REGULATORY GUIDE 272

Product intervention power

June 2020

About this guide

The product intervention power is one of several regulatory tools available to ASIC to improve consumer outcomes. It allows ASIC to temporarily intervene in a range of ways, including to ban financial products and credit products when there is a risk of significant consumer detriment.

This guide provides an overview of the product intervention power and explains:

- the scope of the power;
- when and how ASIC may exercise the power to make a product intervention order; and
- how a product intervention order is made.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC may exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in June 2020 and is based on legislation and regulations as at the date of issue.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act, National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

The product intervention power is one of several regulatory tools available to ASIC to improve consumer outcomes. It allows ASIC to temporarily intervene in a range of ways up to, when necessary, banning financial products and credit products when there is a risk of significant consumer detriment.

This guide provides an overview of the product intervention power, including when and how ASIC may exercise the power.

Objectives of the product intervention power

RG 272.1 As part of its response to the Financial System Inquiry (FSI), the Australian Government introduced a product intervention power that enables ASIC to make a product intervention order when a financial product or a credit product (or a class of such products) has resulted, will result or is likely to result in significant consumer detriment: see Pt 7.9A of the *Corporations Act 2001* (Corporations Act) and Pt 6-7A of the *National Consumer Credit Protection Act 2009* (National Credit Act).

Note: In this guide, unless otherwise specified:

- the term 'consumer' means both a 'retail client' for a financial product and a 'consumer' for a credit product; and
- the term 'product' means both a financial product and a credit product.

RG 272.2 The product intervention power enables ASIC to take a more proactive approach to regulating the market and reducing the risk of significant consumer detriment. The power:

(a) enables us to respond to problems in a flexible, targeted, effective and timely way;

(b) enables us to take action on a market-wide basis; and

(c) is available without a demonstrated or suspected breach of the law, which enables us to take action before significant detriment, or further detriment, is done to consumers, so that we can better uphold community expectations on the conduct of firms that issue or distribute products.

RG 272.3 The Government also introduced a new governance regime for the design and distribution of financial products as part of its response to the FSI (design and distribution obligations): see Pt 7.8A of the Corporations Act. Issuers and distributors of financial products must comply with the design and distribution obligations from October 2021. The obligations provide a legislative framework for issuers and distributors to develop and maintain effective product governance processes across the life cycle of financial products.

Note: The design and distribution obligations were originally scheduled to commence on 5 April 2021. As a result of COVID-19, ASIC has provided a temporary exemption from the design and distribution obligations for six months. The effect of this temporary exemption is that issuers and distributors will only be required to comply with these obligations from 5 October 2021: see ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486.

RG 272.4 When such processes are in place and working effectively, we expect consumer outcomes to be improved, and it may be less likely that we will be required to exercise the product intervention power. However, the scope of the power, which is focused on preventing significant consumer detriment, extends beyond the design and distribution obligations. If ASIC is satisfied there is a risk of significant consumer detriment, the power can be exercised even when these obligations are being complied with: see Section C.

RG 272.5 The product intervention power is not intended to be used for pre-approval of products. The FSI explained that this would likely result in moral hazard—that is, the perception that if the regulator has not intervened this implies a low-risk product.

RG 272.6 The product intervention 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.

RG 272.7 By their nature, there will always be risk in financial markets. However, the product intervention power may, for example, enable interventions 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: see RG 272.45.

Benefits of the product intervention power

RG 272.8 The product intervention power helps us to:

(a) act more quickly and effectively to address the causes of significant consumer detriment in the market;

(b) reduce the number of consumers at risk of significant detriment and for whom the terms, features and risks of a product are inappropriate for their objectives, financial situation and needs; and

(c) ultimately—reduce significant detriment to consumers.

RG 272.9 The ability to use the product intervention power enables us to:

(a) address market-wide problems or particular business models causing significant consumer detriment, more quickly than law reform; and

(b) deal with 'first-mover' issues that may inhibit industry-led responses to products that are causing significant consumer detriment.

Purpose of this guide

RG 272.10 This guide provides a high-level overview of the product intervention power, including:

(a) a broad overview of the scope of the power, including the products that can be subject to an intervention and the types of product intervention orders we can make (see Section B);

(b) when and how ASIC may exercise the power (see Section C); and

(c) how a product intervention order can be made (see Section D).

B Scope of the product intervention power

Key points

This section explains the scope of the product intervention power, including:

- the basis for intervening in relation to a product (or class of products) (see RG 272.11–RG 272.13);
- the products that can be subject to a product intervention order (see RG 272.14–RG 272.20);
- the types of product intervention orders we can make, including the limitations on the types of orders we can make (see RG 272.21–RG 272.34); and
- when a product intervention order commences and its duration (see RG 272.35–RG 272.37).

