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By email: product.regulation@asic.gov.au

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Dear ASIC,

ASIC CONSULTATION: PRODUCT INTERVENTION POWER (CP 313)

This submission is made on behalf of the following organisations:

- 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
- Financial Rights Legal Centre

Information about our organisations can be found at **Appendix A** at the end of the submission.

We welcome the introduction of the product intervention power (**PIP**) and look forward to ASIC using the power to target businesses that cause consumer detriment by engaging in predatory conduct or fail to meet standards that the wider community expects of financial and credit products.

The intention of the PIP is to give ASIC the capability to make timely and targeted intervention in the financial services sector when products are causing significant consumer detriment. The legislative intent also makes clear that the PIP should be used to pursue 'fairness'. Additionally, the community expects regulators to take a more proactive approach to consumer protection. ASIC should be empowered to use the new power boldly.

When determining whether consumer detriment has occurred, we recommend ASIC define 'significant consumer detriment' in the broadest terms possible. ASIC should also recognise that detriment can result in outcomes that are 'significant' to different degrees and the subjective impact of the detriment should be considered as well as the objective significance. Similarly, 'detriment' should include both financial and non-financial detriment and should consider how this impact upon different people.

When deciding how to intervene, ASIC should ensure any consultation does not undermine the intention of the PIP which is to ensure timely and appropriate action to prevent ongoing consumer detriment. Below we discuss some possible risks we think a protracted consultation period could create.

Information included in the consultation should 'name and shame' companies which will act as a deterrent to other financial and credit providers. ASIC should also specify what deficiencies in the law are prompting the use of the power and encourage legislators to address these where appropriate. Consideration should also be given to consulting with affected communities that may not engage with ASIC's traditional consultation approaches.

A case by case approach to determining whether to delay the commencement of an order makes sense but must be justified against the significant consumer harm that will have been identified and will be permitted to continue before an order is implemented.

Our comments are detailed below.

TABLE OF CONTENTS

SUMMARY OF RECOMMENDATIONS	4
Intention of the PIP	5
Determining 'significant consumer detriment'	6
Determining how to intervene	9
Consultation on proposed product intervention orders	12
Consulting with Aboriginal and Torres Strait Islander communities.....	15
Other considerations	18
What happens after the intervention order expires?	18
Remedies	19
Phoenixing	19
Appendix A – About our organisations	21
Appendix B – Product Intervention Power hit list	23

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1.

Consulting on using the PIP should not be overly extensive: if ASIC identifies significant consumer detriment it should be empowered to act swiftly.

RECOMMENDATION 2.

Significant consumer detriment should be defined in the broadest terms possible.

RECOMMENDATION 3.

Defining significant consumer detriment should consider financial and non-financial loss and the impact this has, or is likely to have, on both individuals, and on consumers more broadly.

RECOMMENDATION 4.

Intervention options should be limited and aimed at preventing the detriment identified.

RECOMMENDATION 5.

Consultations should name and shame companies and provide guidance on how to notify affected clients.

RECOMMENDATION 6.

Information on where there are deficiencies or loopholes in the law should also be provided.

Intention of the PIP

The PIP has been designed as a flexible addition to ASIC's regulatory toolkit that allows it to intervene where it perceives a risk of significant consumer detriment. The PIP is broad: ASIC is able to consider a wide range of factors and tailor a product intervention order accordingly.

Our position during the development of the PIP is that ASIC should not be required to undertake extensive consultation before making an intervention as this may hinder ASIC's ability to respond to risks to consumers in a timely fashion. Consultations are a time-consuming process, which industry can use as a way to stave off much-needed reforms, or harm mitigation. Requiring extensive consultation would detract from the pre-emptive, preventive and timely aims of the powers identified as necessary by the Financial Systems Inquiry. ASIC should be empowered to act quickly, and should not be hamstrung by extended consultation periods.

If the requirements to propose and implement a production intervention order are too onerous or pose a risk for ASIC then there is a high chance the PIP will be used rarely and only when egregious harm has already occurred. This simply cannot happen. The Banking Royal Commission uncovered a raft of conduct that may have been legal but fell far below community expectations and standards. What's clear in the wake of the Royal Commission, and was highlighted during the development and passing of legislation governing these intervention powers, is that government and the community expect regulators to take proactive action to protect consumers and hold financial service providers to higher standards. Paying lip service to legal requirements or actively exploiting loopholes in existing laws is not good enough.

The Assistant Treasurer's second reading speech on the bill emphasised that ASIC should be "empowered" to intervene and allow it to be "one step ahead to protect consumers."¹ The PIP must be exercised with this legislative intent – as well as the expectations of the community on the role the regulator should be playing – at the forefront. This approach also aligns with the findings of the ASIC Capability Review, which found that ASIC required a cultural shift 'to become less reactive and more strategic and confident'.² If the risk or regulatory burden of ASIC using the PIP is too great, then this should be communicated to government so further powers or resources can be obtained.

