause, or have caused, significant consumer detriment, but also other products issued by those issuers. This could, in turn, cause other, unintended, consumer detriment. Guidance also should confirm any initial information gathering and research process is confidential. Further, guidance should make clear this confidentiality extends even to general statements around products or classes of products ASIC may currently be investigating. Otherwise, any public notification of review by ASIC could act as a trigger for consumers to exit a product without any relevant information. This, in the case of managed investments, could:

- a. create significant liquidity issues for a particular financial product;
- b. crystallise losses for investors at a point in time (with ASIC subsequently finding there is no reason to intervene); and
- c. create a fall in the value of a financial product that establishes the case for significant detriment, where prior to this no such case may have been established.

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

The information that ASIC sets out in Proposal C1 is appropriate. See our response to C1Q2 below for additional information we consider ASIC ought generally to include in any consultation on a proposed product intervention order.

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

ASIC should provide its reasons for selecting the proposed intervention. It is important that the market is aware whether or not the issuer denies or is in agreement with the ASIC determination and proposed action.

The Consultation should include, where appropriate:

- Whether or not, ASIC has previously issued guidance or material which has indicated a practice or product feature for which ASIC seeks industry change, and if so, what guidance or material has been issued. This goes to whether, in light of the product design and distribution obligations, industry has taken note of any prior ASIC guidance;
- The issuer's or industry's response to ASIC's concerns previously relayed by ASIC (whether via a regulatory guide or ASIC report);
- Whether remediation action has been taken by industry in response to prior ASIC guidance or reports;
- The data or evidence base that ASIC has used to form the view to consult on exercising its product intervention power;

- If conditions are imposed by ASIC as part of the order, ASIC should disclose how it proposes to monitor the compliance with the conditions in the consultation.

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

We support the Proposal in C2. We confirm also our comments in the response to C1Q2, that ASIC describe the evidence base (including data) or other empirical or experiential evidence that supports its finding of actual or potential significant consumer detriment.

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

In principle, we agree with this proposal. We have considered some of the tasks that may need to be completed in order to comply with, or implement, a product intervention order. When determining the length of the delay before a product intervention order is to commence, ASIC should consider whether the terms of the order will require any of the following:

- System changes that may include the need for new software;
- implement modifications to distribution models;
- arrange for impacted third parties to upgrade or alter their systems or processes;
- amend disclosure documents and distribute them to relevant persons, for dissemination to underlying customers;
- renegotiate third party contracts or if required, engaged third party contractors;
- facilitate recruitment of new personnel, redundancies and/or training for staff on new processes and procedures; and
- allow for new self-regulatory models to apply to relevant conduct in the market segment.

This list is not intended to be exhaustive. In our view, it would be appropriate for ASIC to state in its guidance that ASIC will take into consideration the extent to which these and other relevant items will need to be completed when determining the length of a delay.

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?

In principle, we agree with the factors, although as noted above, consideration should be given to whether it would be appropriate to include some additional examples on when a delay may be in order. The examples given in the draft regulatory guidance are at a very high level and it would be useful to have further examples of when ASIC would determine to delay commencement of an order.

As to the lengths of any delay, in our view it is sufficient for the regulatory guide to acknowledge the need for time to implement an order, rather than be specific as to the actual length of a delay.

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

We refer to our response to C3Q1 above.

Part 2: FSC feedback on Draft Regulatory Guide – Product intervention power

For investment products, market movements alone, without misconduct, generally should not constitute significant consumer detriment, as ASIC cannot and should not underwrite or guarantee market performance (via product intervention powers). There can of course be other circumstances or causes beyond market movements which result in significant consumer detriment.

In risk insurance, a claims decision generally should not be considered significant consumer detriment, in the absence of inappropriate sales or other misconduct or poor product design.

