Product Intervention Powers: a Legal, Comparative & Policy Analysis

Dimity Kingsford Smith*

Professor of Law

Faculty of Law,

University of New South Wales,

Sydney, Australia

Ph: 612 9385 2245

E-mail: d.kingsfordsmith@unsw.edu.au

www.law.unsw.edu.au

and

Dr Marina Nehme

Senior Lecturer

Faculty of Law,

University of New South Wales,

Sydney, Australia

Ph: 61 2 9385 7263

E-mail: m.nehme@unsw.edu.au

www.law.unsw.edu.au

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*Correspondence to Professor Kingsford Smith: d.kingsfordsmith@unsw.edu.au
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I. Introduction

This report responds to Recommendation 22 of the Financial System Inquiry Final Report recommending ASIC have a Product Intervention Power (PIPs).[1] Product intervention powers are complementary to disclosure and empower a regulator to intervene in product design or distribution and sales to prevent consumer detriment. While the FSI suggested features PIPs might have, it left many aspects for implementation, such as those addressed in this report. For brevity's sake we take as read chapter 4 of the FSI Final Report and assume some knowledge of PIPs in the jurisdictions we use for comparison. Where we have assumed too much, we are entirely content to provide further information and reasoning on request. Accordingly, the rest of this report addresses the questions asked of us by letter from ASIC's Consumer Advisory Panel dated 23 January 2015 and provides recommendations for PIPs implementation in Australia. For those with limited time, we suggest reading the Executive Summary, our Recommendations and the Conclusion.

II. Executive Summary

Product intervention powers (PIPs) are complementary to disclosure. They empower a regulator to intervene in product design or distribution and sales to prevent consumer detriment. The analysis below shows:

- *PIPs are frequently twinned with product design and distribution obligations. These obligations set out ways a financial services provider may ensure the design and distribution of a product will 'fit' or be 'suitable' for the objects and needs of the class of consumers to which they are targeted;*
- *PIPs are a regulator's tool to take action to prevent losses when this 'fit' has failed and there is 'a risk of significant consumer detriment'. Universally 'significant detriment' is either loss of significant amounts or losses that are wide-spread;*
- *Intervention is preventive and timely because it does not require proof of a breach of the law by providers. PIPs do not impose regulator's sanctions or consumer remedies;*
- *PIPs are low in the hierarchy of regulator action. Intervention should occur when regulator guidance to providers, persuasion and negotiation have failed to achieve a timely removal of 'the risk of significant consumer detriment'. PIPs should be used infrequently;*
- *In a highly concentrated vertically integrated financial sector such as Australia's, PIPs will likely promote competition, market integrity and resilience as well as protect consumers;*
- *Intervention is not product pre-approval. Interventions range along a spectrum from disclosure changes, labelling/terminology changes, warnings, alteration of product features, distribution and sales changes and only if required – product or distribution prohibition. The intervention responds to the case;*

[1] Commonwealth of Australia, *Financial System Inquiry: Final Report* (December 2014) Ch 4 ("FSI Report").

- *PIPs should not change the rights and obligations of existing product-holders. They should be permitted and encouraged to obtain personal advice or other guidance to decide whether the product subject to PIPs remains 'suitable' for them;*
- *PIPs are a flexible tool. They respond to risks we can imagine but not yet identify. They will respond over the next generation to risks we cannot yet imagine: these are likely to eventuate from technology, globalisation, the maturing of Australia's superannuation system, the dis-intermediation of risk and the continuing mass-market financialisation of the personal and house-hold needs of Australians;*
- *PIPs will require initial empowerment of ASIC by Parliamentary legislation. Legislation should provide for judicial review. Implementation will also require additional personnel and resources for greater surveillance, earlier involvement of senior ASIC staff in matters and greater authority for quick decision-making.*

III. Recommendations

Recommendations for Adoption of Product Intervention Powers (PIPs) in Australia	
Recommendation 1: adopt a financial sector product intervention power	Adopt a comprehensive product intervention power for the financial sector to be exercised by ASIC in respect of financial services providers, financial products and financial consumers. This should be accompanied by a prior obligation on providers to design and distribute financial products that are suitable for the target market of consumers to whom they are marketed and sold (FSI Recommendation 21)
Recommendation 2: adopt a standard for exercise of intervention powers	The FSI considered fairness, unsuitability and risk of significant consumer detriment as grounds for PIPs. We recommend PIPs are exercised when there is a risk of (a) Unfairness to financial consumers; or that (b) Financial consumers may hold unsuitable products; and that (c) Financial consumers may suffer significant or wide-spread consumer detriment. The standard for PIPs would not require a breach of the financial services laws.
Recommendation 3: adopt indicative & non-exclusive guidance on	PIPs apply to classes of providers, products and consumers. This requires different evidence of risk of unfairness or unsuitability and consumer detriment, than in a single provider-client relationship. As innovation (especially in online mode) may change indicia of consumer

types of evidence for intervention. Do this in regulatory guidance not in legislation.	detriment, we do not favour specifying these in legislation. We recommend ASIC issues periodically updated regulatory guidance about what evidence it would consider for the exercise of PIPs. This should be closely related to ASIC's guidance about the FSI's Recommendation 21 that there are product design and distribution obligations.
Recommendation 4: PIPs should apply to product design, distribution (including advising) and sale	The products covered should include 'financial products' widely defined and credit. We also recommend as in all jurisdictions we have reviewed, that intervention powers cover products, distribution (inc advising) and sale. We favour this because of the bundling together of products, services and marketing, into 'strategies'. Also because of the difficulties of controlling 'close substitutes'. These are products and services which are practical equivalents of those which have been controlled by exercise of intervention powers. We also recommend a PIPs 'anti-avoidance' provision.
Recommendation 5: adopt flexible modes to intervene	We do not recommend product pre-approval using PIPs. This is not necessary because of the design and distribution obligations. Modes of intervention should be flexible. They should include: changes to marketing and disclosure materials, warnings to consumers; labeling and terminology changes, distribution & sale restrictions, product prohibitions. To encourage more proportionate intervention, we also suggest banning particular features of products or distribution (eg a teaser entry rate or gift; a 'pre-ticked' box for an add-on product in an application form when acquiring a primary product).
Recommendation 6: PIPs should be used infrequently	The FSI intends PIPs to pre-empt losses. The product design and distribution obligations should also improve suitability and disclosure. Being complementary to these obligations and disclosure, PIPs should be needed infrequently. To be preventive PIPs must be timely. So intervention may be justified if regulator guidance to providers, persuasion and negotiation has failed to achieve timely removal of 'the risk of significant consumer detriment'.
Recommendation 7: PIPs should not change the	PIPs should not alter existing rights and obligations between client and provider. All PIPs should provide that consumers holding a product should be able to seek advice or other guidance on whether the products

rights and obligations of existing product-holders	continue to remain appropriate for them individually. The client's existing adviser, a new adviser or someone provided by the the distributor or issuer should be able to give them this guidance.
Recommendation 8: enact legislation to create PIPs (temporary and permanent) and provide accountability for intervention	Enact legislation providing for: (a) The grant to ASIC of a power to make temporary product intervention *rules* lasting 12 months; *and* (b) The grant to ASIC of a power to make a temporary product intervention *order* lasting 12 months. There should be a power to extend the temporary rules or orders and to make permanent PIPs rules. Accountability for proper making of temporary and permanent PIPs *rules* should be through registration under the *Legislative Instruments Act* 2003 and application for judicial review to the Federal Court of Australia. Accountability for exercise of the power to make PIPs temporary intervention *orders* should be under the *Administrative Appeals Tribunal Act* 1975.
Recommendation 9: give ASIC more personnel and resources to permit the more pro-active supervision and timely senior decision-making PIPs require	PIPs need a pro-active approach for ASIC to identify departure from product design and distribution obligations and proper disclosure. ASIC may identify other evidence of unfairness, unsuitability and risk of significant consumer detriment. Studies and thematic supervision campaigns may be required. Experience elsewhere indicates PIPs need senior staff to be involved much earlier and authorised to take timely decisions. Staff should initiate discussions with providers and use informal influence to obtain voluntary changes. It should be clear that ASIC will use PIPs if discussions do not bear fruit. ASIC senior staff may need training to develop the skills required to implement PIPs. Additional resources will be required.

IV. Intervention Powers, Technology and Regulatory Effectiveness

The recommendations in the FSI Final Report are intended to make the Australian financial system work well for its users for the next generation. Technology in finance is an important aspect of the future the Final Report addresses.[2] The FSI notes deficits in financial literacy and distorting effects of behavioural biases on consumer financial decision-making. These are important reasons the FSI recommended intervention powers and design

[2] Ibid Ch 3.

and distribution obligations.[3] Research shows that technology in financial services while presenting new benefits, is also likely to exacerbate behavioural traits such as over confidence, over-valuing immediate rewards (eg teaser rates) and discounting future consequences (eg diminished returns from over-trading). On the FSI's own reasoning, this greater vulnerability of the online consumer to behavioural biases and deficits in financial literacy, provides an even stronger case for intervention powers. Further, the FSI advocates market innovation using technology. The 'immediate, inter-jurisdictional and interactive'[4] capacity of online modes will likely increase the class of investors, the scale and variety of product classes, and the 'pushing' of selling strategies in distribution channels, including advising.[5] The application of PIPs to a class (not an individual) which is central to intervention would augment regulatory effectiveness in this 'mass market' consumer environment. Additionally, it may be that a PIPs power could be drafted to make it responsive to risks of consumer detriment from innovation, but in such a fashion that PIPs could be used as part of the 'graduated' approach to regulation recommended by the FSI for technological innovation.[6]

A. Financial Consumer Vulnerability in the Online Mode

Behavioural effects: The online investing context has been found to exacerbate existing behavioural biases among investors, often resulting in overconfident and irrational investing behaviour. One study finds that 'after going online, investors trade more actively, more speculatively, and less profitably than before'.[7] The online context is also likely to encourage 'herd' behaviour among investors, perhaps due to the difficulty of processing the very large amounts of information available on the Internet, and the ease with which it permits others' behaviour to be observed and imitated.[8]

Information effects: The overabundance of information on the Internet can be another factor which distorts consumer decision-making. Greater access to information can empower online investors, but it can also lead to 'the illusion of knowledge',[9] 'cognitive dissonance' in overestimating the reliability of gathered information,[10] and '"communication via impressions" rather than logical connections'.[11] The shift towards self-service in financial services (eg algorithmic financial advice) may augment these effects.