Basis for intervening

RG 272.11 We may make a product intervention order if we are satisfied that a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment.

RG 272.12 We can exercise the product intervention power in relation to a product (or class of products) regardless of whether there has been a breach of the law. For example, we could exercise the power even if a person has complied with:

(a) the disclosure requirements in Ch 6D or Pt 7.9 of the Corporations Act; and

(b) the design and distribution obligations in Pt 7.8A of the Corporations Act.

RG 272.13 Section C provides further guidance on when and how ASIC may exercise the product intervention power. When consulting on a proposed product intervention order, we will usually describe the type of order we propose to make and the significant consumer detriment that, subject to the consultation process, we consider has resulted, will result or is likely to result from the product (or class of products): see RG 272.68–RG 272.69.

Products that can be subject to intervention

RG 272.14 We can intervene in relation to a broad range of products and activities under our regulatory remit. This includes:

(a) financial products regulated under the Corporations Act;

(b) credit products regulated under the National Credit Act; and

(c) financial products, as defined by the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

RG 272.15 We cannot intervene in relation to a financial product issued, or offered for sale, by an exempt body or an exempt public authority: see s1023B of the Corporations Act.

RG 272.16 The Corporations Regulations 2001 (Corporations Regulations) may also declare that anything is a financial product for the purposes of Ch 7 of the Corporations Act. In addition, the Australian Securities and Investments Commission Regulations 2001 may declare anything to be a financial product within the definition of a financial product in the ASIC Act. This means additional products may become subject to the product intervention power.

Financial products under the Corporations Act

RG 272.17 In the case of financial products regulated by the Corporations Act, the product intervention power applies to those financial products that are, or are likely to be, available for acquisition by retail clients by way of issue. The power also applies to regulated sales of financial products: see s1023D(1)(a), 1023D(3)(a) and 1023B of the Corporations Act. Such products include securities, interests in managed investment schemes, derivatives, insurance products, superannuation products and deposit-taking facilities.

Note 1: The above list is not an exhaustive list of financial products. The general definition of 'financial product' is contained in s763A of the Corporations Act, and s764A sets out a list of specific things that are financial products.

Note 2: 'Regulated sale' is defined as a sale that needs disclosure to investors under Pt 6D.2, a sale in relation to which a Product Disclosure Statement (PDS) must be given, or a sale made in circumstances prescribed in the Corporations Regulations: see s994A(1) of the Corporations Act.

Credit products under the National Credit Act

RG 272.18 In the case of the National Credit Act, the product intervention power applies when a person is engaging, or is likely to engage, in credit activity in relation to a credit product or a proposed credit product.

Note: 'Credit product' is defined as a credit contract, mortgage, guarantee or consumer lease (see s301D of the National Credit Act).

Financial products under the ASIC Act

RG 272.19 The product intervention power also applies to financial products defined in the ASIC Act that are, or are likely to be, available for acquisition by retail clients by way of issue. The ASIC Act provides broad general consumer protections in relation to financial products and services through, for example, prohibitions on misleading or deceptive conduct and unconscionable conduct.

RG 272.20 The remit of the ASIC Act is broader than the Corporations Act and the National Credit Act. For example, it includes some types of extended warranties, some types of short-term credit and certain buy-now-pay-later arrangements that are not covered by, or are exempt from, regulation under the Corporations Act and the National Credit Act.

Types of product intervention orders we can make

RG 272.21 There are two types of product intervention orders that we can make under the product intervention power:

(a) an individual product intervention order, which applies to a specified person, or specified persons, in relation to a product (see s1023D(1) of the Corporations Act and s301D(1) of the National Credit Act); or

(b) a market-wide product intervention order, which applies to a person, in relation to a class of products (see s1023D(3) of the Corporations Act and s301D(3) of the National Credit Act).

RG 272.22 We may be more likely to intervene on an individual basis (e.g. for a specific product issued by a named firm) if the problem is specific to a particular entity or person. Individual orders are not legislative instruments.

RG 272.23 Market-wide interventions are product intervention orders that apply across a class of products. Market-wide product intervention orders are legislative instruments. A market-wide order is more likely to be appropriate when we are seeking to address a practice that is relatively widespread or, even if the practice is not currently relatively widespread, there is a risk the practice will be ‘phoenixed’ or it is one that could be adopted by others.

Note 1: Phoenix activity is when a new entity is created to continue the business of an existing entity.