RECOMMENDATION 1. Consulting on using the PIP should not be overly extensive: if ASIC identifies significant consumer detriment it should be empowered to act swiftly.

¹ Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill, second reading speech, accessed 31/7/2019, available at: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F6be1e50a-06c5-4722-8ba8-9036615ea93c%2F0080%22>

² The Treasury, *Fit for the future: A capability review of the Australian Securities and Investments Commission*, December 2015. Available at: <http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2016/Fit%20for%20the%20future/Downloads/PDF/ASIC-Capability-Review-Final-Report.ashx>

Determining 'significant consumer detriment'

B1 We propose to provide 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 (see draft RG 000 at RG 000.37–RG 000.54).

B1Q1 Are there 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?

We support ASICs proposal to define 'significant consumer detriment' in the broadest terms possible so as not to limit the scope of the PIP.

Significant has two limbs – significant to an individual or significant in that it affects a large group of individuals. Our view is that when consulting on using the PIPs, ASIC should consider both the impact on consumers as a whole as well as detriment that is significant to an individual or class of consumers. When considering significant detriment, ASIC should have regard to the serious impact that the stress and pressure that consumer, credit and debt issues can have on people's health and wellbeing.³ The ClearLoans case study below demonstrates this impact.

For example, financial loss can mean different things to different people and have different effects on people's lives. A focus on impact will capture different kinds of detriment. The loss of a few hundred dollars for example can be devastating for many of the individuals that contact the National Debt Helpline for assistance and mean the difference between affording food or going without. Products that affect or target a significant demographic of consumers but cause a lower level of financial harm should be in ASICs scope.

Case study: Clear loans

Anu (name changed) was listed as a guarantor when her ex-partner (the borrower) took out a loan with ClearLoans for \$5,000. The borrower borrowed the money to purchase a car for his own personal use. The total amount to be repaid was more than \$11,000.

At the time of the loan application, Anu and the borrower were in a relationship where she was subject to family violence perpetrated by the borrower. A few weeks after the loan was obtained, Anu was granted a family violence intervention order against the borrower, who has since been imprisoned for breaches of this order.

³ Hamilton, H. A. et al. (2019) 'Debt stress, psychological distress and overall health among adults in Ontario', Journal of Psychiatric Research, p.9.

The loan was taken out using an online form and the approval process took place by way of a single telephone call from an employee of ClearLoans to the borrower and Anu. The only financial document requested by and made available to ClearLoans in the application process were the borrower's and Anu's bank statements.

When the borrower failed to make repayments on the loan, ClearLoans pursued Anu to recover the debt. She forwarded a copy of her intervention order to them to request special consideration but ClearLoans continued to pursue her for the debt.

(Case study provided by Consumer Action)

Similarly, detriment can be both subjective and objective. Someone with existing vulnerabilities that is required to navigate a complex and stressful process to resolve a matter will suffer greater detriment as a result of their vulnerabilities than someone who is able to confidently advocate for themselves. If a product has the effect of exploiting this former group of people and results in widespread detriment, then this should be captured by the PIP. Detriment that objectively causes extensive harm (including financial loss) should obviously be captured.

We strongly believe that 'significant consumer detriment' should not be confined to actual or potential financial loss. Many people suffer detriment where monetary loss suffered is negligible but where other non-financial detriment is significant. These factors may include things such as stress, anxiety or other vulnerabilities that make it more likely that that consumer will suffer detriment, or that the detriment caused will impact that individual more substantially. Similarly, significant consumer detriment should also take into account inconvenience suffered or time lost trying to resolve a matter.

We are supportive of the fact that significant consumer detriment does not need to have occurred before ASIC makes a product intervention order. Considering detriment that will result or is likely to result in significant consumer detriment is prudent and aligns with the legislative intent of the intervention powers which is to allow the regulator to quickly to prevent financial and credit products from causing harm in the community. Waiting for the harm to become widespread would be counterintuitive.

The timeshare industry is an example where detriment occurs over a long period of time. Timeshare are complex and expensive financial products, with contracts lasting as long as 99 years. A CHOICE investigation found that the industry relies heavily on high pressure sales tactics to coerce people into purchasing often extremely poor-value products.⁴ For one timeshare product that CHOICE reviewed, it took over 43 years of regularly using the property to work out cheaper for the purchaser than booking the accommodation themselves each year. The advice provided to people attending timeshare presentations of poor quality and not in their best interests. The case study below demonstrates the detriment timeshare contracts can cause – including after the individual who entered the initial contract has died.

