



ASIC
Australian Securities &
Investments Commission

REPORT 661

Response to submissions on CP 313 Product intervention power

June 2020

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 313](#) *Product intervention power* (CP 313) and details our responses to those issues.

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.

Disclaimer

This report 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.

This report does not contain ASIC policy. Please see [Regulatory Guide 272](#) *Product intervention power* (RG 272).

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A Overview/consultation process

- 1 In [Consultation Paper 313](#) *Product intervention power* (CP 313), we consulted on our proposed guidance on ASIC's approach to exercising the product intervention power in 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).
- 2 The product intervention power is a new power for ASIC that commenced on 6 April 2019. Guidance on our approach to exercising the product intervention power may be updated over time. Future updates will be informed by our experience in using the power.
- 3 This report highlights the key issues that arose out of the submissions received on CP 313 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 313. We have limited this report to the key issues.
- 5 We received one confidential and 27 non-confidential responses to CP 313, including from industry groups and associations, consumer groups and financial firms. Many of the submissions were quite detailed and we are grateful to respondents for taking the time to send us their comments.
- 6 For a list of the non-confidential respondents to CP 313, see the appendix. Copies of these submissions are currently on the ASIC website at www.asic.gov.au/cp under CP 313.

Responses to consultation

- 7 The main issues raised by respondents related to:
 - (a) the factors that we should take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment;
 - (b) the considerations that we should take into account in determining how we will intervene;
 - (c) the information we should include in our consultation on a proposed product intervention order;
 - (d) our proposed approach to consultation with affected persons;
 - (e) our proposed approach to determining whether to delay commencement of a product intervention order; and
 - (f) our proposed approach to amending, revoking or extending a product intervention order.

B Feedback on proposed guidance on when and how ASIC may exercise the product intervention power

Key points

This section outlines the feedback received on our proposed guidance on when and how ASIC may exercise the product intervention power.

Specifically, the feedback from respondents related to:

- whether there are 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; and
- whether there are any other considerations that we should take into account in determining how we will intervene.

Significant consumer detriment

- 8 We can 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 consumer detriment.
- 9 In [CP 313](#), we proposed to give high-level guidance on:
- (a) the meaning of consumer detriment and how it can arise; and
 - (b) the factors that we are required to take into account in considering whether a product has resulted, will result or is likely to result in significant consumer detriment.
- 10 We did not propose to set benchmarks or thresholds as to when we will exercise the product intervention power.
- 11 We sought feedback on whether there are any additional factors that ASIC may take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment.

Stakeholder feedback

- 12 Submissions focused on:
- (a) the level of guidance;
 - (b) additional factors that we may take into account;
 - (c) the case studies we provided in CP 313; and
 - (d) the evidence that we will rely on in considering whether a product has resulted, will result or is likely to result in significant consumer detriment.

Level of guidance

- 13 There was a divergence of views on the level of guidance that should be provided. Some respondents supported the broad approach to ensure that the scope of the product intervention power is not unduly narrowed. Other respondents were of the view that greater clarity was required as to what would constitute significant consumer detriment.

ASIC's response

We continue to hold the view that high-level guidance appropriately reflects the broad and flexible nature of the product intervention power as a regulatory tool for ASIC to use. Providing additional benchmarks for when we will exercise the power may unduly limit the scope of the power and, in turn, limit our ability to improve consumer outcomes.

Further, what would constitute significant consumer detriment may depend on the circumstances of each particular case. Each time we consult on a proposal to use the product intervention power, we will usually describe the significant consumer detriment that we think has resulted, will result or is likely to result.

This process may provide further guidance to industry about our interpretation of significant consumer detriment and provide an opportunity for stakeholders to respond to our views.

Additional factors that we may take into account

- 14 Some respondents suggested additional factors that we may take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment. Some of the suggested factors included:
- (a) the number of complaints about the product;
 - (b) the socio-economic context of consumers who are impacted;
 - (c) the principle of fairness in assessing the nature and extent of detriment;
 - (d) the potential benefits of the product to the consumer;
 - (e) the age of the product; and
 - (f) whether there has been a breach of the law.
- 15 There was a divergence of views on how much weight we should give to non-financial detriment. Some respondents agreed that we should consider both financial and non-financial detriment. One respondent was of the view that we should focus equally on both forms of detriment. Other respondents were of the view that non-financial detriment should be considered minimally.