Note 2: Justice Stewart in *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479 held that ‘there is nothing in the word “class” that requires there to be more than one financial product presently existing that is within the class’. His honour explained at [71]–[72] that:

> The relevant meaning of class is ‘a set or category of things having some related properties or attributes in common, grouped together, and differentiated from others under a general name or description; a kind, a sort’: *Oxford English Dictionary Online* (Oxford University Press, March 2020). Thus, ‘class’ is a taxonomical tool; it is a set or category with common characteristics. It is not necessary to the concept that there be more than one, or even one, existing thing within the class. There may be only an expectation that there might be a thing or things in the future with the characteristics of the class which will cause them to be categorised as part of the class if and when they come into existence.

RG 272.24 We can make a product intervention order that a person not engage in specified conduct in relation to a product (or class of products):

(a) entirely; or

(b) except in accordance with certain conditions.

RG 272.25 A person does not need to hold an Australian financial services (AFS) licence or Australian credit licence (credit licence) for the product intervention order to apply to them. However, the order cannot operate in relation to a person in their capacity as a consumer: see s1023C(2) of the Corporations Act and s301C(2) of the National Credit Act.

Examples of interventions

RG 272.26 We can make a range of interventions in relation to a product (or class of products): see s1023D(1) of the Corporations Act and s301D(1) of the National Credit Act. For example, we may:

(a) order that a product (or class of products) only be offered by way of issue to specific classes of consumers;

(b) order that a product (or class of products) only be offered by way of issue in specific circumstances—for example, through personal advice or through a deferred sales model;

(c) order the amendment, restriction or banning of marketing, 'choice architecture', promotional and disclosure material relating to a product (or class of products);

Note: 'Choice architecture' is discussed in further detail in RG 272.47.

(d) order that a product (or class of products) not be distributed without prescribed improvements to the information provided to consumers;

(e) order the amendment or banning of remuneration arrangements that are conditional on the achievement of objectives directly related to the product (or class of products)—for example, when remuneration is linked to product distribution;

(f) order the banning of a feature of a product (or class of products), or order that the feature not be available unless it complies with specified criteria—for example, imposing leverage limits on a product (or class of products); or

(g) order the banning of the issue of a product (or class of products).

RG 272.27 The range of potential interventions illustrates the flexibility we have in responding to significant consumer detriment. When we are satisfied that significant consumer detriment has resulted, will result or is likely to result, and if a decision is made to consider making a product intervention order, we will look to craft an intervention that we consider to be the most appropriate regulatory solution to reduce the likelihood of significant detriment, or further significant detriment, occurring.

RG 272.28 A product intervention order may comprise multiple elements. For example, we may order that marketing material for a product be amended, and that the product may be offered only to particular classes of consumers, or only in particular circumstances.

RG 272.29 We may also order a specified person to take reasonable steps to notify their existing customers about the terms of the product intervention order: see s1023N of the Corporations Act and s301N of the National Credit Act. We can do this when the person has:

(a) dealt in a financial product in relation to the consumer;

(b) provided financial advice to the consumer on a financial product; or

(c) engaged in a credit activity in relation to a credit product in respect of the consumer.

RG 272.30 In these circumstances, we may also specify requirements in relation to giving those notifications, including requirements as to the periods within which to give those notifications.

Limitations on the types of product intervention orders

RG 272.31 There are specific limitations on the types of product intervention orders we can make. An order cannot:

(a) require a person to satisfy a standard of training, or meet a professional standard, other than a standard prescribed for the person:

  (i) for a financial product—by or under the Corporations Act; or

  (ii) for a credit product—by or under the National Credit Act;

(b) require a person who is not required to hold an AFS licence or a credit licence to join an external dispute resolution scheme; or

(c) impose requirements in relation to a person's remuneration, other than so much of the remuneration as is conditional on the achievement of objectives directly related to the product.

RG 272.32 We consider that the limitation on dealing with remuneration does not prevent us from intervening in relation to remuneration that is linked to the distribution of the product.

Interventions must be prospective

RG 272.33 We may only intervene prospectively: see s1023C(1) of the Corporations Act and s301C(1) of the National Credit Act. This means that a product intervention order applies to products that are issued or sold after the date of the order. An order cannot apply to a product held by a person if the person acquired the product, or entered into a contract for the acquisition of the product, before the order came into force.

Note: This does not mean that a product intervention order is limited to new products that have not been launched. An order can be made in relation to an existing product, to the extent there are ongoing issues (or regulated sales) of the product. For example, each renewal of an insurance policy will constitute a new issue. An order that applies to an existing product will apply to issues (or regulated sales) of the product from the date the order commences.

Interventions must relate to consumers

RG 272.34 Conduct covered by a product intervention order is limited to conduct in relation to a consumer: see s1023D(5) of the Corporations Act and s301D(5) of the National Credit Act.