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[3] Ibid Ch 4, *passim*.
[4] Caroline Bradley, 'Online Financial Information: Law and Technological Change' (2004) 26 *Law & Policy* 375.
[5] Nancy Lubin and James Wrona, 'The Securities Industry and the Internet: A Suitable Match?' (2001)*Columbia Business Law Review* 602, *passim*.
[6] FSI Report, above n1, 161-67. This is discussed in terms of payment system, but the same approach could be applied to new fin-tech elsewhere.
[7] Brad Barber and Terrance Odean, 'Online Investors: Do the Slow Die First?' (2002) 15(2) *The Review of Financial Studies* 455, 456.
[8] Eunkyoung Lee, Byungtae Lee and Myungsin Tae, 'Herding behavior in online P2P lending: An empirical investigation' (2012) 11(5) *Electronic Commerce Research and Applications* 495; W Duan et al, 'Informational cascades and software adoption on the Internet: an empirical investigation' (2009) 31(1) *MIS Quarterly* 23, 25.
[9] Barber and Odean, above n 7, 460.
[10] Ibid 460-461.
[11] Caroline Bradley, 'Information Society Challenges to Financial Regulation' (2006) 37 *University of Toledo Law Review* 307, 314.

Strategies to augment consumer incapacities: The online context may also alter the nature of the relationship between financial service providers and their clients, in a way that may increases the risk of predatory behaviour. There is a question as to whether 'the sort of real-world trust relationships that produce effective norms will translate to virtual communities'.[12] For example execution-only brokerage services, particularly where 'online brokers encourage investors to trade speculatively and often'[13] may reinforce cognitive biases by the strategic way they present and promote their services. This could also apply to direct online distribution by issuers to end-user consumers.

More competitive providers: Improved telecommunications technology also has the effect of decreasing distribution costs for issuers and intermediaries, creating an environment conducive to the proliferation of products and more competitive providers. The effectiveness of ASIC's role may be diminished if in this more dynamic world, it had to rely on its existing powers that address only particular licensees, and not the class coverage that PIPs afford. Likewise ASIC's action will be less timely and effective if it must go to court to prove technical breaches while online distribution quickly reaches ever larger groups with products that may cause significant or wide-spread consumer detriment.

B. Potential for PIPs to Promote 'Graduated' Regulatory Responses to Innovation.

The core technologies of finance are data processing and telecommunications[14] - in essence, the storage and flow of information. Exponential advances in these technologies have driven transformative change in financial services, and the FSI expects this will continue. The Final Report identified particular changes:[15] new financial products and services, increased competition due to disruptive business models, greater access to a wider range of products and more product information. The FSI expects greater customisation and more targeted marketing due to more effective gathering and analysis of client data. There will be greater proliferation of 'self-service' products, even some with an advisory element, through refinement of web-based interactivity.

New products, services and disruptive business models: New technologically enabled products and services may be unfamiliar to all of investors, policymakers and ASIC making identification of risks difficult. The development and distribution of new financial products and services is made easier by improvements in financial technologies. On one hand, these trends may amplify consumer detriment simply from bringing novel and unfamiliar financial products and services, within the reach of larger classes of investors. Or these trends may increase the threat of financial products that are designed to circumvent legislative protections, again with potential for consumer

[12] Ibid 312.
[13] Barber and Odean, above n 7, 482.
[14] Lawrence White, 'Technological Change, Financial Innovation, and Financial Regulation: The Challenges for Public Policy' (Paper presented at the Wharton School Financial Institutions Center's conference on Performance of Financial Institutions, May 1997).
[15] FSI Report, above n 1, 143.

detriment. PIPs could respond to that as a stop gap while more considered regulatory responses are developed if required.

Promoting a 'Graduated' Approach to Regulating Innovation: Where a new financial product or service is not intended to circumvent legislative protections, specific legal rules still may be vulnerable to technological change. This is because they 'rely on explicit understandings of technological conditions'.[16] When these underlying assumptions are challenged, novel financial products may be left in an unregulated grey area, threatening benefits to both consumers and providers. Here, PIPs may be a flexible quick-response tool to implement the kind of 'graduated' regulatory response to innovation recommended by the FSI. PIPs rules would be a focus for negotiation, persuasion and consultation with providers as innovations are bought to market. PIPs rules can be adjusted to circumstances easily, and at least initially, are only in force for 12 months. They may increase regulatory effectiveness in novel circumstances, to balance the benefits to both providers and consumers of stepped introduction of innovation.

Finally, many of the new products, services and disruptive business models involved in fin-tech may not have the capital and other regulatory safe-guards of established providers. We do not know if they will survive the ebbs and flows of the credit cycle and wider economic pressures. PIPs could be used if these pressures suggest that new approaches are exposing consumers to significant consumer detriment: for example, warnings might be used. As suggested above PIPs may also address systemic risk, and this is one instance that illustrates that possibility.

V. The Features of Intervention Powers in Comparative Analysis

Product intervention powers (PIPs) are regulator's powers to intervene in the design or distribution of a financial product. The FSI recommended PIPs be available where there is 'a risk of significant consumer detriment'.[17] It also recommended the introduction of 'a targeted and principles-based design and distribution obligation.'[18] The FSI left open the form and effect PIPs would have. Accordingly the analysis below considers features of PIPs or equivalents that have been adopted in other jurisdictions including references to design and distribution obligations. This is to map the features of this new regulatory tool and to consider which aspects might be useful in Australia.

PIPs are not individual consumer remedies: they are rules which apply to a class of providers or an administrative order applying to a single provider. Nor are PIPs necessarily grounds for ASIC to begin an investigation or other enforcement. PIPs are regulatory powers to act in relation to a product or industry-wide

[16] Bradley, above n 11, 311.
[17] FSI Report, above n 1, 206 (Recommendation 22).
[18] Ibid 198 (Recommendation 21).

problem. Since individual remedies and traditional regulator action require a breach of the financial services laws, the exercise of PIPs will not usually lead to a cause of action. The ‘class’ nature of PIPs opens some interesting questions: what standard should permit intervention? Are rule-making powers more appropriate for implementation or should PIPs require administrative action? What sort of reasons and evidence are required to support action under PIPs? The last question is particularly interesting since PIPs may be exercised when there is no evidence of actual loss already occurring, but as the FSI said there is ‘a risk’ of loss.[19]

The introduction of ‘a targeted and principles-based design and distribution obligation recommended by the FSI captures the idea of ‘financial product governance’ which is familiar in European jurisdictions. Financial product governance is an approach to regulation which seeks to improve standards of financial provider decision-making higher in the value chain of product provision, than point of sale. It gives guidance on designing financial products so they are suitable for the target investors to which they are directed. Product governance also covers product distribution, making sure that distribution and advising too, is directed to making sure that products are acquired only by investors for whom they are suited. In line with the FSI’s terminology we refer to a ‘design and distribution obligation’ throughout this report.[20]

A. Standards for Intervention

The standard for intervention: The FSI argued that PIPs would increase suitability and fair treatment of financial consumers in product design and distribution. The FSI also argued for ‘fairness’ (including for consumers) as one of the three principles of Australian financial regulation. The final element the FSI identified to trigger PIPs is ‘a risk of significant consumer detriment’.[21] This clearly intends a power to act before consumers suffer actual losses: PIPs should be available where there is ‘a risk’ of detriment. As we discuss further below, we think PIPs should be available not only for ‘complex’ products, but also where common-place or ‘simple’ financial products and services are involved. This is the view of the FSI. An implication of this view is that ‘significant consumer detriment’ should include ‘wide-spread consumer detriment’. This is the position in all the jurisdictions we have reviewed.

The US: In the US power to intervene is given by the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, in relation to conduct or practices that are ‘unfair, deceptive or abusive.’[22] On the meaning of this central standard for intervention[23] there is a well established literature and jurisprudence in US consumer

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[19] See discussion of apprehension of loss in Financial Consumer Authority, *Temporary Product Intervention Rules: Restrictions in the Distribution of Contingent Convertible Instruments* (August 2014)
[20] FSI Report, above n 1, 206 (Recommendation 21).
[21] Ibid (Recommendation 22).
[22] *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010* (US) s 1031 (“Dodd-Frank Act”).
[23] Dodd-Frank Act s 1036(a)(1)(B).

protection for all the terms 'unfair, deceptive and abusive'.[24] This power may be exercised either by taking direct regulatory action in a variety of ways such as the Consumer Financial Protection Bureau (CFPB) issuing a 'cease and desist' order.[25] As in the UK, in the US the power may also be exercised by rule-making.[26] When the power is exercised as rule-making, the heads 'unfair' and 'abusive' must satisfy elements specified in the Dodd-Frank Act itself.[27] These elements specify particular types of unfairness and abuse, which must be present to permit rule-making.[28] These elements are substantially concerned with the evidence the CFPB must have to make rules regarding unfairness and abuse, and this is discussed further below.

