

# ASIC'S PRODUCT INTERVENTION POWER: PROBLEMS AND POSSIBILITIES

10 December 2015 | Australia, Brisbane, Melbourne, Perth, Sydney  
Legal Briefings

---

What are some of the key issues with ASIC's proposed product intervention power that we need to get right?

In its recent *Response to the Final Report of the Financial System Inquiry*, the Government has backed a proposal for an ASIC 'product intervention power'. This new power will be warmly welcomed by ASIC but may receive a cooler reception from product issuers.

The proposed power is significant in that it would allow ASIC to 'modify, or if necessary ban harmful financial products where there is a risk of significant consumer detriment'. The power must be designed well and ASIC must have adequate resources to properly consider its use, otherwise it could be circumvented or fail to address the perceived problem. It's in everyone's interest to get this power, and its use, right.

An initial concern with the power being based on a policy that it is exercisable in cases where there is 'a risk' of 'significant consumer detriment' is that all types of financial products may carry 'a risk' of significant consumer detriment, for example, a significant fall in the share prices. The test should involve a *significant risk of significant consumer detriment* and only be available in cases of significant *loss or damage* to consumers.

Another important consideration is the extent to which product issuers should be required to bear the costs associated with existing financial contracts with investors if (in effect) those contracts are retrospectively amended in connection with the use of the intervention power.

Experience with product intervention powers overseas may give us guidance as to appropriate features of, and limits on, the power. UK Financial Conduct Authority (**FCA**) and European Union (**EU**) product intervention powers are only temporary, and FCA rules must be put before parliament. The threshold for the EU power is much higher than 'a risk' of significant consumer detriment.

While the Response promises 'detailed consultation with stakeholders to ensure the power strikes the right balance', such consultation is only part of what will be required over time to ensure that the use of the product intervention power remains appropriate. ASIC's regulatory policy will have a major impact. A merits review of the use of the power could be expected to apply ASIC policy unless it is unlawful or produces an unjust outcome, so ASIC's policy will likely have significant weight even when ASIC's decision is being questioned. ASIC can amend and re-issue its policies at any time and while it may consult in relation to policy change, product issuers cannot assume that ASIC will adopt their submissions.

Accountability for the exercise of the power will be another critical issue for consideration. The most conceptually similar power that currently exists in the Corporations Act is ASIC's disclosure stop order power. This stop order power is subject to a merits review in the Administrative Appeals Tribunal and a review for error of law in the Federal or Supreme Court.

However, given the extent of the product intervention power a pre-condition to its use should be that ASIC applies for a court order and should generally notify potentially affected parties of its intention to make such an application. A court could make such an order if it was satisfied that the relevant tests had been met, and the court would have the benefit of evidence under a contested hearing.

Having a panel of industry participants related to ASIC consider whether to exercise the power, as suggested by some commentators, raises its own problems and does not address fundamental issues with the design of the new power. First, there is a significant potential for conflicts of interest amongst panel members. Second, unlike the position of the Takeovers Panel, there isn't a developed body of law and market practice on which panel members can consider when making their decisions. Third, the use of a panel deflects attention from the challenge of ensuring the power is structured in a balanced and appropriate way.

The new power also creates risk for ASIC. Once the power is available, a future failure of a financial product will inevitably result in questions as to why ASIC did not use its new power to prevent loss to consumers. It may have the side effect of transferring more responsibility from consumers to ASIC and result in more pressure on the regulatory function if the design of the power does not introduce appropriate accountability features, such as court involvement.

These issues must be taken seriously by all those in the financial services sector. While the government's Response reassuringly states that the new power will enable ASIC to take action in 'exceptional circumstances', it would not be the first law to be enacted with intention of a limited scope but which later finds very wide application - the consumer law origin misleading or deceptive conduct prohibition which even applies to financial products and services now comes to mind.





# LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

---

**SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2022