Commencement and duration of a product intervention order

RG 272.35 If we do not specify a commencement date in the product intervention order, the order will come into force:

(a) for a market-wide order—on the day after the legislative instrument is registered under the *Legislation Act 2003* (Legislation Act); or

(b) otherwise—on the day after the notice in relation to the order is published on ASIC's website (see s1023G(1) and 1023L(3) of the Corporations Act and s301G(1) and 301L(3) of the National Credit Act).

RG 272.36 We are able to specify when the product intervention order will come into force. This allows us to set a later commencement date if we consider that to be appropriate in the circumstances: see RG 272.70–RG 272.73.

RG 272.37 The duration of a product intervention order will depend on the circumstances of the case. We can make an initial order for up to 18 months from the date it comes into force. This can be extended or made permanent with the approval of the Minister: see RG 272.79–RG 272.82.

C When and how ASIC may exercise the product intervention power

Key points

ASIC can intervene if we consider that a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment.

This section explains when and how we may exercise the product intervention power, including:

- how we interpret 'significant consumer detriment' (see RG 272.38–RG 272.55);
- how we may intervene (see RG 272.56–RG 272.57); and
- how the product intervention power forms part of our regulatory toolkit (see RG 272.58–RG 272.60).

When ASIC may exercise the power

RG 272.38 We can make a product intervention order if we are satisfied that a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment: see s1023D(1)(b) of the Corporations Act and s301D(1)(b) of the National Credit Act. When consulting on a proposed product intervention order, we will usually describe the significant consumer detriment that we are concerned has resulted, will result or is likely to result from the product (or class of products): see RG 272.68–RG 272.69.

RG 272.39 Under s102(2C) of the ASIC Act, the power to make a product intervention order can only be delegated to a member of ASIC or a senior staff member. The delegate decides whether to exercise ASIC's power after considering the evidence, submissions received as part of the consultation process and other relevant matters. If a proposed order will apply to a body that is regulated by the Australian Prudential Regulation Authority (APRA), we must also consult with APRA before making the order: see RG 272.67.

What is consumer detriment?

RG 272.40 The Revised Explanatory Memorandum to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 states that:

> The meaning of detriment is intended to take its ordinary meaning in the context of the new provision. However, it is intended to cover a broad range of harm or damage that may flow from a product. The harm or damage may arise from any number of sources associated with the product, including the product's features, defective disclosure, poor design, or inappropriate distribution.

RG 272.41 This could include harm that is financial in nature, such as actual or potential financial loss to consumers resulting from a product. It could also include harm that is non-financial in nature (e.g. the effect on a person's credit rating).

RG 272.42 Detriment can also arise when consumers are sold a product that is misaligned with their needs, understanding or expectations, and that detriment arises even before that misalignment crystallises into some financial or other loss.

RG 272.43 Consumer detriment may:

(a) affect consumers on a market-wide basis or individually;

(b) be apparent to consumers or be hidden; or

(c) crystallise immediately if a product is obviously inappropriate or mis-sold at point of sale, or take time to emerge.

RG 272.44 The effects of detriment affect some consumers more heavily than others.

RG 272.45 The product intervention power is not directed towards eliminating all risk from the financial markets. For example, we are unlikely to exercise the power solely on the basis that a particular investment product has reduced in value and resulted in losses to consumers. However, we are more likely to intervene when we identify that significant consumer detriment has resulted, will result or is likely to result from such a product, and it:

(a) has been designed poorly without consumer needs in mind; or

(b) is being distributed to, or targeted at, consumers who are unaware of the product's risk and whose objectives are inconsistent with that product offering.

When is consumer detriment significant?

RG 272.46 As noted above, we can only make a product intervention order when we are satisfied that a product (or class of products) has resulted, will result or is likely to result in significant detriment to consumers. The term 'significant' is not defined in the Corporations Act or the National Credit Act. Whether consumer detriment (or likely detriment) is significant will depend on the individual circumstances of the matter. The Revised Explanatory Memorandum to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 states that:

> Generally, this would require the detriment [or potential detriment] to be sufficiently great to justify an intervention, having regard to the circumstances of the case and the object of the intervention power.

What can result in significant detriment to consumers?

RG 272.47 Significant detriment to consumers can emerge at any point in the life cycle of a product. It may result from industry conduct that may be intentional, reckless or inadvertent. For example, significant consumer detriment can arise as a result of a product's inherent design features, as well as the circumstances in which the product is offered, including the way in which the product is marketed or targeted at consumers. Significant consumer detriment may also result from the way that the product is framed and how options, processes and pathways for the product are organised and presented—that is, the 'choice architecture' built around the product.