⁴ CHOICE 2018, Are holiday timeshare resorts worth it?
<https://www.choice.com.au/travel/accommodation/timeshare/articles/are-timeshares-worth-it>

Case study: Timeshare

Anne Begbie, currently aged 87, bought a share certificate for ownership of a specific time period scheme at Pacific Palms Resort with her late husband in 1985. The Resort is listed with Classic Holidays. Anne's contract length is 99 years, ending in 2084.

In April 2019, Anne's daughter Lindy sought CHOICE's advice on how to exit her mother's contract with Classic Holidays in the event of her death. Lindy raised concerns that the contract would extend beyond her mother's death and that any remaining debt would be settled out of her mother's estate, based on representations made by Classic Holidays.

Classic Holidays misleadingly represented that the 99-year contract would continue after Anne's death and that claims would be made on her estate after death. Classic Holidays subsequently represented that Anne was eligible for hardship relief and offered to switch her to a shorter 6-year contract costing \$12,500 over the life of the contract. On the basis of these representations and believing that death would not exempt her from her financial obligations to Classic Holidays, Anne accepted the shorter 'hardship relief' contract. Worryingly, Classic Holidays appears to have relied on mention of ASIC decisions to justify this punishing approach to hardship relief.

(Case study provided by CHOICE)

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We support the definition being market-wide. As noted in our joint submission to Treasury's proposals paper,⁵ we strongly discourage any exclusions as they would have the potential to create regulatory gaps and will encourage regulatory arbitrage. We agreed with the intention outlined in the Proposals Paper, which is 'to cover the market as comprehensively as possible to avoid any possible gaps in the market'. This will allow ASIC to address misconduct directed at large numbers of low-income consumers who might suffer small losses in dollar terms, but which have a disproportionate impact on their financial capacity.

Speaking to consumers every day, financial counsellors and consumer lawyers are in a position to identify new and emerging threats to people's financial wellbeing. This information will be invaluable to ASIC in identifying exploitative emerging products where the PIP might be used, and we look forward to greater clarification from ASIC on how it will determine where and when the PIP will be used.

⁵ Consumer Action et al, submission to the Design and Distribution Obligations and Product Intervention Power – Proposals Paper, The Treasury, available at: <https://consumeraction.org.au/design-and-distribution-obligations-and-product-intervention-power-proposals-paper/>

RECOMMENDATION 2. Significant consumer detriment should be defined in the broadest terms possible.

RECOMMENDATION 3. Defining significant consumer detriment should consider financial and non-financial loss and the impact this has, or is likely to have, on both individuals, and on consumers more broadly.

Determining how to intervene

B2 We propose to:(a) give guidance that ASIC 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 (see draft RG 000 at RG 000.55–RG000.56).

B2Q1 Are there any other considerations that we should take into account in determining how we will intervene?

Any guidance and proposed solution should also prioritise timely and appropriate action to prevent ongoing consumer detriment.

While we accept there are some benefits to consulting on a range of intervention options, there a number of risks that ASIC should consider. First, the intervention consultation gives companies that fall within the remit of the proposed order time to adapt or change their product to evade the order. For example, ASIC CP 316: Using the product intervention power: Short term credit names two related entities exploiting the short-term credit exemption in the National Consumer Credit Protection Act 2001 (NCCP). CP 316 effectively gives these companies time to tweak their operations to fall outside the scope of the intervention order. In other situations, time to adapt business practices may be appropriate. For example, if ASIC were to use the PIP to ensure buy now, pay later (BNPL) providers fulfilled responsible lending obligations under the NCCP, time to adjust their business systems may be appropriate.

When determining how to intervene, we do not believe any consultation should give options to address the harm. If ASIC have determined that significant consumer detriment has occurred the response should be targeted and swift. We suggest ASIC propose one option to address the conduct and invite stakeholders to comment on whether they agree with ASIC's suggested intervention. If stakeholders do not agree they should be invited to explain "why not?"

If ASIC proceed with giving options when consulting on using the intervention power, then all options should adequately tackle the significant consumer detriment that has been identified. Presenting options that do not address the harm has the potential for adverse outcomes. ASIC CP 316 presents three options to address the consumer detriment caused by short term lending. Option 3 "No change" would allow significant consumer detriment to occur which is inappropriate.

Another problem with presenting a 'do nothing' option is that businesses whose products are targeted by an intervention order could hypothetically encourage their users to petition ASIC to adopt a 'do nothing' approach. Industry itself could also apply pressure and lobby for the status quo. If other options are presented then they should all have the ability to curb the consumer detriment identified – there should be no option for ASIC to 'do nothing'. Thus, the proposed intervention should be specific and targeted to address the consumer detriment identified in a practical way.