The United Kingdom: In the UK the Financial Conduct Authority (FCA) is empowered[29] to make rules for product intervention. The rules may prohibit conduct by authorised persons as appears to be necessary for advancing the FCA's 'consumer objective or the competition objective' or if Treasury orders the FCA's 'integrity objective.' The consumer objective is 'securing an appropriate level of protection for consumers.'[30] Likewise the competition objective[31] and the integrity objective[32] are 'promoting effective competition in the interests of consumers' and 'protecting and enhancing the integrity of the UK financial system', respectively.[33] In more straightforward policy statements the FCA has stated that it will act under its PIPs when 'there is a risk of consumer detriment'.[34]

The European Union: The European Union (EU) has adopted a number of different financial product intervention strategies.[35] An example is the Markets in Financial Instruments Regulation, under which European Securities Markets Authority (ESMA) has the power to temporarily prohibit or restrict the marketing, distribution or sale of certain financial instruments or a type of financial activity or practice.[36] Such an intervention order will be made if there is a 'significant investor protection concern or a threat to the orderly functioning and integrity of the markets

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24 Tiffany S Lee, 'No More Abuse: Dodd-Frank and Consumer Financial Protection Act's "Abusive" Standard' (2011) 14 *Journal of Consumer and Commercial Law* 118; cf John D Wright, 'Dodd-Frank's "Abusive" Standard: A Call for Certainty' (2008) 11 *Berkeley Business Law Journal* 164; J. Howard Beales, 'The FTC's Use of Unfairness Authority: Its Rise, Fall and Resurrection' (Paper presented at the Marketing and Public Policy Conference, Washington DC, 30 May 2003). See also: *FTC v Sperry & Hutchinson & Co* 405 US 233 (1972).
25 Dodd-Frank Act s 1031(a) and Subtitle E of Title X – Bureau of Consumer Financial Protection especially s 1053(b)(1).
26 Ibid s 1031(b) and Subtitle E of Title X – Bureau of Consumer Financial Protection especially s 1053(b)(1).
27 Ibid s 1031(c) (unfair) and s 1031(c) (abusive).
28 See references listed in n 24.
29 *Financial Services Act 2012* (UK) s 137A, D & E.
30 Ibid s 1C.
31 Ibid s 1E.
32 Ibid s 1D.
33 FCA is required to advance these objectives by reference to factors in the empowering sections.
34 Financial Conduct Authority, 'Policy Statement 13/3: The FCA's Use of Temporary Product Intervention Rules' (March 2013) 32 [19].
35 These range from product design regulation (eg Undertakings for Collective Investments in Transferable Securities) to a ban on the issue of certain products (eg European Securities and Markets Authority Regulation). The EU has conferred powers like this since the 1985 Undertakings for Collective Investments in Transferable Securities (UCITS) and more recently Packaged Retail and Insurance-based Investment Products (PRIIPs). This regulation gives power to prohibit or restrict the marketing, distribution or sale of insurance-based investment products or financial activities or practices if there are significant investor protection concerns or a threat to the orderly functioning of the market: Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014, art 17.
36 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014, art 40(1).

or commodity markets or to the stability of the whole or part' of the EU financial system.[37] France and Belgium have also taken action: France to institute a system of warnings on complex products, and Belgium to declare a moratorium on sale of complex products while the regulator drafts further rules for retail investors generally.[38] Other EU national authorities have not yet introduced general PIPs as far as we know.

Analysis: The standards applied vary due to constitutional structures, regulatory history and scope. The EU has long experience with product intervention (since 1985 with UCITS).[39] Its standards are the most capacious in scope ('significant investor protection concern') and justification (including competition, stability and integrity objectives). The UK power is likewise broad in scope ('significant risk of consumer detriment') and justification. Its power is exercised against the policy background of the long-standing 'Treating Clients Fairly' program. This requires firms to put the interests of the customer at the heart of all dealings with them.[40] The US criteria for 'cease and desist' administrative orders and rules appear tighter: for example they require a breach of law. The concepts of 'fairness' and 'abusive' in US consumer law are settled and quite technical. This is reflected in the evidence the CFPB must have to make rules as discussed below. It is notable that 'fairness' is a central standard in all the jurisdictions we have reviewed. We suspect the terms in which the FSI argues PIPs be adopted in recommendation 22, will fall somewhere between the EU/UK and US models. In none of the jurisdictions we have reviewed have we found any sign that the standard for intervention is *limited* by reference to the size of the class of consumers affected, or the size of their likely individual detriment. Nor is it restricted only to complex products.

B. Evidence and Reasons for Intervention

The Reasons and Evidence Required for Intervention: FSI's objective for the introduction of PIPs is to give ASIC additional powers to deal with stubbornly unsuitable products, distribution and recommendations by advisers, continuing to be made to retail clients. As already mentioned fairness, suitability and risk of significant consumer detriment are the elements the FSI thought should inform PIPs and of which evidence will be required.

In traditional securities law 'suitability' requires a 'fit' between a product and the needs of the investor. This applies only to advisory recommendations, not to issuer direct sale (execution only) transactions or to product design and performance. Suitability is further limited by its application to single recommendations to a particular client at a point in time: remedies are likewise limited.[41] In Australia the suitability obligation has been substituted, by an obligation for individual advisers to have a 'reasonable basis' for their recommendation[42] or a requirement

[37] Ibid art 40(2).
[38] We can provide more detail about this on request.
[39] Undertakings for Collective Investment in Transferable Securities, Directive 2001/107/EC and 2001/108/EC.
[40] Financial Conduct Authority, 'Treating Customers Fairly' (3 March 2015).
[41] Lubin and Wrona, above n 5, 608ff.
[42] *Corporations Act 2001* (Cth) s 945A (repealed by the *Corporations Amendment (Future of Financial Advice) Act 2012*).

that a recommendation be 'appropriate'[43] and in the 'best interests' of the individual retail client.[44] In the credit licensing regime supervised by ASIC there is also a requirement that lenders not enter into a credit contract or lease with a consumer, if it is 'unsuitable for the consumer'.[45] Likewise, the obligation is to an individual consumer.

By contrast product intervention powers are intended as preventive and pre-emptive, and available in respect of a class of investors, a class of products, market structure or pattern of conduct. That raises the obvious question of what kind of evidence is required to ground and defend a decision to intervene. Put another way, the question is: what evidence is required to prove what we might call lack of 'class suitability'?

The United Kingdom: Experience in the UK makes it possible to suggest some angles.[46] Evidence of the size and level of sophistication of the investor group, and the nature and performance of the product or practice in question will be central. The value of losses and whether the product is a central or peripheral one will be important. For these criteria the general sense is, the larger and more vulnerable the investor class, the more likely the intervention. Relevant too, will be whether there is hardship or other vulnerability involved; whether the product is 'complex', unusual or where disclosure cannot mitigate product opacity. Finally, whether future retail investor benefit is proportional to the damage which may be done to already invested consumers should be considered. Given PIPs pre-emptive purpose, that financial consumers have losses already will be probative, but not necessary. This kind of evidence[47] was relevant in the only UK intervention to date, limiting distribution of contingent convertible bonds to retail investors.[48]

The US: As noted already, in making rules the CFPB may address any conduct it considers 'misleading, unfair or abusive.' If relying on the 'unfairness' element, the CFPB must have 'a reasonable basis to conclude' that the act or conduct being addressed 'is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers.'[49] The agency cannot make rules if it considers that injury to consumers is out-weighed by the benefits of competition induced by the practice.[50]

In relying on the 'abusive' element the CFPB may only make rules if the target act or practice 'materially interferes with the ability of a consumer to understand the terms and conditions of a financial product or service'.

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[43] Ibid s 961C.
[44] Ibid s 961B.
[45] *National Consumer Credit Protection Act 2009* (Cth) Ch 3 ("National Credit Act"); ASIC, 'Credit Licensing: Responsible Lending Conduct' (Regulatory Guide, November 2014).
[46] Financial Services Authority, 'Product Intervention' (Discussion Paper 11/1, January 2011) 29-30.
[47] FCA, above n 34, 33 [20].
[48] Financial Consumer Authority, 'Temporary Product Intervention Rules: Restrictions in the Distribution of Contingent Convertible Instruments' (August 2014).
[49] Dodd-Frank Act s 1031(c)(1)(A).
[50] Ibid s 1031(c)(1)(B).

Alternatively the CFPB may make rules against abuse if the act or conduct 'takes unreasonable advantage of a lack of understanding on behalf of the consumer' or 'the inability of the consumer to protect' their interests. Likewise if the provider's act or conduct undermines the 'the reasonable reliance by the consumer on the covered person to act in the consumer's interests.'[51] It is logical to assume that the CFPB must have evidence and other reasons to establish all of these pre-requisites to authority to make rules.