> Note 1: Justice Stewart in *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479 confirmed that the power is not limited to being exercised when a financial product or class of products itself directly causes the significant detriment and can be exercised when the circumstances in which the product, or class of products, is made available to retail clients results in significant detriment. His honour explained at [42]:
>
> > The causal requirement is satisfied if the detriment would not have occurred but for the financial product or the class of financial products being made available in those circumstances.
>
> Note 2: 'Choice architecture' refers to the features in an environment, noticed and unnoticed, that influence consumer decisions and actions. These design features are present at every stage of product design and distribution. Examples include product bundling, default settings, and website and sales process design.

RG 272.48 For example, products that are not fit for purpose, sales or marketing techniques that prioritise commercial interests over consumer interests, and shrouding key features of a product, including fees and how they are charged, may result in significant consumer detriment.

> Note: For an example of price shrouding, see Consultation Paper 294 *The sale of add-on insurance and warranties through caryard intermediaries* (CP 294) at paragraphs 136–137.

RG 272.49 A product may result in significant consumer detriment even if a person has complied with all applicable disclosure requirements, and—when they commence—with the design and distribution obligations for that product.

When is there a risk of significant detriment to consumers?

RG 272.50 We can intervene when we consider that a product (or class of products) is 'likely' to result in significant consumer detriment.

RG 272.51 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);

(e) other obstacles that consumers face in using the product that are likely to lead to significant detriment; and

(f) products, conduct or methods of distribution of a sufficiently similar nature that have previously resulted in significant consumer detriment.

Factors to be taken into account

RG 272.52 In considering whether a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment, we will take into account relevant factors. Table 1 provides a non-exhaustive list of factors we may consider. Of the factors listed, we are required by the legislation to take into account:

(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; and

(d) any other matter prescribed by regulations (see s1023E(1) of the Corporations Act and s301E(1) of the National Credit Act).

RG 272.53 In addition, we may consider other factors: see s1023E(2) of the Corporations Act and s301E(2) of the National Credit Act.

RG 272.54 Detriment or likely detriment may be significant when only one of the factors applies to the circumstances, or when there is a combination of factors.

RG 272.55 We may use our compulsory information-gathering powers to obtain information about a product and other matters, as necessary: see Information Sheet 145 *ASIC's compulsory information-gathering powers* (INFO 145).

Determining how we may intervene

RG 272.56 In determining how we will design a product intervention order, we will focus on:

(a) identifying the specific product features, conduct or other factors that have contributed, or are likely to contribute, to the significant consumer detriment or likely significant consumer detriment; and

(b) how we can best reduce the likelihood of significant consumer detriment, or further significant consumer detriment, occurring.

RG 272.57 We will aim to design an intervention that we consider to be the most appropriate regulatory solution to reduce the significant detriment to consumers, or the likelihood of significant detriment occurring.

Table 1: Factors to be taken into account in considering whether a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment

Factor	Explanation
The nature and extent of the detriment	In considering the extent or likely extent of the detriment, key considerations will include: • the number and/or proportion of consumers affected or likely to be affected; • the amount of detriment incurred or likely to be incurred at an individual level; and • the total amount of detriment incurred or likely to be incurred by all consumers affected. We may exercise the product intervention power when a small number of consumers have incurred, or are at risk of incurring, a significant amount of detriment at an individual level. Equally, we may exercise the power when a large number of consumers have incurred, or are at risk of incurring, a small amount of detriment at an individual level, but the detriment is significant in total. To better understand the extent or likely extent of the detriment, it may be relevant to consider the size of the market where the conduct is occurring, the number and types of entities involved in that market, and the prevalence of the conduct (including whether the conduct is occurring on a market-wide basis).
The actual or potential financial loss to consumers resulting from the product	This could include, for example, the cost of acquiring a product and any actual or potential losses flowing from a product that was mis-sold to consumers. A product could be mis-sold, for example, when a product is sold to consumers who are unaware of the product's risks or whose objectives are inconsistent with that product offering.
The impact that the detriment has had, will have or is likely to have on consumers	The impact of detriment is likely to vary from consumer to consumer, and from demographic to demographic. In considering impact, we will consider the types of consumers who are affected or are likely to be affected. For example, we may consider if the impact is greater for those who are at a socio-economic disadvantage (e.g. when a financial loss has a greater impact on them because they do not have sufficient resources to recover financially). In assessing the impact of detriment, we may also consider the vulnerabilities faced by consumers at particular times of their lives or their engagement with the financial system.
Any other matter prescribed by regulations: see s1023E(1)(4) of the Corporations Act and s301E(1)(4) of the National Credit Act	As at the date of publication of this guide, there were no relevant regulations. You should check to see whether the regulations have specified any further factors.

Factor	Explanation
Additional factors: see s1023E(2) of the Corporations Act and s301E(2) of the National Credit Act	We may also take into account any additional factors that we consider to be relevant in determining whether a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment.