It may be that ASIC feels that it needs to provide a range of options, including a 'do nothing' option, to comply with regulatory impact assessment processes.⁶ We seek clarity as to whether PIPs are considered regulation for the purposes of the Office of Best Practice Regulation, and whether ASIC is required to undertake a regulatory impact statement to use a PIP. Our view is that, given the time and burden involved in such a process, this would be contrary to the purpose of the PIP regime.

Consideration should also be given to other regulatory tools ASIC has available as the PIP has the potential to be used in conjunction with these tools. In our view, enforceable undertakings have been a very effective enforcement tool. In determining the scope of the product intervention power, the success of ASIC's enforcement outcomes via enforceable undertakings should be taken into account. For example, an enforceable undertaking to compensate consumers for past wrongdoing by a company, coupled with an intervention order to prevent the conduct from causing ongoing detriment, would provide a holistic response to consumer harm. The product intervention power should provide ASIC with the flexibility to fix the root cause of problems, rather than just patch up the symptoms.

Consideration of community expectations should also be taken into account when determining how ASIC will intervene. In the wake of the Banking Royal Commission it is clear that the Australian public expect financial institutions to act according to a higher standard, and that regulators such as ASIC should act boldly when misconduct is identified. The regulatory objectives set out in s(1)2 of the ASIC Act should be read in light of these expectations. The obligation to "promote the confident and informed participation of investors and consumers in the financial system" is particularly relevant.⁷ Confident and informed participation of consumers relies on businesses acting fairly toward consumers and Australians rightly expect fair treatment when engaging with financial and credit products. All of these considerations must be taken into account when ASIC determines how to use the PIP.

Some intervention orders will be more complex than others, as a broad principles-based approach will be required to curb a range of poor practises and products peddled by companies that are driving significant consumer detriment. An example would be using the PIP to prevent the harm caused by debt vultures, who often position themselves as 'credit repair' or 'debt relief' firms. Debt vultures are particularly challenging as they purport to offer legal and financial services, but in reality these services are false or misleading. These include arranging unaffordable Part IX debt agreements or claiming to assist with credit defaults – often funnelling customers into other services from the same (or a related) firm. They also offer lending 'advice' and refer consumers in financial hardship to lenders who offer finance to this cohort – often at very high rates. Some companies target consumers in mortgage stress who are at risk of losing

⁶ See, eg, Australian Government Guide to Regulation, available at: <https://pmc.gov.au/regulation>.

⁷ See draft RG 000 at RG 000.57–RG 000.59

their home. For consumers engaging with these companies, the risks can be very high especially in instances where the family home is at stake. Whilst some product interventions will be quite specific and targeted, the example of debt vultures indicates that ASIC must also take a broad principles based approach when using the PIP to effectively tackle a range of misleading or poor practises utilised by companies. The debt vulture case study below demonstrates a complex problem where a consumer was promised assistance that was never delivered and, as a result, will likely result in her losing her home.

RECOMMENDATION 4. Intervention options should be limited and aimed at preventing the detriment identified.

Case study: Debt vultures

Alison appeared by telephone in the Federal Circuit Court in April 2019. The Applicant was the buyer of an outstanding credit card debt and was seeking a sequestration order. Alison told the Registrar that following an unsolicited approach, she had engaged the services of a debt management firm (**the firm**). She told the court that she had been assured by the debt management firm that refinancing of the current home loan could be arranged, with the result that funds would be available to settle the debt to avert the creditor's bankruptcy petition. Alison told the Registrar that she had been told by the firm to seek an adjournment. The Federal Court Circuit Registrar agreed to a four week adjournment but made it clear that any further adjournment requests must be made by affidavit. The Registrar then advised Alison of free financial counselling services available and sought permission from Alison for the financial counsellor to contact her. The financial counsellor attempted to contact Alison several times, but Alison never engaged with the financial counsellor as she had been told by the debt management firm that they would help her stop the creditor from making her bankrupt.

Alison then appeared by telephone again at the next Federal Circuit Court hearing. The Registrar noted that no affidavit had been filed. Alison reported that she had received no further contact from the debt management firm, notwithstanding she had provided financial information to them. The Registrar adjourned for another few weeks and informed Alison that no further adjournments would be granted. Alison was told that in the absence of any settlement action, a Sequestration Order would be made at the next hearing.

Alison contacted the CCLCSA a few days before the adjourned hearing and said she had received no contact from the firm. The credit card debt was in excess of \$8,000 with over \$7,000 in added legal costs. Alison's husband was incapacitated and unable to work. Alison operated a small

business which provided a limited income. Their current home loan was approximately \$300,000, and their house was worth approximately \$450,000. Their mortgage repayments were \$400 per week. Alison and her family were experiencing significant financial hardship. The only other asset Alison owned was a vehicle that Alison estimated to be worth \$16,000.