*The European Union: T*he factors and evidence in determining whether there is a significant investor protection concern or threat to the market relate to the size and value of the product or activity, its degree of complexity, innovation or leverage.[52] Generally, the greater the effect, the more likely the intervention. There are other factors: type of clients, product transparency, degree of disparity between the expected return and the risk of loss, innovation and ease and cost to investors of switching and selling the product. [53] Due to the variety of situations, one of these factors may be sufficient to identify a risk while in others a number of factors may be required before PIPs rules can be made. The assessment ultimately depends on the circumstances of each case.[54]

Analysis: In terms of reasons and evidence to ground PIPs, in all of the UK, the US and EU there are developed policies. They concentrate on the numerousness, character and capabilities of target consumers. They also consider the nature and features of the product and degree of disparity between the expected return and the risk of loss. We think that the FSI's discussion means all these criteria are relevant, depending on the case. In Australia with compulsory superannuation we think the UK criterion whether the product is a central or peripheral one, is important. In all of the jurisdictions we have reviewed the evidence is at large and not limited, for example, to complex products or small classes.

ASIC may use evidence to demonstrate a reasoned apprehension of a risk of future 'consumer detriment' in the absence of actual consumer losses. We think a departure from product design and distribution obligations may be initial evidence for use of PIPs. ASIC may bring evidence of losses in like products in other jurisdictions, or evidence of losses in Australia in like products. ASIC may bring behavioural evidence of established effects on consumers of product features or distribution practices. By comparison with the UK, the US and the EU the Australian retail market is very concentrated.[55] It is a market where a small number of issuers and intermediaries are related and where the vast majority of recommendations are concentrated in a short list of products. It therefore may be easier to find evidence of lack of suitability and fairness as well as 'risk of significant consumer detriment' in a class, than where the market is more diverse. ASIC may reason that a product is so wide-spread

[51] Ibid s 1031(d)(1) & (2).
[52] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014, art 40(8).
[53] For more on this, please see: European Securities and Markets Authority, 'ESMA's Technical Advice to the Commission on MiFID II and MiFIR – Final Report' (ESMA/2014/1569, 19 December 2014) 191-196. .
[54] Ibid 188.
[55] ASIC, 'Review of Financial Advice Industry Practice' (Report 251, 2011) 11-13.

that both consumer detriment and systemic risk may be created by a synchronised reaction to a market event. Accordingly, while consumer protection is the primary objective of PIPs, we think the larger the group of affected consumers disclosed by the evidence, the more PIPs may be able to advance pro-competition objectives, resilience and market integrity objectives as well. This is even more likely with wide-spread simple products than complex ones.

C. Is a breach of financial services laws required to intervene?

The FSI stated specifically that 'This power would enable intervention without a demonstrated or suspected breach of the law.'[56] This is to promote the pre-emptive, preventive and timely aims of PIPs. It gives perspective however, to consider briefly the position in other jurisdictions.

The United Kingdom: In the UK intervention does not require a breach of the financial services laws. The approach implements the stated desire of the FCA to 'intervene, earlier in the product chain if necessary, to anticipate consumer detriment and to choke it off before it occurs'.[57] There need not be even a suspicion of breach as is usually necessary to begin an investigation. PIPs can be used alone and before enforcement action (if any) is taken.

The US: A 'cease and desist' administrative order against a single provider by the Consumer Financial Protection Bureau (CFPB) is only available on a breach of the prohibition on 'unfair, deceptive and abusive' conduct or practices.[58] The authority for the CFPB's power to make rules for a class is more subtle. This is because while the standard is linguistically the same it is subject to the legislative pre-requisites discussed above requiring evidence or 'reasonable basis' to ground rule-making.

The European Union: Similar to the UK, ESMA intervention does not require a breach of the financial services laws. It is focused on preventing harm to investors, markets and the EU financial system.

D. Are product intervention powers available in retail markets only?

The FSI expressly stated its objectives in recommending the introduction of PIPs in Australia was to reduce detriment 'from *consumers* buying financial products they do not understand…build *consumer* confidence and trust …through increased *consumer* engagement and participation.'[59] The FSI also discussed complex products, and whether PIPs should be limited to complex products. It concluded that although simple products may be

[56] FSI Report, above n 1, 206.
[57] Hector Sants, FSA Chief Executive, 'FSA Business Plan 2010/11' (March 2010).
[58] Lee, above n 24; cf Wright and Beales, above n 24. See also: *FTC v Sperry & Hutchinson & Co*, 405 US 233 (1972).
[59] FSI Report, above n 1, 207 (emphasis added).

more wide-spread 'the risk of consumer confusion about risk and features is not limited to complex products.'[60] Again, it is illuminating to consider what is done elsewhere.

The United States: The jurisdiction of the US Federal Consumer Financial Protection Bureau (CFPB) is distinctively consumer and is limited by definition to 'consumers'[61] and to 'consumer financial products and services'.[62] These products and services are further defined as being provided for use of consumers primarily in domestic, household or personal purposes. There is no jurisdiction in the Bureau in relation to wholesale markets.[63]

The United Kingdom: By contrast with the US, there is nothing which limits the FCA's power to make product intervention orders, to orders against consumer products only.[64] The FCA is clear that it intends to exercise its intervention power more widely than merely consumer products, though in the interest of consumers: 'We recognise that activities in retail and wholesale markets are connected and that risks caused by poor wholesale conduct can be transmitted between them.'[65] And further, "[p]oor wholesale conduct is not a victimless act simply because it takes place in between sophisticated market participants…It also captures a range of activities that exploit differences in knowledge or market power to undermine trust in the integrity of markets or cause harm to retail consumers.'[66]

The European Union: The EU does not specify which products or markets may attract intervention, and the justifications remain wider than consumer protection. The regulation refers to characteristics of products such as the degree of complexity, innovation and leverage[67] that are more likely to cause consumer than wholesale investor detriment. In practice intervention is overwhelmingly in consumer markets.

E. Which financial products, structures or practices are within scope of an intervention?

The FSI discussion of PIPs does not limit that discussion to investment products. It is true that it uses the term 'financial products', so it is arguable that the FSI did not intend to extend PIPs to credit products. However, the justifications the FSI gives for supporting intervention (consumer behavioural and literacy shortcomings,

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[60] Ibid 209.
[61] Dodd-Frank Act s 1002 (4).
[62] Ibid ss 1002 (5) and (15).
[63] The Bureau has consumer jurisdiction under its title of the Dodd-Frank Act as well as enumerated parallel statutes which deal with fair credit and mortgage practices: Dodd-Frank Act ss 1002(12) and (13).
[64] *Financial Services Act 2012* (UK) ss 137A-D.
[65] Financial Services Authority, 'Journey to the FCA' (October 2012) 12.
[66] Ibid.
[67] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014, art 40(8).

confusing marketing and disclosure documents and variable quality of financial advice) also extend to credit products.[68] This report therefore continues on the basis that PIPs will extend to credit.

The United Kingdom: The FCA supervises a wide horizon of consumer and wholesale financial products, to which its intervention power applies. This ranges from investments, through derivatives and insurance to credit and hire-purchase contracts and financial activities relating to information about persons' financial standing.[69] PIPs may be exercised so long as the rules pursue the FCA's statutory objectives as outlined in Part A above.[70] The FCA may intervene in relation to the entry into 'specified agreements' whether those are for the issue or distribution of products including advising. Policy-wise the focus has been on products, and on product development rather than waiting until point-of-sale or beyond.[71] In practice, as we have mentioned already the FCA's only intervention to date limits distribution including advising: prohibiting retail investors being sold contingent convertible bonds.

The FSI received arguments that PIPs should be restricted to complex products. In the UK this issue is itself more complex because the FCA has other rulemaking powers. It has issued rules under its general rule-making powers prohibiting the sale to retail investors of certain types of complex products.[72] It has also made rules in relation to structured products under other powers.[73] There is no 'bright-line' or definitional limit on the types or features of products that might be the subject of an FCA order under PIPs. In fact, the FSA has made policy and intervened, largely in relation to complex products only.[74] The FCA has recognised that complexity may be a trigger for intervention: 'Consumers cannot always be expected to have enough financial knowledge, information and understanding of complex products and risks to make informed decisions.'[75]

The US: By contrast the jurisdiction of the Credit Financial Protection Bureau concentrates on credit and deposit products and residential mortgages.[76] Jurisdiction over investment products remains with the Securities Exchange Commission under its mandate to regulate 'securities' widely defined. This is whether the 'securities' in

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[68] ASIC, 'Advertising Financial Products and Services (including credit)' (Regulatory Guide 234, November 2012) espec paras 234.1-234.15>; ASIC, 'Unsolicited Credit Cards and Debit Cards' (Regulatory Guide 201, July 2010) [201.4] ; ASIC, 'Mortgage Early Exit Fees: Unconscionable Fees and Unfair Contract Terms' (Consultation Paper, August 2010).

[69] *Financial Services and Markets Act 2000* (UK) s 22 and Sch 2, as amended by the *Financial Services Act 2012* (UK) s 7.

[70] *Financial Services Act 2012* (UK) s 137D.

[71] Financial Services Authority, 'Product Intervention' (Discussion Paper 11/1, January 2011) 16.

[72] Financial Conduct Authority, 'Policy Statement 13/3: Restrictions on Retail Distribution of Unregistered Collective Investment Schemes and Close Substitutes' (June 2013).