Section of Regulatory Guide	FSC Comments
<p>RG 000.51-000.54 (Factors taken into account(p15))</p>	<p>We suggest that ASIC itemise the data it has relied on to make its determination to issue a Product Intervention Power order.</p>
<p>RG 000.57-000.59 (Balancing our regulatory objectives(p17))</p>	<p>The FSC recommends that a review of the Product Intervention Power RG should be conducted two years after it is finalised to provide more specific guidance and incorporate examples based on ASIC’s exercise of these powers during those two years. In conjunction with updating its published guidance on these new powers, ASIC could also at that time reassess the exercise of these new powers to evaluate the impact of ASIC’s exercise them, including any product intervention orders it may have made and their subsequent impact. ASIC could, in the context of that review, determine the extent to which the exercise of these new powers was balanced (taking into consideration each instance in which ASIC considered exercising, or, did, in fact, exercise, these powers as well as the extent (if any) to which these powers affected product development and innovation (both in an international comparative context and domestically). Of course, ASIC could also assess its exercise of these powers during the two year period against ASIC’s regulatory objectives, including ASIC’s obligation to improve the performance of the financial system and the entities within it.</p>

<p>RG 000.65-000.66 (Nature of consultation(P19))</p>	<p>The FSC requests that ASIC enable the affected party or parties to provide ASIC with a submission on the steps they are taking to remediate the perceived issues – to be included in ASIC’s initial upload of the Product Intervention Power order consultation. This will provide balance and transparency. It would allow the public to have at their disposal the complete information on why the order was issued and how it is being addressed by the affected party or parties. In circumstances where there is an individual order, ASIC, at the very least, should consult by first notifying the individual product issuer affected.</p> <p>We also note that ASIC will “generally “consult by publishing on its website. The industry is keen to understand what consultation process will be followed in situation where ASIC does not consult by publishing on its website.</p> <p>The FSC is also interested in knowing how ASIC will consult with APRA and whether the relevant product issuer or issuers will be notified of the fact.</p>
<p>Other comments</p>	
<p>Innovation</p>	<p>We understand that the Product Intervention Power is not intended to be used for pre-approval of products (draft RG 000.5). However, we would appreciate ASIC’s views on how the Product Intervention Power could be exercised in such a manner to reduce the risk of significant consumer detriment, while at the same time, not having a deleterious effect on product innovation. Accordingly, we request ASIC’s policy facilitate issuers approaching ASIC on new products before they are released to give the issuer the opportunity to have regard to ASIC’s views prior to ASIC intervening after-market launch. Without this, innovation may be stifled to varying degrees, depending on the nature of the product and ASIC’s view of the product. We understand that any liaison with ASIC would not and could not bind ASIC in future but can inform the development of novel products and innovative access given technology. Further, we acknowledge that actual or potential significant consumer detriment may only be identified, in some cases, after the launch of a product. However, the opportunity for a product issuer to approach ASIC on new products prior to launch, assists innovation and encourages investment in new financial products.</p>

Part 3: other matters

In ASIC's submission to Treasury dated August 2018 in support of the Revised Exposure Draft of the Design and Distribution Obligation & Product Intervention Power Bill, ASIC made the following points (in summary):

- ASIC will only use the Product Intervention Power after a significant process of evidence gathering and consultation.
- ASIC will look for interventions that represent the most targeted and appropriate regulatory solutions to address the identified practices causing detriment, in order to improve consumer outcomes.
- The Product Intervention Power will only be used if other 'low intensity' interventions have not or will not address the particular problem.
- Intervention orders will be withdrawn once the problem is resolved or if the order was not effective in addressing the problem.
- Prior to imposing an intervention, ASIC will consult with industry, to give industry the opportunity to self-regulate.

There is no mention of these policy positions in the draft Regulatory Guide on Product Intervention Power or the CP 313 consultation paper. It would be helpful to know whether these points still represent ASIC policy, and if not, why not. Alternatively, if this continues to represent ASIC's policy position, it would be helpful to understand why ASIC has not proposed that they be stated in ASIC's published guidance.

It would also be useful to understand how ASIC proposes to exercise these new powers in circumstances where they overlap with other powers ASIC may have (for example, under Chapter 7 of the Corporations Act).

Should you wish to discuss this submission, please contact me on [REDACTED].

Yours sincerely,



Allan Hansell

Director of Policy & Global Markets