The CCLCSA advised Alison what would happen to her assets if a sequestration order was made. At the next hearing Alison reported that she still had not heard from the firm and a sequestration order was made.

The CCLCSA's view is that the debt management firm's involvement did nothing but create a false hope that Alison could refinance her home to resolve her financial issues. However, any reasonable assessment would have concluded that refinance was most highly unlikely. In fact, Alison never received any offer to refinance. Alison was discouraged from seeking financial counselling advice early in the process. Alison was misled to believe that she could refinance in a situation where she had no realistic chance of success. Alison was not advised or given any other opportunity by the firm of other options to commercially negotiate settlement with the Applicant to avoid any sequestration order. The result was that a sequestration order was made in circumstances where Alison was misled to believe that the debt management firm would act for her and so she took no further action. Alison and her husband's assets are now all vested with the trustee in bankruptcy.

(Case study provided by CCLCSA)

Consultation on proposed product intervention orders

C1 We propose that as part of our formal consultation process:(a) we will identify the product and its availability to retail clients;(b) we will describe the significant consumer detriment that we consider has occurred, will occur or is likely to occur, and set out our reasons for making this assessment;(c) we will set out our proposed intervention or a description of our proposed intervention; and(d) in some circumstances, we will present a range of options for intervening (see draft RG 000 at RG 000.63).

C1Q1 Do you have any feedback on the information we propose to include in our consultation on a proposed product intervention order?

C1Q2 Is there any other information that we should include when we consult on a proposed product intervention order?

As stated above, the main benefit of the PIP is for ASIC to act quickly when consumer detriment is occurring and the usual regulatory tools or approaches are not well equipped to stop harm from occurring. We are supportive of a consultation approach that gets to the heart of the issue and proposes a solution.

We recommend that ASIC also be required to 'name and shame' companies where practicable, particularly in the event of an individual intervention. We acknowledge that naming affected companies could be difficult if a wide class of providers or products were covered by the intervention, hence we would limit the requirement to naming companies 'where practicable'. Any previous interventions against the same entities or similar products should also be highlighted.

ASIC should also be empowered to require affected companies to notify relevant clients of an intervention and their rights to redress, including access to dispute resolution services via EDR. Communication plans should also be subject to approval by ASIC. This power aligns with ASIC's current approach to enforceable undertakings, whereby affected companies are required to contact affected customers using an ASIC-approved communications plan.

It's also important to spell out why ASIC is using the PIP and what deficiencies in legislation or in ASIC powers are prompting the use of the power. This will allow government, regulators and other stakeholders to consider how the consumer detriment might be stopped permanently when the PIP expires. It may also provide other insights to parliamentarians as to how laws and regulation relating to financial products might be better made to stop regulatory arbitrage.

Case study: Consumer leases

Mollie (name changed) is an Aboriginal woman in her mid-40s. She lives in regional Victoria and is currently receiving Centrelink payments.

In January 2019, Mollie attended a furniture store and saw a lounge suite she was interested in buying. The sales attendant told Mollie that the lounge suits was for sale for an amount slightly above \$1500.

To buy the lounge suite, Mollie contacted a company that offers rental agreements for household furniture and appliances (**the Rental Company**).

A representative from the Rental Company attended Mollie's home and told Mollie that the lounge suite would cost 'a bit' more than the recommended retail price if Mollie purchased the suite through the Rental Company. Mollie intended to pay off \$100 a week and understood from the discussion with the representative that if she paid this amount regularly, she would pay off the contract quickly. She also thought she would then own the lounge suite.

After meeting with the representative, Mollie entered into a consumer lease contract with the Rental Company.

About 4 months (or 16 weeks) later, Mollie contacted the Rental Company to check on her account. Mollie had been paying \$100 a week to the Rental Company and so thought that she must be close to paying off the lounge suite. It was around this time that Mollie realised that the contract purportedly required her to pay an amount slightly over \$7,500 over a period of three years. This was more than 4 times the recommended retail price of the lounge suite.

Mollie sought the assistance of Consumer Action. Consumer Action is assisting Mollie make several claims under the consumer and credit laws including irresponsible lending and misleading conduct. The misleading conduct relates to the true cost of the lounge suite, the time it would have taken Mollie to pay out the contract and that the written contract, in fact, did not give Mollie the right to own the lounge suite.

(Case study provided by Consumer Action)

Consulting with Aboriginal and Torres Strait Islander communities

Consumer Action and the Victorian Aboriginal Legal Centre (VALS) commenced an Integrated Practice project (the IP Project) in March 2019. The purpose of this project is to allow both Consumer Action and VALS to deliver integrated consumer credit and debt legal related services to Aboriginal communities in Victoria and is led by Consumer Action's Koori Engagement Manager. This project has underscored the wide range of systemic consumer credit and debt issues within Victorian Aboriginal communities and has emphasised how critical community engagement sessions are to identify these issues.