[73] Financial Conduct Authority 'Structured Products: Thematic Review of Product Development and Governance' (March 2015) <http://www.fca.org.uk/static/documents/thematic-reviews/tr15-02.pdf>; Financial Services Authority, 'Retail Product Development and Governance – Structured Products Review' (March 2012) *passim*.

[74] FSA, above n 73, 4; Financial Services Authority, 'Treating Customers Fairly – Structured Investment Products' (October 2009).

[75] Financial Services Authority, 'Journey to the FCA' (October 2012) 8 <www.fca.org.uk/static/documents/fsa-journey-to-the-fca.pdf>; Financial Consumer Authority, 'Temporary Product Intervention Rules: Restrictions in the Distribution of Contingent Convertible Instruments' (August 2014).

[76] See definition of 'financial product or service': Dodd-Frank Act ss 1002(5) and (15).

question are targeted to retail or wholesale purchasers. Further, the Commodities and Futures Trading Commission retains commodities and derivatives regulation. Though this is a market mostly used by professionals, the Commission regulates both retail and wholesale transactions under its mandate.[77] In this report we concentrate on the intervention powers of the CFPB since they have a specifically consumer protection purpose, and they have a rulemaking aspect, which the 'cease and desist' powers of the SEC and CFTC do not. The jurisdiction of the CFPB demonstrates a practical consumer protection intervention policy in relation to credit products ranging from motor vehicle finance to home mortgages through credit cards and student loans and beyond. Further the power applies to 'acts or practices in connection with any transaction with a consumer for a financial product or service.'[78] It applies therefore to products, distribution and advising.

There is no distinction in the CFPB's powers between 'complex' and other consumer products. Complex products leave greater opportunity for design and selling practices to be 'unfair, deceptive and abusive'[79] since they are harder for consumers to understand. However, no formal distinction between simple and complex is made otherwise limiting the CFPB's jurisdiction over a wide spectrum of credit and other non-investment financial products.

The European Union: The EU system has product intervention strategies that focus on different aspects of the product. For instance, the UCITS regulation focuses on product design. The Markets in Financial Instruments Regulation gives ESMA the power to temporarily prohibit or restrict marketing, distribution or sale of certain financial products or a type of financial activity or practice.[80] Thus the intervention may be as a result of a product feature, its marketing campaign or even linked to a particular activity or practice of the provider of the financial product. This approach is to ensure the protection of investors, markets and the financial system.[81]

Analysis: While the jurisdictions differ in the division of authority, there is an overarching picture of intervention powers being available across the broad range of consumer financial instruments including credit. There is no sense in which intervention is limited by categories of provider or function. This seems wise given the inter-related business models of issue and distribution in retail markets. The high concentration of ownership, control, product recommendation and bundling of products into strategies with other services (eg platforms) in Australia commends this approach even more.

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[77] SEC cease and desist powers: 15 U.S. Code § 78u–3; CFTC cease and desist powers: 7 U.S. Code § 13a; Andrew M. Smith, 'SEC Cease and Desist Orders' (1999) 51(4) *Administrative Law Review* 1197-1228.
[78] Dodd-Frank Act s 1031(a) and (b).
[79] Lee, above n 24; cf Wright and Beales, above n 24. See also: *FTC v Sperry & Hutchinson & Co*, 405 US 233 (1972).
[80] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014, art 40(1).
[81] Ibid art 40(2).

Further, the hybridisation of product design between previously institutional categories (eg investment, insurance, credit, derivatives) has been a leading characteristic of all financial sectors over the last 40 years. The 'functional approach' to regulation adopted by the Wallis Committee[82] and exemplified by the single license, was to address the worst[83] of this hybridisation. One consequence of the institutional approach is arbitrage through product design taking advantage of the least regulated of the product categories bought together in hybridisation. This difficulty could return if providers offered products or services that have functionally similar performance to those the subject of an intervention. Product bundling, use of platforms and other distribution approaches can pose a similar catch. This would be facilitated if only issuers were subject to PIPs, or credit or other products were left out.

The FCA's policy has taken a robust approach to products which are a functional substitute to those the subject of product intervention.[84] The FCA has placed marketing restrictions on authorised providers in relation to products that might be sold in lieu of those on which a product intervention order has placed limits. This is designed to ensure that the class of persons to be protected by the order is not harmed by the offering of substitutes that the FCA cannot act on directly. Accordingly drafting of powers to make PIPs rules should be mindful of these problems and in line with the functional approach to regulation. PIPs should include all product categories and provider types: this seems likely to be both most efficient and most consumer protective. Including an anti-avoidance provision may assist.

With the exception of France and Belgium, the common approach between the jurisdictions to refrain from defining the difference between complex and simpler products seems wise. A number of bodies have presented attempts to crystallise what it is that makes a financial product 'complex'. They have adopted a number of different approaches. An interesting illustration of the difficulty in using a definition of 'complex product' to limit an intervention power, is that on the IOSCO definition[85] most interests in superannuation funds in Australia would qualify as 'complex': under the ASIC approach[86] it is not clear that super fund interests would be considered complex. In Belgium, simple bank deposit products have been classified as complex if teasers are attached to them.[87] Accordingly, it seems that rather than drawing a regulatory line between 'complex' and simpler products, it may be better to adopt a less fragmented approach and have PIPs available across the product and services range. Their use could be clarified with regulatory guides setting out which aspects are more likely to result in intervention.

F. What interventions are permitted under product intervention powers?

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[82] FSI Report, above n 1, *passim*.
[83] *ASX v SFE* (1995) 56 FCR 236.
[84] FCA, above n 72.
[85] International Organization of Securities Commissions, 'Suitability Requirements With Regard to the Distribution of Complex Financial Products' (Final Report, January 2013).
[86] ASIC, 'Regulating Complex Products' (Report 384, January 2014) 12-15.
[87] Financial Services and Markets Authority (FSMA), *Rapport Annuel 2013*, 144.

The FSI stated that PIPs should include powers to 'require or impose amendments to marketing and disclosure materials, warnings to consumers, and labeling or terminology changes, distribution restrictions and product banning.'[88] The limit was that the FSI did not consider it desirable for PIPs to 'address problems with pricing'[89] or to 'be used for pre-approval of products … [creating] the perception that no regulator intervention implies a low risk product.' [90]

The United Kingdom: Criticisms of product intervention argue that it will be a product pre-approval power, chilling innovation and consumer choice. The FCA has made it plain that it will not exercise a product pre-approval power: 'we have explored the possibility of a product pre-approval scheme and ruled it out…'[91] The UK's intervention powers permit the FCA to make rules to 'prohibit authorized persons from …entering specified agreements with any person…or unless requirements specified in the rules have been satisfied…or the holding by them of any beneficial or any other sort of economic interest in specified agreements'[92] So rather than a general power to for example, require warnings or a 'suitability rating', the FCA's mode of intervention is to limit agreements entered by providers. These agreements may be with virtually anyone, and may be prohibited or subjected to conditions which can introduce a range of approaches. The FCA may also use PIPs to provide that agreements entered in disregard of a PIPs rule, may be unenforceable, may provide for recovery of money and property or for the payment of compensation.[93]

The FCA has general rule-making powers[94] which they have made clear they intend to exercise alongside PIPs. The FCA now has a power to stop misleading promotions: 'One of our powers allows us to ban misleading financial promotions…without going through our enforcement process...this new power will be determined by the specific promotion and not used against the firm as a whole.'[95] It also has new powers to publically announce that it has begun enforcement action. The FCA will be able to 'publish details of a 'warning notice' proposing disciplinary action'[96], allowing the FCA to signal its conduct expectations to firms and to the public at large. The latter power can only be exercised when the FCA considers a person has contravened a provision of the financial services laws.

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88 FSI Report, above n 1, 206.
89 Ibid 206.
90 Ibid 210-11.
91 FSA, above n 75, 14.
92 *Financial Services Act 2012* (UK) s 137D.
93 Ibid s 137D(7).
94 Ibid s 137A(3).
95 FSA, above n 75, 14. See also *Financial Service and Markets Act 2000* (UK) ss 21 and 145, as amended, and a recent example of such rules: FCA, above n 66.
96 FSA, above n 75, 15; *Financial Services and Markets Act 2000* (UK) ss 205 and 207, as amended.

The US: In the US the power to intervene with administrative action is clearly not intended as product pre-approval, since a breach of the central prohibition is required to take action. As discussed above[97] the authority for rule-making would make it practically unlikely to be available as a pre-approval power. The CFPB's most interventionist tool is to issue a 'cease and desist' notice.[98] The' notice is returnable to a court within 30-60 days of issue, and takes effect after 30 days, unless the subject of a court order to stay, vary or remove it.[99] If the notified party accepts the order it is effective immediately. The CFPB is also empowered to take other traditional enforcement action itself[100] or to seek the assistance of a court. This ranges through recission or reformation of contracts, refund of monies and return of real property, disgorgement, damages, public notification, and imposition of limits on the activities or functions of providers. The Bureau may also apply for civil penalties. Finally, a breach of the standard can bring on accessorial liability as well. [101]

The European Union: The modes of intervention in the EU are similar to the UK. ESMA has the power to either restrict or temporarily prohibit a product, activity or practice.[102] In Belgium there are some products in relation to which the regulator gives product pre-approval but this is not across the board.[103] In France the only mode of intervention is to introduce warnings.[104]

Analysis: With the exception of Belgium and the EU's reliance on UCITS, no jurisdiction has embraced product pre-approval. Otherwise, the picture is that each regulator has a different mix of enforcement and rule-making powers to limit or prohibit products and services. All jurisdictions reviewed give their regulators much wider rule-making powers than ASIC enjoys. In all jurisdictions where PIPs or their equivalents are found, the effectiveness of intervention partly depends on the use of other existing enforcement and rule-making powers as well. We particularly like the 'menu' of interventions suggested by the FSI, since we think this may lead to more proportionate and focused action.