ASIC's response

We agree that the factors listed in paragraph 14(a)–(d) are factors that we are likely to take into account in determining whether a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment. We have not separately listed these factors in [Regulatory Guide 272 Product intervention power](#) (RG 272) because we think:

- they are encapsulated in the factors set out in Table 1 of RG 272; and
- the specific issues we consider will depend on the circumstances of the matter.

For example, in the explanation of the impact that the detriment has had, will have or is likely to have on consumers, we discuss that we will consider the types of consumers who are affected. We also explain that we may consider if the impact is greater for those who are at a socio-economic disadvantage.

We consider it unlikely that the factors listed in paragraph 14(e)–(f) will be relevant to determining whether the product (or class of products) has resulted, will result or is likely to result in significant consumer detriment.

Some respondents suggested that, when a product has been available over a long period of time, it is unlikely that there would be significant consumer detriment because the availability of that product reflects consumer demand and understanding of the product. We do not think that it is necessarily the case that the age of a product is an indicator of whether a product has resulted, will result or is likely to result in significant consumer detriment.

In relation to a demonstrated or suspected breach of the law, Parliament intended that the product intervention power be focused on reducing significant detriment to consumers, regardless of whether there has been a breach of the law.

Note: See, for example, paragraphs 2.3–2.7 and 2.34 of the Revised Explanatory Memorandum to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019.

Accordingly, we consider that a product (or class of products) may result in significant consumer detriment even if all applicable laws have been complied with. RG 272 at RG 272.4 notes that when the design and distribution obligations commence, it may be less likely that we will be required to exercise the product intervention power if appropriate product governance processes are in place and working effectively.

We have not set out in RG 272 the weight we will give to non-financial detriment in considering whether we are satisfied that a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment. This will depend on the circumstances of a particular case. As stated in RG 272 at RG 272.40, the concept of detriment is intended to cover a broad range of harm that may flow from a product. The law specifies

that the requirement to specifically consider financial loss does not limit the matters to be taken into account when considering the nature and extent of the detriment: see s1023E(1) of the Corporations Act and s301E(1) of the National Credit Act. We consider that detriment could include harm that is non-financial in nature.

Case studies

- 16 In [CP 313](#), we provided two case studies—one on the automatic rollover of term deposits and another on the practice of ‘flex commissions’—to illustrate circumstances in which we may have considered using the product intervention power (had the power been available to us) to address significant consumer detriment identified at the time.
- 17 Some respondents were of the view that the detriment identified in these case studies was attributed to mis-selling of the product rather than the product being inherently harmful. These respondents argued that the product intervention power should only be used when a feature of a product, rather than mis-selling of the product, results in significant consumer detriment.

ASIC’s response

The product intervention power is not limited to cases where products are inherently harmful. As noted in [RG 272](#) at RG 272.47 we are of the view that significant consumer detriment can arise throughout the life cycle of a product. This includes harm arising from:

- the product’s intrinsic features;
- how, and to whom, the product is distributed; or
- a combination of these factors.

When significant consumer detriment arises as a result of the use of a product by consumers to whom it has been inappropriately sold, we will consider the range of regulatory and enforcement tools available to us, including the product intervention power.

As noted in paragraph 2.33 of the Revised Explanatory Memorandum to the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019, the meaning of detriment 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.

We consider that the detriment identified in the case studies in [CP 313](#) could be attributable to both the mis-selling of these products and features of the products. For example, the dual pricing and the automatic rollover of term deposits were features of the product that contributed to the detriment identified in the

term deposits case study. Similarly, the higher interest rate applicable to car loans as a result of flex commissions is a feature of the product that contributed to the detriment identified in the flex commissions case study.

Evidence that we will rely on

18 Some respondents were of the view that our guidance should outline the type of evidence that we would rely on in determining whether a product (or class of products) has resulted, will result or is likely to result in significant consumer detriment. In particular, respondents queried:

- (a) whether the evidence relied on would be based on current data; and
- (b) how that data would be gathered and verified.

ASIC's response

We receive information from a number of sources, including, for example, reports of misconduct and reports from other government agencies. As noted in [RG 272](#) at RG 272.55, we may use our compulsory information-gathering powers to obtain information about a product and other matters, as necessary. Guidance on ASIC's information-gathering powers is available in [Information Sheet 145](#) *ASIC's compulsory information-gathering powers* (INFO 145).

We do not intend to list in guidance the type of evidence that we will have regard to. The nature and type of information that we gather and rely on will depend on the circumstances of the case.