Responding to significant consumer detriment: Using our regulatory toolkit

RG 272.58 The product intervention power is one of several regulatory tools available to ASIC to improve consumer outcomes.

RG 272.59 When we have identified instances of significant consumer detriment, we may use one or a combination of regulatory tools to address the significant consumer detriment or likely significant consumer detriment. For example, if the cause of the significant consumer detriment also involves unlawful conduct, we may consider exercising our enforcement powers in relation to the unlawful conduct, in addition to, or as an alternative to, making a product intervention order.

RG 272.60 When the design and distribution obligations come into force in October 2021 for financial products, it is likely that in at least some cases—when there has been significant consumer detriment such that we have needed to intervene using the product intervention power—the detriment will have resulted from the financial product being inappropriately distributed to consumers due to a breach of the design and distribution obligations. In such cases, as well as intervening prospectively using the product intervention power, we will be able to take enforcement action for the breach of the design and distribution obligations.

D How a product intervention order is made

Key points

This section explains the process for making a product intervention order, including:

- how we will usually consult on a proposed order with affected persons, including our description of the significant consumer detriment (see RG 272.61–RG 272.69);
- factors we will consider when determining an appropriate commencement date for an order (see RG 272.70–RG 272.73);
- how we will publicise an order (see RG 272.74–RG 272.77);
- the service of an individual order (see RG 272.78); and
- how an order can be extended, amended or revoked (see RG 272.79–RG 272.86).

A person affected by a decision we make may have a right of review: see RG 272.87–RG 272.91.

There are civil and criminal penalties associated with breaching a product intervention order: see RG 272.92–RG 272.96.

Consulting with affected persons

RG 272.61 Before making a product intervention order, we propose to consult persons who are reasonably likely to be affected by the order: see s1023F(1) of the Corporations Act and s301F(1) of the National Credit Act. When we undertake such consultation, we will usually:

(a) identify the product (or class of products) and its availability to retail clients;

(b) describe the significant consumer detriment that, subject to the consultation process, we consider has resulted, will result or is likely to result; and

(c) set out our proposed intervention or a description of our proposed intervention.

RG 272.62 In some circumstances, we may present a range of options for intervening.

RG 272.63 The aim of this consultation process is to seek feedback on our proposal to intervene. We will invite broad feedback, including in relation to the significant consumer detriment we have identified. However, we will expect submissions to be supported by evidence and data. If we include a draft product intervention order as part of the consultation process and, after having taken into account feedback from that consultation process, we decide to make an order, the terms of the final order may be different from the draft version that we consulted on.

Nature of consultation

RG 272.64 We will usually publish our consultation document on our website. ASIC is taken to have complied with the requirement to consult affected persons if we make the proposed product intervention order, or a description of the content of the proposed order, available on our website and invite the public to comment on the proposed order: see s1023F(2) of the Corporations Act and s301F(2) of the National Credit Act.

Note: If we consider our consultation document to be market sensitive, we will publish it during a period that licensed Australian securities markets are not trading (e.g. overnight or on a weekend).

RG 272.65 We will generally undertake public consultation in this manner for both market-wide and individual product intervention orders. Given that the product intervention power allows ASIC to be more agile in responding to significant consumer detriment (see RG 272.8), the time we provide for responding to consultation will depend on the circumstances of the significant consumer detriment.

RG 272.66 We note that s1023F(3) of the Corporations Act and s301F(3) of the National Credit Act provide that a failure to comply with s1023F(1) of the Corporations Act and s301F(1) of the National Credit Act respectively does not invalidate a product intervention order. Further, given the wide range of products in respect of which ASIC may make a product intervention order, and the wide variety of circumstances that may result in ASIC being satisfied of significant consumer detriment, the nature of consultation we may undertake may vary significantly in different cases.

Consultation with other regulators

RG 272.67 If a proposed product intervention order will apply to a body that is regulated by APRA, we must also consult with APRA before making the order: see s1023F of the Corporations Act and s301F of the National Credit Act. We may also consult with other regulators as appropriate.

Describing significant consumer detriment at consultation

RG 272.68 When consulting on a proposed product intervention order, we will usually describe the type of order we propose to make and the significant consumer detriment that, subject to the consultation process, we consider has resulted, will result or is likely to result from the product (or class of products).

RG 272.69 In describing the significant consumer detriment, we may refer to:

(a) the nature of the product (or class of products) 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 (or class of products); and

(iii) the impact that the detriment has had, will have or is likely to have on consumers (see Table 1).

Commencement date

RG 272.70 As explained at RG 272.36, in making a product intervention order, we can specify that the order comes into force on a later day: see s1023G of the Corporations Act and s301G of the National Credit Act.