G. Should product intervention powers be used only as a 'last resort'?

The FSI argued that PIPs should be used only as a 'last resort'.[105] There is apparent tension between this and the FSI's objective that PIPs would permit ASIC pre-emptive and preventive action. What is the position in comparable jurisdictions on this question?

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97 See the discussion on evidence required for rulemaking under the Dodd-Frank Act s 1031.
98 Dodd-Frank Act s 1053 (b)(1).
99 Ibid s 1053(b)(2).
100 Ibid s 1031 and Title E, especially s 1055 (a)(2).
101 Ibid s 1036(a)(3), if there is knowing or reckless substantial assistance in violation of provisions of s 1031.
102 EU Regulation No 1095/2010 of the European Parliament and of the Council of 24 November 2010, art 9(5); EU Regulation No 600/2014 of the European Parliament and of the Council of 15 May 2014, art 40(6).
103 FSMA, 'Technical Questions Relating to the Provisions of the Moratorium' Question 2.
104 AMF, Position No 2010-05 dated 15 October 2010, 13.
105 FSI Report, above n 1, 206.

The United Kingdom: There is no reference in law or policy to intervention being the 'last resort'. Instead, PIPs are part of more pro-active regulation. They are tools for a more active mode of supervising, designed to prevent harm and loss. There is now a more inclusive approach to intelligence gathering,[106] and a more muscular character to enforcement decision-making and intervention. The FCA has promised that 'We will encourage our staff to be more confident in making bold, firm and predictable decisions….FCA staff will ask more probing questions'[107] The FCA will get its more senior staff involved in supervision and enforcement at an earlier stage, and will 'have a more open and engaged, and challenging approach with firms at the senior management and board level.'[108]

The US: There is no sense in any of the literature surrounding the Consumer Financial Protection Bureau, that the rule-making or enforcement powers we have considered would be used only in the 'last resort'.

The European Union: The more vigorous approaches to supervision and enforcement seen in the UK have been part of EU policy as well as it has developed since the financial crisis. In fact, our research suggests that the term 'last resort' may come from EU discussions in which it is propose that ESMA may only act in the 'last resort'. This is because ESMA would only act when a national authority has failed or was unable to deal with the regulation of the product or its distribution and EU citizens are suffering because of significant investor protection concerns.[109]

Analysis: If it is intended that intervention would be resorted to only when ASIC's attempts to address problems by regulator guidance, persuasion and negotiation have been exhausted, then the notion of 'last resort' makes sense. PIPs should not be thought of as coming after an enforceable undertaking or other enforcement. That would undermine PIPs preventive character. All existing enforcement requires a reasonable suspicion of a breach of the financial services law which the FSI expressly rejected for PIPs. It should be clarified in any final form of Australian PIPs that the 'last resort' is limited to the use of ASIC's informal influence, and not formal enforcement. They should be used infrequently, but Australian PIPs should not be at the 'end-of-the-line' of formal enforcement.

H. Have intervention powers been accompanied by 'product design and distribution obligations'?

[106] UK 'super complaints' from consumer organisations allowing consumer bodies to draw attention to patterns of behaviour or harmful products and their 'on the ground' experience of them: FSA, above n 75, 15.
[107] FSA, above n 75, 9.
[108] Ibid 25.
[109] European Commission, 'Request for EIOPA's Technical Advice on Possible Delegated Acts Concerning the Regulation on Key Information Documents for Packaged Retail and Insurance-Based Investment Products' (30 July 2014) 3 ; EU Regulation No 600/2014 of the European Parliament and of the Council of 15 May 2014, art 40(2).

The FSI's recommendation 21 advocated 'a targeted and principles-based design and distribution obligation.'[110] Such an obligation is also known as 'financial product governance' especially in Europe. It is an approach to regulation which seeks to improve standards of financial provider decision-making higher in the value chain of product provision, than point of sale.

The United Kingdom: In the UK financial product governance has been under development as part of the long-standing retail product review process, and the 'Treating Customers Fairly' program. In the FCA's view the essence of product governance is a change of approach by providers to product design and distribution. The aim is to have the principles of suitability and fairness, built into the decision-making of providers before the point of sale. The FCA's statements on this approach are bold: 'Provider firms will be expected to have robust procedures to assess their target market, perform adequate stress testing, and manage the product risks for consumers. We would expect the sorts of standards that consumers associate with basic vehicle safety or over the counter medicines…for widely sold financial products'[111] The FCA also expects provider identification of problems in post-sale product performance and distribution practices with feed-back to the provider so problems can be acted on then and avoided in further offerings. The outcome sought through product governance is clear: the FCA is 'putting more responsibility on the providers to ensure that products only reach the customers they were designed for – and that they function as expected'.[112]

The US: In the US the search for overt discussion or a requirement of product design and distribution obligations yields very meager results. There appears to be no express reference to it in the Dodd-Frank Act, nor in the materials of the Consumer Financial Protection Bureau, in its regulations, guidance or policy discussion documents. However, there is no doubt that financial product and services compliance practice in the US is developed, though it mostly responds defensively to legal liabilities.

The European Union: In the European arena ESMA's approach to product design and distribution obligations is very like the UK.

Analysis: It is clear that express requirements for 'financial product governance' are more developed in Europe and to some extent in international organisations[113] than in the US or Australia. There are also self-regulatory examples in Australia of established product and distribution obligations.[114] The FSI has required a product governance obligation, dealing with product design and distribution, and for the reasons given above, we

[110] FSI Report, above n 1, 198 (Recommendation 21).
[111] FSA, above n 75, 13.
[112] Ibid.
[113] IOSC, above n 85, 18, espec principle 7; Organization for Economic Co-Operation and Development, 'Governance Systems for Collective Investment Schemes in OECD Countries' (2001) 13.
[114] Australian Financial Markets Association, 'Principles Relating to Product Approval – Retail Structured Finance Products' (October 2012).

interpret this as including advice. Further, the FSI recommended it be ‘principles based’. This could be done by ASIC developing a Regulatory Guide setting out expected design and distribution obligations and shaping the PIPs powers. An alternative, still principles based and which we prefer, would be to anchor the Regulatory Guide expectations of product design and distribution obligations in a new license obligation under Section 912A of the Corporations Act. We suggest the Regulatory Guide for design and distribution obligations, should be closely related to the standard and evidence required for intervention using PIPs.

VI. Product Intervention Powers and ASIC Rule-making

ASIC’s Current Powers to Respond to Consumer Markets: Generally, ASIC has powers to deal only with particular transactions or individual licensees. It has limited powers to give relief from rules to individual applicants. ASIC also has nominated powers to make class orders which in relation to settled policy can give relief to a class without an individual application to ASIC.[115] However, class orders are limited in being used to give relief from nominated rules already in existence, and only in exceptional circumstances involve the making of new rules on new subject matter. This limits ASIC’s ability to respond to the risk of consumer detriment industry-wide.

On the enforcement side, the closest ASIC regulation comes to a power that deals with a mass of breaches, is the enforceable undertaking.[116] The enforceable undertaking can respond to a mass of claims by consumers: it can require future consumer redress, rehabilitation of a non-compliant licensee, business model changes, reform of client-facing practices and so on. Its foundation however, remains past non-compliance by a single licensee, and the undertaking is a customised settlement agreement between ASIC and that licensee.[117] As well as being individualised these regulatory tools are essentially backward looking: they seek to repair the past, they do not have a preventive purpose.[118]

The FSI’s Recommendation that ASIC have New Powers for Consumer Markets: It is clear that the FSI intends PIPs to be used in ‘class’ circumstances: ‘The power could be used against an individual firm or class of firms in relation to a product or class of products.’[119] This is also clear from the modes of intervention which the FSI

[115] ASIC, ‘Applications for Relief’ (Regulatory Guide 51, December 2009) [51.63] .
[116] *Australian Securities and Investments Act 1989* (Cth) ss 95A and 95AA.
[117] Theoretically an enforceable undertaking could be entered by ASIC in identical terms with a number of licensees involved in the same non-compliance (eg misleading the market through manipulation of the Bank Bill Swap reference rate (BBSW)). The authors know of no case in which this has been done.
[118] If an enforceable undertaking is effective in changing an organisation it may prevent future breaches. Section 50 of the *Australian Securities and Investments Act 1989* (Cth) also allows ASIC to take action in relation to a class of investors and addresses the ‘mass market’ context. It allows ASIC to stand in the shoes of a class of investors and sue a non-compliant financial provider on their behalf. Section 50 is however the classic backward looking sanction, for it authorises litigation, not forward-looking prevention.
[119] FSI Report, above n 1, 206.

recommended:[120] product banning for example, is ineffective against a single provider. Most explicitly, the FSI recommends PIPs as a diagnosis of the deficiency that 'ASIC can only take enforcement action against conduct causing consumer detriment on a firm-by-firm basis, even where the problem is industry-wide.'[121] Also the stipulation that intervention need not demonstrate 'a suspected breach of the law'[122] accords with exercise of PIPs through making rules as does its description as a 'pro-active' power.[123] The fact that the FSI recommends consultation with APRA before using the power,[124] that its use should be reviewed by the Government after 5 years[125] and that after the 12 month span of any particular order it might be 'extended by Government if more time was needed',[126] all suggest a rule-making power rather than an administrative decision-making power.

