Finity Regulatory Compass

Aug 2020

Product Intervention Power: The smart bomb in ASIC's arsenal?

This update was prepared in collaboration with The Fold

ASIC's Product Intervention Power (PIP) commenced on 6 April 2019. This power is intended to provide ASIC with powers that it can use to proactively reduce the risk of significant detriment to retail clients resulting from financial products. ASIC released Regulatory Guide 272 'Product Intervention Power' on 17 June 2020 which provides guidance on how this power operates. [1]

There has also been a recent case about a product intervention order (**PIO**) that applies to pay-day lending products,[2] a possible class action related to that case [3] and a consultation paper on a product intervention order for continuing credit contracts. [4]

ASIC is currently seeking stakeholder feedback on a PIO in relation to risk products offered through car yards which has been under consultation for some time. [5] We can expect to see more PIOs used by ASIC for general insurance and credit products.

So, what does ASIC's Product Intervention Power actually involve?

Scope of PIP

The PIP allows ASIC to make a PIO when a financial or credit product (or class of products) has, will, or is likely to result in *significant consumer detriment*.

It also applies to financial products that are subject to the ASIC Act (meaning it will apply to extended warranties, short-term credit and buy-now-pay-later arrangements and other products that are not otherwise regulated by ASIC). Meaning, ASIC can now make PIOs in relation to previously unregulated sectors.

'Detriment' covers a broad range of harm or damage flowing from any number of sources. Consumer detriment may:

- be financial and non-financial (eg damage to credit ratings)
- be significant, regardless of how many relevant factors apply (relevant factors are discussed below);
- affect consumers on a market-wide basis or individually;
- be apparent or be hidden;
- crystallize immediately or later;
- arise at any point in the life cycle of a product;
- result from intentional, reckless or inadvertent conduct; and
- also arise from how the product is framed, and how options, processes and pathways to purchasing the product are organized and presented.

When considering consumer detriment ASIC is obliged to take into account:

- the nature and extent of the detriment;
- the actual or potential financial loss to consumers; and
- the impact that the detriment has had, will have or is likely to have on consumers.

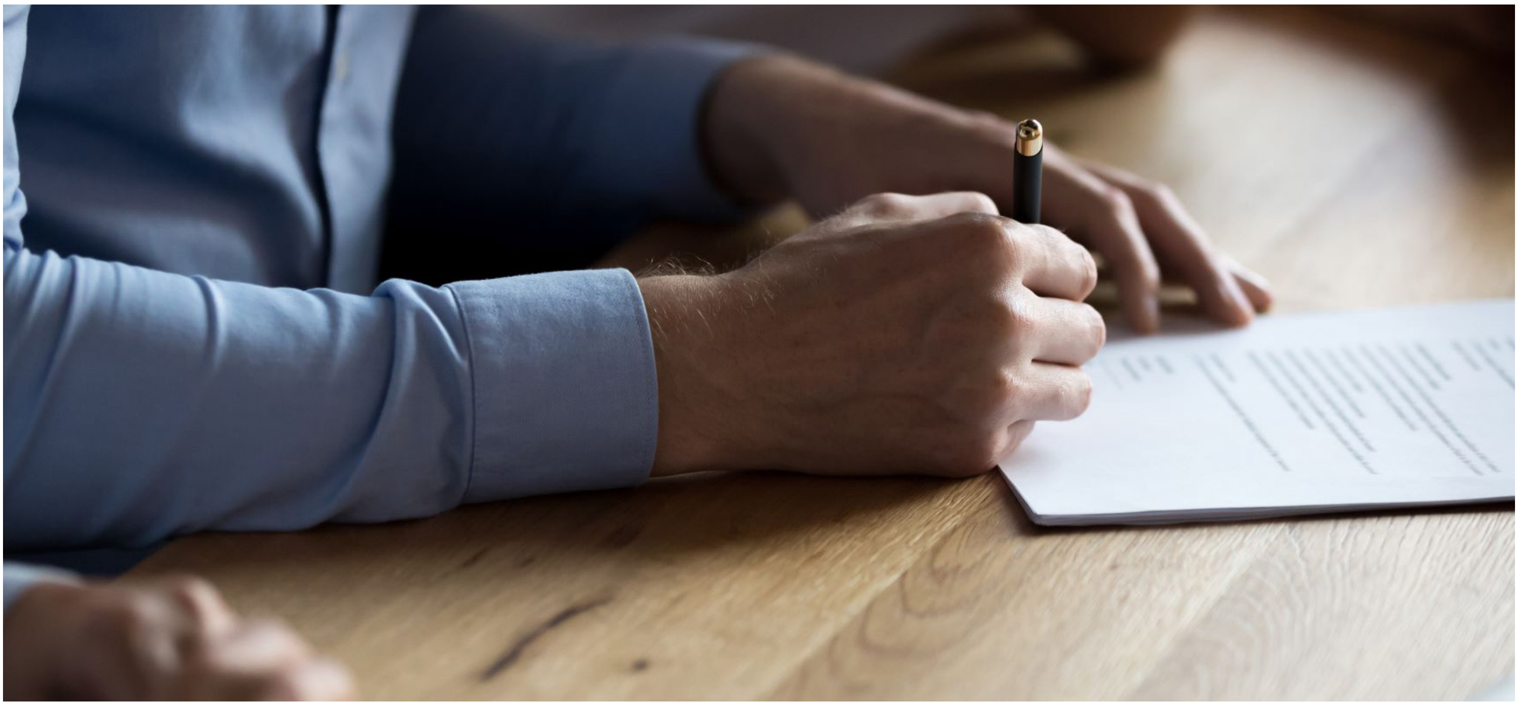
They may also consider:

- the product's inherent design features;
- any conflicts of interest;
- the complexity of the product and the circumstances of its sale;
- evidence or risk of consumer confusion or misunderstanding;

the choice architecture (ie how choices and processes are presented to consumers that influence product take-up and use);

- any other obstacles that consumers face in using the product; and
- any products, conduct or distribution methods of a sufficiently similar nature, that have previously resulted in significant consumer detriment.