We are concerned that where Victorian Aboriginal communities are being affected by detrimental products, merely advertising a consultation on ASIC's website when a product intervention is proposed will be too late to consult with Victorian Aboriginal communities.

Appropriate consultation with Victorian Aboriginal communities will also ensure proposed product intervention orders recognise and respond to the needs of Victorian Aboriginal communities. This can only be done through culturally appropriate and ethical consultations and could build on ASIC's Indigenous Outreach Program. The National Health and Medical Research Council's (NHMRC), *Ethical guidelines for research with Aboriginal and Torres Strait Islander Peoples 2018*, while relate to research, provide a useful starting point.

The consumer lease case study below demonstrates the importance of properly consulting with affected communities. While the case study epitomises the kinds of low value contracts and poor sales practices we often see around consumer leases, it does not adequately capture our clients' views about these products.

Through the IP Project, several Aboriginal clients with consumer leases sought Consumer Action's assistance not because of the excessive cost of the goods but because they were concerned about the quality of the products and services of the lease providers. These clients were reluctant to pursue any irresponsible lending claims that they may have against the lease providers, as they did not want to undermine their ability to take out further leases in the future. One of these clients, who was particularly financially and socially vulnerable, explained that while she understood that these contracts were a bad deal, she felt that there were no alternatives for someone in her financial position to acquire basic household goods.

ASIC's new product intervention powers could play an important role in re-establishing the balance of power in these contractual relationships, while ensuring that people still have multiple options to enable them to buy basic household goods when they cannot afford them outright. For example, the PIP could be used to regulate these kinds of products to make them fairer. However, to come up with a solution that is responsive to Victorian Aboriginal community needs, appropriate consultation will need to occur.

The PIP is not a panacea: until products are designed to meet people's needs and wants without causing them harm, we will still see detriment to consumers as pursuit of profits is placed ahead of their interests. However, we see the PIP as a tailored intervention tool to stop ongoing consumer detriment and allow regulators, government and other stakeholders time to address the problems that ASIC has identified. These might be problems in the law which constrain the regulator to act using other regulatory tools or problems which parliament must address. The consultation process is an opportunity to detail this information.

- RECOMMENDATION 5.** Consultations should name and shame companies and provide guidance on how to notify affected clients.
- RECOMMENDATION 6.** Information on where there are deficiencies or loopholes in the law should also be provided.
- RECOMMENDATION 7.** Consultation should appropriately engage with affected stakeholders including Aboriginal and Torres Strait Islander communities.

C2 We propose to provide guidance in draft RG 000 at RG 000.68–RG 000.69 that, when we consult on making a product intervention order, we will describe the type of order we propose to make and the significant consumer detriment that has resulted, will result or is likely to result from the product. In describing the significant consumer detriment, we may refer to:(a) the nature of the product 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; and(iii) the impact that the detriment has had, will have or is likely to have on consumers.

C2Q1 Do you have any feedback on how we intend to describe the significant consumer detriment?

Please refer to our comments to question 1 above. In addition to ASIC's proposed approach, significant consumer detriment should describe:

- Detriment that includes both financial and non-financial loss including time spent trying to resolve a problem;
- Non-financial detriment should cover things such as stress, anxiety or other vulnerabilities that make it more likely that that consumer will suffer detriment;
- Consumer detriment that has not yet occurred but will likely occur - waiting for harm to become widespread would be counterintuitive to the intent of the PIP;

We encourage ASIC to include case studies that identify the harm caused by the product and include information about how the proposed intervention will stop that harm in practice.

We also suggest ASIC consider 'significant consumer detriment' in a holistic way and the impacts this has on someone's life. In our experience, financial products have impacts that are far more significant than simply debt or financial hardship. The case study below demonstrates the impacts that paying for clothing

using buy now pay later had on a homeless client. BNPL has experienced huge growth in recent years and while the product is safe for many people, a cohort of consumers with insufficient or irregular income are finding themselves in debt. Intervention orders should describe the significant consumer detriment not only on a typical customer, but also on those that may have other vulnerabilities such as insecure housing, disabilities or cognitive impairments, or poverty.

Case study: Buy now, pay later

Mary was living in her car. She had recently been evicted from her rental property and was not eligible for financial assistance for another rental bond. She was trying to save enough money for a rental bond to secure another rental property. When she went to the shopping centre, she purchased new items of clothing from clothing retail outlets using a popular BNPL provider. There was no assessment on her ability to repay, despite only receiving Centrelink benefits. Mary saw a Financial Counsellor and it was discovered that direct debits for purchases she made using the BNPL provider had left Mary with insufficient funds to secure new accommodation. Mary had new clothes but was living in her car.