RG 272.71 Whether we delay commencement, and the length of any delay, will depend on the circumstances of the case, including:

(a) the nature of the product intervention 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.

RG 272.72 For example, we may delay commencement when compliance with the terms of a product intervention order will take time to implement.

RG 272.73 However, this must be balanced against other factors, such as the nature of the significant consumer detriment. For example, if we are concerned that significant consumer detriment may occur imminently, then a shorter delay or immediate commencement may be appropriate.

Public notification of decisions

RG 272.74 We must make public our decision to exercise the product intervention power by publishing the product intervention order on our website, together with a notice that:

(a) describes the significant consumer detriment that has resulted, will result or is likely to result from the product (or class of products) to which the order relates;

(b) sets out why the order is an appropriate way of reducing the significant consumer detriment;

(c) describes the consultation that ASIC undertook in relation to the order; and

(d) if the order comes into force after it is published—specifies the day it comes into force (see s1023L(3) of the Corporations Act and s301L(3) of the National Credit Act).

Note: We will generally publish non-confidential submissions on our website at the same time as announcing the outcome of consultation on a proposed product intervention order.

RG 272.75 We must also publish on our website, with the product intervention order, any amendment of a product intervention order: see s1023L(6) of the Corporations Act and s301L(6) of the National Credit Act.

RG 272.76 When a product intervention order is extended or made permanent by declaration, we must publish that declaration on our website, together with the order: see s1023L(4) of the Corporations Act and s301L(4) of the National Credit Act.

RG 272.77 As a general principle, it is our view that there is significant public interest in ensuring that consumers and the broader community are aware of and informed about action taken by us. Transparency and disclosure are important factors in market integrity and investor confidence, and serve to promote deterrence as well as to educate.

Serving an individual product intervention order

RG 272.78 We must serve a copy of an individual product intervention order, and any instrument amending that order, on any person to whom we consider the order applies. Failure to comply with this requirement does not invalidate the order: see s1023L(1) and (5) of the Corporations Act and s301L(1) and (5) of the National Credit Act.

Extending a product intervention order

RG 272.79 We can make a product intervention order for an initial period of up to 18 months. Beyond the initial period, an order can only continue if we extend it by declaration, after receiving approval from the Minister. In seeking approval from the Minister, we must provide a report to the Minister on whether the extension should be made. The declaration must be made by legislative instrument. ASIC must, before making a declaration, undertake the consultation that ASIC considers to be appropriate and reasonably practicable to undertake: see s17 of the Legislation Act.

RG 272.80 We can extend a product intervention order for a set period of time or make the intervention permanent. We can extend an order multiple times, but each extension requires the approval of the Minister, after considering a report on the matter from us.

RG 272.81 If we make a declaration to extend a product intervention order, we must publish the declaration on our website, together with the order.

RG 272.82 If a product intervention order ceases to be in force or is revoked, we may not remake the order, or make an order in substantially the same terms, unless:

(a) the circumstances have materially changed from those when the order was made; or

(b) the Minister approves the remaking of the order.

Amending or revoking a product intervention order

RG 272.83 We can amend or revoke a product intervention order that has not been extended at any time. If an order has been extended, we may only amend or revoke the order with the approval of the Minister.

Note 1: A market-wide product intervention order can only be amended or revoked by legislative instrument: see s1023J(6) and 1023K(4) of the Corporations Act and s301J(6) and 301K(4) of the National Credit Act. The consultation provisions in the Legislation Act apply to these kinds of amendments or revocations.

Note 2: An individual product intervention order can also be amended or revoked. Procedural fairness may require ASIC to consult with affected persons.

RG 272.84 We must publish all amendments to product intervention orders on our website, together with a notice that:

(a) sets out why the amendment is appropriate; and

(b) describes the consultation that we undertook in relation to the amendment (see s1023L(6)–(7) of the Corporations Act and s301L(6)–(7) of the National Credit Act).

RG 272.85 An amendment will commence:

(a) for a market-wide order—on the day after the amending legislative instrument is registered under the Legislation Act, or a later day specified in the amendment; or

(b) otherwise—on the day after the notice in relation to the amending order is published on ASIC’s website, or a later day specified in the amendment (see s1023J(5) of the Corporations Act and s301J(5) of the National Credit Act).

RG 272.86 We will publish all revocations of product intervention orders on our website: see s1023L(8) of the Corporations Act and s301L(8) of the National Credit Act.

Your rights of review

RG 272.87 You may have a right to complain to the Commonwealth Ombudsman or to seek other independent review of our decisions.

RG 272.88 For an individual product intervention order, s1317B of the Corporations Act provides a general right to apply to the Administrative Appeals Tribunal for merits review of a decision made under that Act by ASIC and certain other bodies. Section 327 of the National Credit Act provides an equivalent right of review for decisions made by ASIC under that Act.