The FSI makes fewer references that suggest PIPs might also be exercised through administrative action. One quotation above refers to the use of the PIPs rules against a single firm, and in relation to a single product. This is an unusual way to exercise rule-making power which is usually reserved for a class of subjects. Further, a rule made against a single provider would not be registrable under the Commonwealth *Legislative Instruments Act* 2003. That shuts off the major avenue of accountability of Parliamentary review by disallowance motion. A more opaque reference in the FSI report is in the recommendation that 'The power be subject to a judicial review mechanism.'[127] We discuss this further below. Now it is enough to say that a reference to 'judicial review' is by no means a clear indicator one way or another between rule-making or administrative decision.

As ASIC has few rule-making powers and PIPs are universally exercised in other jurisdictions through rules, the rest of this Part considers how this might be done in Australia. It also gives some consideration to giving ASIC *both* rule-making and administrative decision-making powers for intervention, allowing ASIC greater flexibility of action as circumstances of an intervention dictate. This is the position in the US.

A. ASIC's Current Delegated Legislative Rule-making Powers

PIPs Rule-making Powers in Comparative Analysis: As discussed in detail above, all of the overseas regulatory agencies we have considered have more capacious general powers to make rules than ASIC. ASIC has virtually no general powers to make rules itself. As also discussed above, in the EU, the UK and the US product intervention is implemented by rule-making.

[120] Ibid.
[121] Ibid 207.
[122] Ibid 206.
[123] Ibid: the adjective used in the text of Recommendation 22 itself.
[124] Ibid.
[125] Ibid 206 and 211.
[126] Ibid 206.
[127] Ibid 206 and 212.

By contrast ASIC's power which is most like rule-making is to make class orders. This power is unusual but also limited: ASIC may 'along with its power to exercise "on the ground" discretion…alter the way in which legislative rules are applied…the executive agency that is charged with administering the corporations legislation has the power to rewrite aspects of that legislation.[128] It can, 'in effect, do the work of Parliament.'[129] This is a unique power amongst Australian federal regulatory agencies and appears to be unique in the world.[130] An unusual example of the use of this power was in relation to short-selling at the height of the Global Financial Crisis. From September 2008, ASIC issued a series of class orders under Part 7.9 of the Corporations Act (which regulates the issue, sale and purchase of financial products) which inserted new provisions into the Act, imposing disclosure requirements on those conducting covered short sales.[131] The class orders[132] were later confirmed by the enactment of the *Corporations Amendment (Short Selling) Act 2008* by Federal Parliament.

These class orders were unusual. First, ASIC normally gives relief from the Corporations Act in response to single applications, although the wording of the sections granting the modification powers also allows ASIC to initiate changes.[133] Second, class orders rarely result in the enactment of legislation. Third, the modifications prohibited conduct and imposed potential liability on people to whom the class orders applied. Usually, class orders are beneficial and provide relief from requirements.[134] The Regulatory Guide *Applying for Relief*[135] says that ASIC exercises discretion to grant relief consistently with existing policy and 'on the basis of principles which are definitive and whose limits are clearly defined.'[136] The Regulatory Guide states that (emphasis added):[137] "*In general*, we will not use our discretionary powers to effect law reform. That is, relief will not be given to reverse the usual and intended effect of the Corporations Act.' Also, ASIC acts 'on policy that is well settled or after undertaking public consultation':[138]

Accordingly, we are of the view that ASIC's class order powers are too limited to allow the making of PIPs rules. In our opinion legislation is required to grant ASIC a rule-making power tailored to the purposes of intervention identified by the FSI.

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128 It is worth noting, given our discussion of the requirements of the *Legislative Instruments Act 2003* (Cth) below, that ASIC Class Orders are exempted from the requirements of that Act, under s 7.
129 Stephen Bottomley, 'The Notional Legislator: The Australian Securities and Investments Commissions' Role as a Law Maker' (2011) 39 *Federal Law Review* 2.
130 Ibid.
131 Another Class Order issued two days later amended the earlier Class Order, inserting another section which prohibited short selling of securities traded on licensed financial markets in almost all situations. Two new Class Orders were issued in the following two days: ASIC, *ASIC Class Order - Covered Short Sales,* CO 08/751, 19 September 2008, in Bottomley, above n 129, 3.
132 ASIC, *ASIC Class Order - Variation of Class Order,* CO 08/752, 21 September 2008, in Bottomley, above n 129, 3.
133 Explanatory Memorandum, Financial Services Reform Amendment Bill 2003 (Cth) [3.65] which notes that 'in most situations' exemption and modification powers are exercised in response to requests', in Bottomley, above n 129, 7.
134 Bottomley, above n 129, 5.
135 ASIC, above n 115.
136 Ibid r 51.53.
137 Ibid r 51.62.
138 Ibid r 51.64.

B. Accountability for Product Intervention Powers (PIPs)

In this section we consider the processes and accountability avenues that would apply when implementing PIPs by rulemaking.

Accountability through the Requirements of the Legislative Instruments Act 2003: The first question is whether PIPs rules would be within the requirements of the Commonwealth *Legislative Instruments Act* 2003. This question is relevant because it goes some way to meet the FSI's requirement of accountability for PIPs. The legislation defines a 'legislative instrument' in Section 5:

> (1) Subject to sections 6, 7 and 9, a legislative instrument is an instrument in writing:
> (a) that is of a legislative character; and
> (b) that is or was made in the exercise of a power delegated by the Parliament.
>
> (2) Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.
>
> (3) An instrument that is registered is taken, by virtue of that registration and despite anything else in this Act, to be a legislative instrument.
>
> (4) If some provisions of an instrument are of a legislative character and others are of an administrative character, the instrument is taken to be a legislative instrument for the purposes of this Act.

The *Legislative Instruments Act* would apply if the PIPs were (as seems logical) inserted into the Australian Securities and Investments Act and the *National Consumer Credit Protection Act 2009* (Cth). That would require PIPs rules to abide by the drafting standards contained in s 16 of the *Legislative Instruments Act.* Further ASIC should, pursuant to s 17 of the Act, conduct consultation before issuing PIPs rules. This will be especially important where (as seems likely) the proposed rules are likely to 'have a direct, or a substantial indirect, effect on business.'[139] Consultation should include those who may have expertise in the area and those affected by the making of PIPs rules.[140] The FSI has also recommended that APRA be consulted prior to any intervention.[141] Section 18 provides a number of circumstances in which consultation is not necessary: one of these, where instruments are required as a matter of urgency, may apply given that the FSI has recommended that PIPs rules are to be preventive. Further the FSI has limited the duration of PIPs rules to 12 months: their temporary nature also suggests the character of urgency. Legislative instruments are not rendered ineffective or invalid because consultation was not undertaken.[142]

Accountability Through Parliamentary Disallowance: Part 2 of the *Legislative Instruments Act* provides that instruments which meet the definition of 'legislative instrument' in Sections 5-7 of the Act must be registered with

[139] *Legislative Instruments Act 2003* (Cth) s 17(1).
[140] Ibid s 17(2).
[141] FSI Report, above n 1, 206.
[142] *Legislative Instruments Act 2003* (Cth) s 19.

the First Parliamentary Drafter's Office. Failure to do this impairs validity and enforceability.[143] All registered instruments must then be tabled in Parliament, and may be subject to a Parliamentary motion of disallowance under Part 5 of the Act. In broad terms that Part allows all legislative instruments tabled, to remain effective after the expiry of the waiting period of 15 Parliamentary sitting days of being tabled, unless a disallowance motion is successful.[144] While 15 days is not a long period, if Parliament is not in session, then the 15 days may in fact be many weeks. This may compromise the pre-emptive and preventive purposes of PIPS rules. As in the UK, in legislating for PIPs it may be necessary to exempt temporary rules from the Parliamentary disallowance procedure. Instead they should be published in the Gazette and made available on the ASIC web-site in a place dedicated to PIPS rules whether temporary or permanent. Alternatively ASIC could try to negotiate a temporary voluntary moratorium with providers (as in Belgium) for the 15 sitting days or use the administrative decision route that we have recommended for particularly egregious providers.

Accountability for PIPs Rules Through Judicial Review: It is a commonplace that the administrative decisions of ASIC are subject to review on the merits, usually by the Administrative Appeals Tribunal. ASIC class orders are considered administrative and judicially reviewable by the AAT. [145] The PIPs administrative decisions that we have recommended would also be reviewable through this avenue.

As the FSI has included the requirement that PIPs rules be judicially reviewed, it is necessary to consider how this might be done. The Federal Court can judicially review legislative enactments under s 39B(1A) of the *Judiciary Act 1903* (Cth). The issue will be whether PIPs rules made by ASIC pursuant to Corporations Act provisions count as a matter "arising under any laws made by the Parliament." Section 39B(1A) provides the following:

> s 39B Judiciary Act: (1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
> (a) in which the Commonwealth is seeking an injunction or a declaration; or
> (b) arising under the Constitution, or involving its interpretation; or
> (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Creyke and McMillan argue that:

> …s 39B(1A)…confers a broad jurisdiction on the court that extends beyond administrative law matters...s 39B(1A) augments the administrative law jurisdiction of the court, as the following three examples illustrate: First, s 39B(1A)(c) enables the court to review directly the validity of subordinate legislation, which the court cannot do under the ADJR Act because it is not an issue of an administrative character…The public law jurisdiction arising

[143] Ibid s 31.
[144] The grounds for such a disallowance are set out in Order 23 of the Standing Orders of the Australian Senate.
[145] For abundant caution they are exempted from the *Legislative Instruments Act 2003* (Cth) s 7 and have been held by the High Court to be reviewable by the AAT: *ASIC v DMB Management P/L & Ors* [2000] HCA 7; (2000) 199 CLR 321.