(Case study provided by CCLCSA)

C3 We propose to consider whether delayed commencement (and the length of any delay) is appropriate for a product intervention order on a case-by-case basis. We propose 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 (see draft RG 000 at RG 000.70–RG 000.73).

C3Q1 Do you agree with our proposed approach to determining whether to delay commencement of a product intervention order? If not, why not?

We agree that a case by case approach to determining whether to delay the commencement of an order makes sense. However, this must be balanced against the significant consumer harm that will have been identified and will be permitted to continue before an order is implemented.

In most circumstances where significant consumer detriment has been identified, we would urge ASIC to act swiftly to prevent the harm. There should be a presumption that prompt action is needed when detriment has been identified. Any proposal to delay commencement should have to rebut that presumption.

C3Q2 Do you agree with the examples of factors that we should consider when determining whether to delay commencement, and the length of any delay? If not, why not?

The factors look sound. Again, we would encourage ASIC to keep in mind the intent of the PIP and act quickly unless there are compelling factors to justify any delay.

C3Q3 Are there any other factors that we should consider when determining whether to delay commencement, or the length of any delay?

ASIC should include a factor that describes the consumer detriment that will occur during any delayed commencement. This will allow any proposals to delay the commencement to be balanced against the consumer harm that will occur during the delay.

Delaying the commencement of the PIP should not preclude ASIC from using other tools it has to prevent harm – such as litigation – and which may complement the PIP when it comes into effect. This power should not be seen as a ‘last resort’, but instead be used as a pro-active enforcement tool that protects consumers from risky products before widespread harm occurs. Intervention at the ‘risk’ stage rather than actual stage is vital for vulnerable consumers as the long-term effects of any detriment will likely be greater for them.

RECOMMENDATION 8. Delays to commencement of an order should rarely occur, with the presumption being that prompt action is needed to stop the detriment identified.

OTHER CONSIDERATIONS

What happens after the intervention order expires?

We recommend that there be a presumption of continuance and an intervention be renewed after 18 months if there is a risk that consumer detriment will occur again. An intervention order should only be lifted if ASIC, or the Government, decides that the risk of consumer harm has been addressed and the intervention order is safe to remove.

There must be a clear process for getting the issue on the Government agenda and resolving the source of the consumer detriment that prompted the product intervention. In our experience, 18 months is not enough time to implement reforms in the financial industry.

We also recommend ASIC publish a report on the intervention order toward the end of the 18-month period. This report should review the effectiveness of the order in stopping the significant consumer detriment identified and lay out some proposed next steps for affected businesses, ASIC and/or government to take in order to prevent ongoing detriment. The review will inform ASIC and stakeholders whether another order should be made if there is a chance the consumer harm will re-commence at the expiration of the order.

RECOMMENDATION 9. ASIC should produce a report as the expiration of an intervention order approaches that assesses its effectiveness and confirms the intervention order is safe to remove.

Remedies

ASIC should also address remedies that may be available to customers and how these might interact with the PIP. This will likely draw on ASIC's other regulatory tools to enforce remediation that occurred prior to the intervention order taking effect, if possible.

Phoenixing

We are concerned that there is a risk of businesses phoenixing if they are targeted by the PIP. Consumer Action noted individuals in the past who have repeatedly engaged in misleading and deceptive conduct, or sold defective goods, and then wound up their current corporate entity only to recommence the same activity under the guise of another entity. One impact this has on the consumer is a lack of redress for conduct that has already occurred. ASIC must be alive to this risk.

Please contact Policy Officer Patrick Sloyan at Consumer Action Law Centre on 03 9670 5088 or at patrick@consumeraction.org.au if you have any questions about this submission.

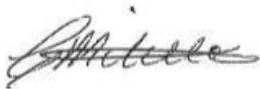
Yours Sincerely,



Gerard Brody
Chief Executive Officer
Consumer Action Law Centre



Fiona Guthrie
Chief Executive Officer
Financial Counselling Australia



Gemma Mitchell
Managing Solicitor
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Consumer Credit Law Centre SA



Sarah Agar
Head of Campaigns and Policy
CHOICE



Prof. Gail Pearson
Consumers' Federation of Australia



APPENDIX A – ABOUT OUR ORGANISATIONS

Australian Shareholders' Association

The Australian Shareholders Association (ASA) is an independent, not-for-profit, member-funded organisation that has grown to be the major autonomous body representing Australian retail investors. Its advocacy promotes the interests of retail shareholders. ASA also helps its members improve their investment knowledge through its educational offerings.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most. To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns

Consumer Action Law Centre

Consumer Action Law Centre is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Consumers' Federation of Australia

The Consumers' Federation of Australia (CFA) is the peak body for consumer organisations in Australia. CFA represents a diverse range of consumer organisations, including most major national consumer organisations. Our organisational members and their members represent or provide services to millions of Australian consumers.