Whether detriment is *significant* is determined on a case-by-case basis.



Scope of PIO

A PIO may apply to an individual or it may apply on a market-wide basis. A PIO applies to any person regardless of whether they hold a financial services or credit licence.

A PIO may restrict the sale of a product, including:

- distribution methods (ie the way that the product is offered and by whom);
- marketing (ie the PIO may order the amendment, restriction or banning of marketing or require revisions to the 'choice architecture'); or
- remuneration arrangements (ie when remuneration is linked to product distribution).

The initial PIO can last for up to 18 months and this period may be extended or made permanent (with the Minister's consent).

ASIC will consult persons who are reasonably likely to be affected by the PIO, by publishing the proposed PIO on their website (for example, ASIC is currently seeking stakeholder feedback in relation to the proposed PIO on the sale of motor vehicle add-on insurance).

They will also undertake public consultation, prior to making the PIO. ASIC may also order a person to take reasonable steps to notify their existing customers about the terms of a PIO. The duration of the consultation period depends on the circumstances of the significant consumer detriment. The point of this is to allow ASIC to be more agile in responding to detriment.

There are avenues for review if a person has a complaint about an individual PIO. There are fewer avenues to review market-wide PIOs, however market-wide PIOs are subject to parliamentary oversight.

Other Legislation

A PIO is available even where there is no breach of law. The PIP also extends beyond the Design and Distribution Obligations (**DDO**) and can be relied upon even where DDO has been met.

There is some overlap with a number of other powers and instruments (for example, DDO) however the PIP allows ASIC to exercise these powers in a more agile, responsive, and unfettered manner.

The purpose of PIP is to deal with 'first-mover' issues inhibiting industry-led responses to products that may result in significant consumer detriment. The PIP enables ASIC to head off detriment and uphold community expectations on the conduct of financial firms. It allows ASIC to get to heart of their concerns quickly.

Submissions

ASIC is currently seeking feedback as to whether, and if so how, to exercise the product intervention power relating to add-on insurance sold with motor vehicles. [6] Submissions should be sent by August 19 to product.regulation@asic.gov.au.

The Fold's view

We think that ASIC will use the PIP to deal with a number of long-held concerns about particular sectors where there has been a persistent failure to provide customers with protection or value for money. Concerns about 'choice architecture' will allow ASIC to effect real change in the motor vehicle industry (which has already been the subject of ASIC investigation) and short term consumer credit for more vulnerable customers.

The PIP may allow ASIC to take decisive action even where the area has not been the subject of previous consultations or comprehensive review (for example, insurance advisor remuneration, which was not fully scrutinised during the Hayne Royal Commission). It's an outcome-focused power that allows ASIC to focus on consumer protection, not whether the product is legally compliant.

It is important to remember that the trigger for a PIP is significant consumer detriment. Pay-day loans have been consistently shown to cause significant consumer detriment, whereas something like a 'buy now, pay later service', may adversely impact a smaller proportion of customers.

The PIP should serve as a strong motivation for product providers to ensure their products do not result in consumer detriment, regardless of whether the products they offer are legally compliant or exempt from regulation.

According to ASIC, there is 'significant public interest' in publishing PIOs because consumers and the broader community must be aware of and informed about the action taken by ASIC. We agree this promotes deterrence and education.

Finity's view

Whereas DDO imposes positive obligations on product issuers and distributors, the PIP emboldens ASIC to "carry a big stick" in the case of actual or foreshadowed significant consumer detriment. These powers are big and broad – they can be and will be used proactively to address ASIC's long held concerns with respect to pay-day lending and credit contracts as well as add-on insurance sold at car yards.

It is important for the industry to recognize that DDO is the vehicle to remedy any legacy issues regarding products that are problematic, that is, represent poor value to customers and are often accompanied by pressure selling. If the opportunity presented by DDO is not fully grasped, then it is very likely that ASIC will use its considerable powers to quash products that present real and potential risks of significant consumer detriment. The take away message is "do it yourself or it will be done to you".

About the Fold

Servicing clients nationally from offices in Sydney and Brisbane, The Fold Legal offers a full range of regulatory, corporate and commercial legal services to financial services and credit businesses. As a specialist industry-focussed law firm, The Fold has extensive industry knowledge and is known for giving strategic advice that specifically addresses clients' commercial needs. If you need advice on what the Royal Commission recommendations mean for your business, get in touch with The Fold's team of experts.

Read our ongoing Regulatory Compass blog on the Finity website.

[1] https://download.asic.gov.au/media/
[2] https://asic.gov.au/about-asic/news-centre/
[3] https://www.slatergordon.com.au/media/
[4] https://download.asic.gov.au/media/
[5] https://asic.gov.au/about-asic/news-centre/
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