

# FIRST JUDICIAL CHALLENGE TO ASIC'S USE OF ITS NEW PRODUCT INTERVENTION POWER FAILS

21 April 2020 | Australia

Legal Briefings - By **Fiona Smedley, Graeme Johnson, Ewan MacDonald, Julian Vertoudakis and Soraya Pradhan**

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On 15 April 2020 the Federal Court confirmed<sup>1</sup> that a judicial review application lodged in September 2019 to challenge ASIC's exercise of its new product intervention power (**PIP**) had failed.

The judicial review challenge related to a class wide intervention in relation to short term credit facilities, made on 12 September 2019 under the *ASIC Corporations (Product Intervention Order - Short Term Credit) Instrument 2019/917 (PIO Instrument)*. The intervention was made by a legislative instrument, the effect of which was to limit the total fees that could be charged to retail clients, to the maximum amount specified in the *National Credit Code*.

The PIO Instrument had been issued following *Consultation Paper 316 - Using the product intervention power: Short term credit* which was published on 9 July 2019 (**CP 316**). ASIC had sought submissions in relation to intervening in relation to a short term credit model which resulted in high costs to consumers. The consultation had cited three case studies, one in relation to Cigno Pty Ltd (**Cigno**).

# FIRST JUDICIAL CONSIDERATION OF 'SIGNIFICANT DETRIMENT' UNDER PIP

Cigno's first challenge to the making of the PIO Instrument was that ASIC had not been satisfied that a "financial product"<sup>2</sup> had resulted in, or will or is likely to result in, "significant detriment to retail clients". Cigno contended that ASIC had not been satisfied of significant detriment in relation to the credit facility itself, but rather that ASIC had considered the detriment caused by the short term lending model and the collateral service fee arrangements together, which was indirect to the detriment caused by the credit facility.

This argument was rejected by Stewart J as being overly narrow, and he found that the significant detriment may be caused by the financial product directly or indirectly. Factors supporting this contention included:

- the product intervention power is "nuanced" and prohibitions or conditions may relate to conduct "in relation to" the financial product. The relevant conduct is not, nor is it required to be, inherent in or a feature of the class of product or of products in the class;
- the phrase "resulted in" does not say or indicate whether there must be a direct causal relationship between the product and the detriment or whether it can be indirect;
- the note to section 1023D, which gives an example of an intervention order following a finding of significant detriment which imposes a personal advice distribution condition. That example illustrates that it can be the circumstances relating to the product (for example, uninformed investors obtaining the product without advice) that give rise to the detriment, rather than the features of the product; and
- the explanatory memorandum provided that the power was meant to be used proactively and was a fundamental piece of remedial and protectionist legislation. As such it "should be construed broadly so as 'to give the fullest relief which the fair meaning of that language will allow'"<sup>3</sup>.

## CAN ONE PRODUCT CONSTITUTE A CLASS FOR PIP?

The second challenge raised by Cigno was that ASIC had not been satisfied of significant detriment in relation to a "class" of financial products, as required by section 1023D, because it had in substance been concerned only with one product.

Stewart J also dismissed this ground noting 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.

Consistent with the intention that ASIC can use its PIP proactively, Stewart J found 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.

## **JUDICIAL REVIEW CONSIDERATIONS**

The decision demonstrates that applications for judicial review of ASIC’s power to make a product intervention order:

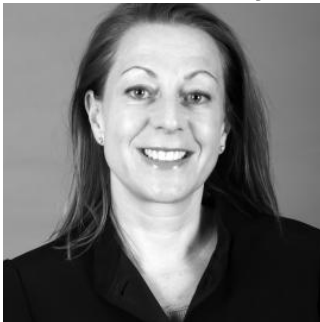
- will be difficult to make out as the power is conditioned on ASIC reaching a state of “satisfaction” that a product is, will or is likely to cause “significant detriment” to retail clients. This requires an assessment of ASIC’s subjective state of mind, which Stewart J considered was adequately shown by:
  - the notice ASIC was required to publish under section 1023L;
  - the explanatory statement which accompanied the PIO Instrument; and
  - the contents of the CP 316 consultation paper published by ASIC in advance of its making the PIO Instrument; and
- may be easier to make out where the power is exercised under section 1023D(1) in respect of a specified person rather than in respect of a class of products under section 1023D(3). This is because orders made under section 1023D(1) will not be the subject of a public consultation process (like CP 316) in which ASIC authors documents showing the considerations it took into account in making a decision. However, we expect that ASIC may express a preference for exercising its power under section 1023D(3) now that this case has confirmed that the power can be exercised where only one product actually falls within the class.

## ENDNOTES

1. *Cigno Pty Ltd v Australian Securities and Investments Commission* [2020] FCA 479.
2. The scope of financial products covered by the PIP was expanded in 2019 to include 'ASIC Act financial products' which include a credit facility - section 12BAA of the ASIC Act.
3. *Webb Distributors (Aust) Pty Ltd v Victoria* [1993] HCA 61; 179 CLR 15 at 41 per McHugh J writing about *the Trade Practices Act 1974* (Cth).

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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