RG 272.89 Merits review is not available for decisions made by legislative instrument (i.e. market-wide intervention orders): see s1317C(gdm) of the Corporations Act and s327(1)(d)(iii) of the National Credit Act. Market-wide product intervention orders are subject to parliamentary oversight through the disallowance process.

RG 272.90 You may also have a right to seek judicial review of a decision made by ASIC under the *Administrative Decisions (Judicial Review) Act 1977*.

RG 272.91 For further information on your rights in dealing with ASIC, see Information Sheet 9 *ASIC decisions: Your rights* (INFO 9) and Information Sheet 107 *Guidelines for managing allegations of misconduct against ASIC officers* (INFO 107).

Consequences of breaching a product intervention order

RG 272.92 If a person or firm contravenes a product intervention order, or related obligation under Pt 7.9A of the Corporations Act or Pt 6-7A of the National Credit Act, we may take enforcement action through civil penalty proceedings or criminal prosecution.

Note: A person may contravene a related obligation if the person fails to take reasonable steps to ensure that other persons who engage in conduct to which the product intervention order applies are aware of the order, or if the person fails to notify their customers of the terms of the order as required by ASIC.

RG 272.93 For consumers, there are a number of options available to enforce their rights, including:

(a) making a complaint directly to the financial services provider;

(b) if the financial services provider is unable to resolve the issue, making a complaint to the Australian Financial Complaints Authority—the provider’s external dispute resolution scheme; and

(c) taking court action against the provider.

Civil liability

RG 272.94 A consumer who suffers loss or damage because of a contravention of a product intervention order may recover that loss or damage by civil action.

RG 272.95 This may occur when:

(a) a person must comply with a product intervention order and contravenes the order; and

(b) the consumer suffers loss or damage because of the other person’s contravention of the order.

RG 272.96 If a court finds that a person has contravened a product intervention order, it may:

(a) award damages for loss or damage;

(b) make an order declaring that a contract entered into by the person who suffered loss or damage is void; and

(c) if it makes such an order—make such other orders as it thinks are necessary or desirable because of that order.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Australian Financial Complaints Authority (AFCA)	AFCA is the operator of the AFCA scheme, which is the external dispute resolution scheme for which an authorisation under Pt 7.10A of the Corporations Act is in force
consumer	Means both a retail client for a financial product and a consumer for a credit product
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
credit	Credit to which the National Credit Code applies Note: See s3 and 5–6 of the National Credit Code.
credit activity (or credit activities)	Has the meaning given in s6 of the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
credit product	Means a credit contract, mortgage, guarantee or consumer lease Note: See s301D(a) of the National Credit Act.
design and distribution obligations	Means the obligations contained in Pt 7.8A of the Corporations Act

Term	Meaning in this document
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
FSI	Financial System Inquiry
Legislation Act	*Legislation Act 2003*
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
product	Means both a financial product and a credit product
product intervention order	Means an order made under s1023D(1) or (3) of the Corporations Act or s301D(1) or (3) of the National Credit Act
product intervention power	Means the power contained in Pt 7.9A of the Corporations Act and Pt 6-7A of the National Credit Act
regulated sale	Has the meaning given in s994A(1) of the Corporations Act
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations

Related information

Headnotes

AFS licence, consumer, credit licence, credit product, financial product, product intervention order, product intervention power, significant consumer detriment

Information sheets

INFO 9 *ASIC decisions: Your rights*

INFO 107 *Guidelines for managing allegations of misconduct against ASIC officers*

INFO 145 *ASIC's compulsory information-gathering powers*

Consultation papers

CP 294 *The sale of add-on insurance and warranties through caryard intermediaries*

CP 313 *Product intervention power*

Reports

REP 661 *Response to submissions on CP 313 Product intervention power*

Legislative instruments

ASIC Corporations (Deferral of Design and Distribution Obligations) Instrument 2020/486

Legislation

Administrative Decisions (Judicial Review) Act 1977

ASIC Act, s1, 102(2C)

Australian Securities and Investments Commission Regulations 2001

Corporations Act, Chs 6D and 7, Pts 6D.2, 7.8A, 7.9 and 7.9A, s763A, 764A, 994A, 1023B, 1023C, 1023D, 1023E, 1023F, 1023G, 1023J, 1023K, 1023L, 1023N, 1317B, 1317C

Corporations Regulations 2001

Legislation Act, s17

National Credit Act, Pt 6-7A, s301C, 301D, 301E, 301F, 301G, 301J, 301K, 301L, 301N, 327

Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019 (Revised Explanatory Memorandum)

Cases

Cigno Pty Ltd v Australian Securities and Investments Commission [2020] FCA 479