CFA advocates in the interests of Australian consumers. CFA promotes and supports members' campaigns and events, nominates and supports consumer representatives to industry and government processes, develops policy on important consumer issues and facilitates consumer participation in the development of Australian and international standards for goods and services. CFA is a full member of Consumers International, the international peak body for the world's consumer organisations.

Consumer Credit Law Centre SA

The Consumer Credit Law Centre South Australia (CCLCSA) was established in 2014 to provide free legal advice and financial counselling to consumers in South Australia in the areas of credit, banking and finance. The Centre also provides legal education and advocacy in the areas of credit, banking and financial services. The CCLCSA is managed by Uniting Communities who also provide an extensive range of financial counselling and community legal services as well as a large number of services to low income and disadvantaged people including mental health, drug and alcohol and disability services.

Consumer Credit Legal Service (WA)

Consumer Credit Legal Service (WA) is a not-for-profit charitable organisation which provides legal advice and representation to consumers in WA in the areas of banking and finance, and consumer law. We strengthen the consumer voice in WA by advocating for, and educating people about, consumer and financial, rights and responsibilities. In the 2018/2019 financial year, we represented over 100 clients in their disputes, and participated in over 40 law reform activities.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

Financial Rights

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

APPENDIX B – PRODUCT INTERVENTION POWER HIT LIST

While collaborating on this submission, the following range of products were identified by our organisations as causing significant consumer detriment and as such, prime candidates for ASIC to examine further and consider using the PIP to prevent further consumer harm.

Funeral insurance and expenses only policies – particularly where there are harmful practices like stepped premiums that become unaffordable, products that mislead consumers, or arrangements that mean people end up paying much more than the product will ever pay out.

Debt vultures – so-called “debt management” firms peddle conflicted advice and inappropriate “debt solutions” and budgeting products to financially stressed Australians. These firms operate in a regulatory black hole – they’re not required to hold a license or meet even basic competency and ethical standards. ASIC could use the PIP to impose some professional standards on these providers, including duty to act in the best interest of the debtor, a ban on unsolicited selling and client money obligations.

Buy now pay later providers that avoid Australia’s credit laws – it doesn’t make sense that BNPL should get special treatment under the national credit laws. ASIC should use the PIP to mandate responsible lending obligations as these providers don’t have to comply with those important protections.

Accidental death and accidental injury insurance. Accidental death insurance is a particularly low-value product, the likelihood of accidental death is extremely low: approximately 5% of deaths in Australia are accidental. Accidental death policies can also contain clauses which further limit the likelihood of a successful claim, such as exclusions where the use of alcohol or drugs contributions to the insured’s death and have an average payout ratio for the years 2015 to 2017 of 16.1%.⁸

Junk ‘dealer-issued’ extended car warranties – ASIC has already taken action on some add-on insurances, but this has been limited to where the warranty was ‘dealer-issued’. We think that the PIP does, however, capture these products and ASIC should use it to ensure that they are treated the same as other add-on insurances.

Payday loans can have a devastating impact on their target market and cause ongoing financial harm. It is not uncommon for borrowers to take out multiple payday loans alongside existing debts and household expenses. ASIC should consider more effective cost caps given very high-cost loans cannot be provided responsibly, and consider other interventions that prevent harmful recurrent use of payday loans.

Timeshare – the timeshare industry is characterised by extremely high-pressure sales, products that are such poor value that they result in consumer harm, and consumers who do not understand the risk/return trade-off involved in the product. CHOICE has made several complaints about specific timeshare providers to ASIC but the problems are industry-wide rather than limited to particular bad actor firms. We

⁸ Consumer Action Law Centre, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *submission on round 6 hearings case studies*. Accessed at: <https://consumeraction.org.au/wp-content/uploads/2018/10/181001-RC-insurance-final-case-study-subs.pdf>

recommend ASIC initiate a market-wide intervention order to address the issues in the industry, particularly:

- Misleading, coercive and unfair sales practices;
- The quality of financial advice provided;
- The length of contracts; and
- Disclosure given regarding the nature of the product and total cost.

Pet insurance is a product that is often expensive, confusing and poor value. CHOICE's recently reviewed 86 pet insurance policies, and were unable to recommend a single policy due to highly restrictive terms and a lack of competition in the market.⁹ Veterinarians and staff at vet offices are selling or recommending pet insurance products to pet owners and, in some scenarios where they are considering individual circumstances, may be providing personal financial advice. Rather than address this on a case-by-case basis, CHOICE recommends that ASIC investigate sales practices and separately initiate a market wide intervention order into restrictive terms.

⁹ See: see: <https://www.choice.com.au/money/insurance/pet/articles/six-things-you-need-to-know-about-pet-insurance>