As noted in RG 272, before making an order, ASIC must be satisfied, based on the information available to it, that the product (or class of products) has resulted, will result or is likely to result in significant consumer detriment. This will include consideration of whether there is sufficient evidence for ASIC to be satisfied that this test has been met.

Before making a product intervention order, we propose to consult persons who are reasonably likely to be affected by the order. We will consider all submissions received during consultation.

Determining how we will intervene

19 In [CP 313](#), we proposed to:

- (a) give guidance that we will aim to design an intervention that we consider to be the most appropriate regulatory solution to reduce the likelihood of significant consumer detriment occurring; and
- (b) focus on the following when determining the type of intervention we will use:
 - (i) understanding the range of product features, conduct or other factors that have contributed to the significant consumer detriment or likely significant consumer detriment; and

- (ii) how we can best reduce the likelihood of further significant consumer detriment occurring.

20 We sought feedback on whether there are any other considerations that we should take into account in determining how we will intervene.

Stakeholder feedback

21 Some respondents noted that, when practical, the product intervention power should be used proactively to prevent harm before it occurs. One respondent suggested that the guidance should contain a separate section on how ASIC will assess harm that has not yet occurred. Respondents also noted that the power should be used to complement ASIC's other regulatory tools.

22 Other respondents noted that interventions should be tailored to what is reasonably necessary to achieve the appropriate outcome. Some respondents were of the view that ASIC should consider a phased approach—starting with less intrusive interventions, and only progressing to more restrictive measures when necessary. There was a divergence of views on whether the product intervention power should be used as a last resort.

23 Some respondents also submitted that in determining how to intervene, ASIC should consider whether an intervention is likely to inhibit consumer choice, stifle competition between product issuers, or provide an advantage to certain product issuers.

ASIC's response

We agree that the product intervention power should be used to complement ASIC's other regulatory tools, where appropriate. As noted in [RG 272](#), the product intervention power is one of several regulatory tools available to ASIC to improve consumer outcomes. When we have identified instances of significant consumer detriment, or likely significant consumer detriment, we may use one or a combination of regulatory tools to improve consumer outcomes. For example, we may consider using our enforcement powers in relation to unlawful conduct, in addition to, or as an alternative to, making a product intervention order.

We agree that, when appropriate, the product intervention power should be used proactively to reduce the likelihood of significant consumer detriment occurring. RG 272.50–RG 272.51 in RG 272 explain how we will assess when there is a risk of significant detriment to consumers. In particular, we note that in considering if a product (or class of products) 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. Examples of these factors are set out in RG 272 at RG 272.51.

In RG 272, we explain that we will look to craft an intervention that we consider to be the most appropriate regulatory solution to reduce the likelihood of significant consumer detriment, or further significant consumer detriment, occurring. This means that we would not choose a less intrusive intervention when a more intrusive intervention is required to reduce the likelihood of significant consumer detriment. Examples illustrating the wide range of interventions we can make are set out in RG 272 at RG 272.26.

In deciding what intervention to make, we will focus on 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.

C Feedback on engagement and consultation on a product intervention order

Key points

This section outlines the key feedback we received on our proposed engagement and consultation on a product intervention order. The issues raised related to:

- our consultation process with affected persons;
- the information we propose to include when consulting on a proposed product intervention order; and
- our approach to delaying commencement of a product intervention order.

Consulting with affected persons

- 24 In [CP 313](#), we outlined our proposed consultation process, and noted that before making a product intervention order, we must consult persons who are reasonably likely to be affected by the order.
- 25 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 its content, available on our website and invite the public to comment on the proposed order.
- 26 We proposed to generally consult on a product intervention order (whether market-wide or individual) publicly on our website. This will allow affected persons and interested stakeholders the opportunity to comment on the proposed intervention. We are also required to publish the final product intervention order on our website.

Stakeholder feedback

- 27 Some respondents from the financial industry submitted that ASIC should confidentially engage with firms before publishing a proposed product intervention order to confirm material facts and assist ASIC in working through potential options for addressing the detriment. Respondents noted that this approach may lead to issuers taking action that may negate the need for an order.
- 28 Respondents also noted the reputational damage that may flow from public consultation on a proposed product intervention order.

- 29 Other respondents argued that extensive consultation would be time-consuming and detract from the pre-emptive purpose of the product intervention power.
- 30 One respondent noted that information contained in product intervention orders could be market sensitive and suggested caution when releasing commercially sensitive information or setting the timing for publication.
- 31 Two respondents also submitted that ASIC should seek to consult with particular consumer groups who are affected by a product, including, for example, Aboriginal and/or Torres Strait Islander consumers and communities to ensure that a product intervention order responds adequately. Respondents noted that ASIC should consider culturally appropriate consultation practices, where relevant.
- 32 Several respondents also requested that publication of a proposed or final product intervention order be accompanied by a public notification (e.g. a media alert) or direct communications (e.g. by email) to alert stakeholders and the general public.

ASIC's response

We see consultation as an important step in developing an effective regulatory solution to address significant consumer detriment. When we undertake such consultations, we will consider the best way to engage and consult with stakeholders, including firms that are reasonably likely to be affected by a proposed product intervention order and consumers who are affected, or are likely to be affected, by the product.

We acknowledge the importance of consulting directly with Aboriginal and/or Torres Strait Islander consumers and communities on any regulatory issues of relevance and when regulatory intervention responds to significant detriment impacting Aboriginal and/or Torres Strait Islander consumers and communities. ASIC's Indigenous Outreach Program assists ASIC to ensure that engagement with Aboriginal and/or Torres Strait Islander consumers and communities is culturally appropriate.

Section 1023F of the Corporations Act does not require us to confidentially engage with, or notify, firms before formal consultation on a proposed product intervention order. However, we consider it would be likely that firms will be aware of our concerns through the course of our regulatory work, before we consult on a proposed product intervention order. In any event, we note that firms will have the opportunity to provide submissions during the consultation period.

We also note that we must consider our procedural fairness obligations when exercising our discretionary powers under the Corporations Act and the National Credit Act (e.g. when proposing to disclose information obtained using our powers).

Our guidance in [RG 272](#) at RG 272.64 also states that 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).

We note the importance of transparency and disclosure to market integrity and investor confidence. RG 272 at RG 272.77 reiterates that there is significant public interest in ensuring that consumers and the broader community are aware of and informed about action taken by us. As a result, we will generally publish a media release on our website to accompany any proposed or final product intervention order. For individual orders, ASIC must serve a copy of the product intervention order on the affected person or persons.

Information provided when consulting on a proposed product intervention order

33 In [CP 313](#), we sought feedback on the information we propose to include when consulting on making a product intervention order. To ensure transparency, we proposed to:

- (a) identify the product and its availability;
- (b) describe the significant consumer detriment that we consider has resulted, will result or is likely to result from the product, and set out the reasons for our assessment;
- (c) set out our proposed intervention or a description of our proposed intervention; and
- (d) in some circumstances, present a range of options for intervening.

34 In describing the significant consumer detriment, we proposed to refer to:

- (a) the nature of the product and its distribution; and
- (b) the circumstances of the detriment, including:
 - (i) whether it has already occurred;
 - (ii) the nature and extent of the detriment; and
 - (iii) the impact the detriment has had, will have or is likely to have on consumers.

Stakeholder feedback

35 Respondents generally agreed with our proposed approach. Some respondents submitted that we should also describe additional information when consulting on a proposed product intervention order, including:

- (a) why we believe the intervention will reduce the extent of the detriment;
- (b) the expected timeline for the intervention;

- (c) whether we have previously raised concerns or issued guidance on the practice or product; and
 - (d) the possible impact on competition.
- 36 Several respondents submitted that we should provide information for existing consumers on remedies that may be available to them, while drawing on regulatory tools, including agreeing with product issuers on remediation for consumers who have suffered loss or detriment.
- 37 Some respondents submitted that intervention options set out in consultation should be limited and aimed at preventing the significant consumer detriment identified.

ASIC's response

Based on the feedback received, we have amended our guidance in [RG 272](#) to note that we can require a specified person, in the product intervention order, to notify affected consumers of the terms of the order and specify requirements in relation to giving those notifications: see RG 272.29–RG 272.30. RG 272 at RG 272.59 also notes that 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. We consider that this may involve seeking remediation, where appropriate.

We may refer to other matters when consulting on our use of the product intervention power, as appropriate. As noted in RG 272 at RG 272.74, we are also required to describe why a product intervention order is an appropriate way of reducing significant consumer detriment in our public notification of our decision.

We have not amended our guidance that, in some circumstances, we may present a range of options for intervening when consulting on a proposed product intervention order. We consider it may be useful to test different options for intervening when we are considering more than one option. We agree that the options set out should be aimed at reducing the significant consumer detriment identified.

Delaying commencement of a product intervention order

- 38 In [CP 313](#), we proposed to consider whether to delay commencement of a product intervention order (and the length of any delay) on a case-by-case basis. We proposed to provide guidance that we will consider the circumstances of the case, including:
- (a) the nature of the order, including the extent of any changes it requires or any consequential impacts; and
 - (b) the nature, likelihood and extent of the significant consumer detriment.

39 We sought feedback on our proposed approach and the factors we should consider, while also requesting suggestions for any other factors we should consider when determining whether to delay commencement, or the length of any delay.

Stakeholder feedback

40 Most respondents agreed with our approach to delay commencement on a case-by-case basis. However, several respondents submitted that there should be a presumption that urgent action is required to address the significant consumer detriment identified, with delays rarely occurring. Two submissions requested that any decision to delay be subject to consultation.

41 Some respondents submitted that we should provide additional guidance on factors we would take into account when determining a delay. Some of the suggested additional factors included:

- (a) the number of consumers currently holding a product;
- (b) the time needed to implement changes, including modifications to systems, distribution models and promotional material;
- (c) the availability of alternative products;
- (d) whether there are any third-party arrangements and contracts; and
- (e) the need to avoid further entrenching any consumer detriment.

ASIC's response

We are of the view that the factors described in paragraph 41(a)–(e) are relevant, and already contemplated by our guidance in [RG 272](#) on the circumstances we will consider in deciding whether to delay commencement of a product intervention order. These factors go to:

- the extent of changes required because of the order;
- any consequential impacts of the order; and
- the nature, likelihood and extent of the significant consumer detriment.

These matters are described in RG 272 at RG 272.71. On this basis, we have not amended our guidance to add further factors.

During the consultation process, affected persons will generally have an opportunity to provide submissions on the impact of a proposed product intervention order, and any changes that would be required to be made because of the proposed order.

D Other feedback

Key points

This section outlines the other feedback we received on our proposed guidance on the product intervention power.

Amending, revoking or extending a product intervention order

- 42 In the draft guidance attached to [CP 313](#), we set out our proposed guidance on the process for amending, revoking or extending a product intervention order. Our proposed guidance explained that:
- (a) We can make a product intervention order for an initial period of up to 18 months. Beyond that 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.
 - (b) 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.

Stakeholder feedback

- 43 One issue raised by respondents related to whether an application for relief from a product intervention order can be made—for example, if an entity cannot meet the requirements of an order.
- 44 Another issue raised by respondents related to whether we would consult before amending or extending a product intervention order.

ASIC's response

ASIC does not have exemption and modification powers (also known as 'relief powers') relating to the product intervention power. However, as set out above, ASIC has the power to amend a product intervention order. After we make an order, we will monitor its effectiveness in preparation for a decision on whether to extend the order and provide a report to the Minister for their approval of any extension.

We have clarified in [RG 272](#) at RG 272.79 that before amending, extending or revoking a product intervention order by way of a legislative instrument, we must undertake the consultation that ASIC considers to be appropriate and reasonably practicable to undertake: see s17 of the *Legislation Act 2003*. We must also consider our procedural fairness obligations when amending or revoking an individual product intervention order.

Appendix: List of non-confidential respondents

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- Association of Financial Advisers
 - Australian Banking Association
 - Australian Finance Industry Association
 - Australian Financial Complaints Authority
 - Australian Financial Markets Association
 - Australian Institute of Superannuation Trustees
 - Australian Retail Credit Association
 - Australian Shareholders' Association, CHOICE, Consumer Action Law Centre, Consumer Credit Law Centre SA, Consumer Credit Legal Service (WA), Consumers' Federation of Australia, Financial Counselling Australia and Financial Rights Legal Centre (joint submission)
 - Evolution Trustees
 - Finance Industry Delegation
 - Financial Counselling Australia
 - Financial Planning Association
 - Financial Services Council
 - Gain Capital Australia Pty Ltd
 - GO Markets Pty Ltd
 - Industry Super Australia
 - Insurance Council of Australia
 - Legal Aid NSW
 - Legal Aid Queensland
 - Min-it Software/Financiers Association of Australia
 - Motor Trade Association of South Australia
 - National Credit Providers Association
 - Pepperstone Group Limited
 - Prospa
 - SMSF Association
 - Toyota Finance Australia Limited
 - Westpac Group
-