> under the Judiciary Act is extensive, but subject to limits nevertheless… An action resting on s 39B(1A)(c) must 'arise under' a law made by Parliament. [146]

A relatively recent case of prohibition of medicinal products under the *Therapeutic Goods Act 1989* (Cth) illustrates how judicial review under Section 39B(1A) might operate in relation to PIPs rules.[147] As Creyke and McMillan summarise,[148] 'the *Therapeutic Goods Act 1989* (Cth) conferred power on the National Drugs and Poisons Schedule Committee to decide what drugs could be listed on the Poisons Standard. A drug listed in Appendix H of the Standard could be sold without prescription; that is, it could be advertised for direct sale to consumers. Acting on a complaint from the Australian Medical Association and the Australian Consumers Association, the Committee decided under s 52D(2) of the Act to remove from the Standard a weight control drug, Orlistat… Roche Ltd, which manufactured the drug, challenged that decision under the ADJR Act. The court held that a decision by the Committee to amend the Poisons Standard was a decision of a legislative character, and accordingly was not reviewable under the ADJR Act.'

The court's conclusion that the power to prohibit the drug had been legislative in character, relied on several considerations. In particular, the inclusion of a substance in a schedule of the Poisons Standard determined the future general lawfulness of conduct in relation to that substance. The decision had determined the content of rules of general application. Any decision to prohibit the drug, would apply to the substance in general, not merely to the substance when manufactured or supplied by a single provider. Public consultation was thought an important element of the process that led to the decision and its legislative character. The court considered the Poisons Standard an important element of a national system of controls relating to the quality, safety, efficacy and timely availability of therapeutic goods. It formed part of a framework for the control and regulation of poisons in Australia. It was permissible for the decision-makers to have regard in exercising their powers to broad policy considerations concerning public health. Finally, it was important that there was no provision for merits review of the decision of the committee — other than by the committee itself. Absolutely finally, that prohibition decisions were required to be published in the *Gazette* and, not amenable to executive variation or control, spoke to their legislative quality.

This decision indicates that properly drafted, PIPs rules subsequently made by ASIC under legislation would be judicially reviewable by the Federal Court as delegated legislation. This involves a shorter list of factors than the merits review of administrative decisions usually undertaken by the AAT. The grounds of review of delegated legislation include: failure to complete formal requirements in making the rules; that delegated legislation is not

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[146] Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (2nd Ed, LexisNexis Butterworths, 2009) 47. See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001). See also Administrative Review Council, *The Scope of Judicial Review*, Report to the Attorney-General No 47 (April 2006).
[147] *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.
[148] Creyke and McMillan, above n 146, 111.

within the scope or purpose of the empowering primary legislation; that it is inconsistent with the primary act or other law; delegated legislation that is unreasonable or disproportionate in effect given the purposes of the primary legislation; finally, delegated legislation may be reviewed if too uncertain in its terms to discern the rights and obligations it imposes.[149] Unlike an administrative decision disregard of the bias rule of natural justice, absence of reasons and taking account of irrelevant circumstances will not be available to challenge the validity of PIPs rules as delegated legislation.[150]

Analysis: This discussion strongly suggests that new legislation is required to grant ASIC the product intervention powers recommended by the FSI to further financial consumer protection. The power should be available as a power to make rules about classes of providers, products, practices or consumers. A power to make rules should be exercised in conformity with the *Legislative Instruments Act* except where there are reasons of urgency requiring consultation and Parliamentary disallowance to be by-passed. The rules made should be in a form that makes them judicially reviewable under s 39B(1A) of the *Judiciary Act.*

The new legislation should also make intervention available as a power to make administrative orders in relation to particular providers, products or practices. This gives greater regulatory flexibility. It could augment ASIC's ability to act pre-emptively. Given the concentration of the Australian consumer financial services sector, an intervention with one provider may give greater coverage than in other jurisdictions. The discussion above shows that it is unlikely that an intervention power could be exercised against one provider as rule-making. This is because of the *Legislative Instruments Act* and judicial decisions such as that in the therapeutic goods area, discussed above. A decision against one provider under PIPs would be reviewable at the AAT unless the legislation to grant the power provided otherwise.

The FSI suggested that a many of the criticisms of intervention powers can be met by the design and implementation of the power,[151] and making the Australian version 'less extensive'[152] than those in other places. By comparison with the general and PIPs rule-making powers in other jurisdictions, the grant to ASIC of a limited power to make rules specifically for product intervention, would already be less extensive. Features such as focused tools for intervention rather than over reliance on prohibition have the same targeting effect.

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[149] Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (Butterworths, 3rd Edition) 114-115.
[150] Ibid 115.
[151] FSI Report, above n 1, 210.
[152] Ibid 211.

VII. Would Product Intervention Powers Have Assisted in Past Financial Services Failures?

The chief regulatory tools available to ASIC under the settings from the Wallis Report are disclosure and market integrity. Even in instances of complying disclosure, consumers have suffered losses that were not disclosed in a way that investors were likely to understand. Market integrity is enforced through ex-post court action and full restitution of losses is rare. Intervention is not a substitute for disclosure or market integrity, but is complementary to them. This Part of our report identifies cases in which these regulatory tools were not enough, and we suggest how PIPs would have assisted.

A. Simple Products

Complexity makes it harder to explain risk, but as the FSI recognised, even simple products may lead to investor confusion or detriment.[153] This may be because product design or distribution takes advantage of a behavioural short-coming of consumers. It may also be simply because the product is bad value for money and disclosure is so poor this cannot be discovered. This may be so even in disclosure which is formally compliant.

Funeral insurance: This is an example of a wide-spread product that used questionable marketing techniques and in some instances appealed to a known consumer behavioural bias. Insurance companies offer policies providing funeral cover. These products are advertised on daytime TV in emotional terms. Product disclosure statements likewise reveal a focus on giving 'peace of mind' and 'at this emotional time'[154] This kind of marketing distracts attention from the cost of products and the rules on premium increases. These were often not clear even when formal disclosure requirements were met,[155] obscuring the fact that the payout on funeral insurance was less than the premiums. In other words funeral insurance may be bad value for money. Finally, 'free' gifts were offered as 'teasers' on entry to funeral insurance. Behavioural research shows that 'teasers' distract buyers from the assessment of longer term benefits of a product such as value for money. In Belgium offering a 'teaser' may result in a product being classified as complex.[156] 'Poor marketing and advertising practices mean that consumers aren't able to easily make good assessments when considering funeral insurance, limiting the effectiveness of competition'.[157]

ASIC negotiations with funeral insurers have led to withdrawal of advertising campaigns.[158] If there had been urgency or recalcitrance, PIPs would have allowed ASIC to stop marketing quickly and unilaterally. The PIPs

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[153] FSI Report, above n 1, Ch 4.
[154] ASIC, 'Paying for funerals: How Consumers Decide to Meet the Costs' (Report 292, July 2012) 16-17.
[155] Ibid 37.
[156] Financial Services and Markets Authority, *Rapport Annuel 2013,* 144.
[157] Consumer Action Law Centre, 'ASIC Action Exposes Funeral Insurance Advertising Tricks' (Media Release, 26 June 2013).
[158] See for example ASIC, 'ASIC Acts to Improve consumer Understanding of Funeral Insurance' (Media Release 13-152, 26 June 2013); ASIC, 'ASIC Continues to Focus on Funeral Insurance' (Media Release 14-007, 20 January 2014).

interventions we have recommended include a power to ban a product feature: this could have been used to remove the offer of 'free' gifts for example.[159]

Consumer credit insurance: Consumer credit insurance covers loan repayments if a borrower/policy holder becomes unemployed, ill or dies. The mis-selling of this product has been such that ASIC has received complaints from consumers who were not even aware that they had purchased the product.[160] Further, ASIC reports evidence that the process of claiming on consumer credit insurance is costly and stressful.[161] This is because some consumers are sold insurance they paid for but were not told that because of exclusions they were ineligible to claim. A similar product in the UK, payment protection insurance, was sold aggressively, with payment protection insurance applications being included in consumer loan applications. Consumers would be provided disclosure documents, but pressured to buy, not told the product was optional, not told the true cost of the policy nor that there were substantial exclusions and the product was not suitable for them.[162] A High Court challenge[163] concluded with huge compensation repayments.[164] As all this indicates, even what appears to be a simple product may result in widespread losses to investors and the problems are not unique to the UK.

In Australia the difficulties with consumer credit insurance were spotted in 1987. There was some improvement in 1996 with capping of the very high commissions on policy sales. This only occurred because the whole of consumer credit was being reviewed. In the meantime tens of thousands of policies were sold. If PIPs had been available to prohibit dubious selling practices and un-explained exclusions, a large group of consumers would have been saved wide-spread losses on a relatively simple product.[165] In Britain the policies were sold from 2005. From 2006, onwards there were 500,000 complaints a very high percentage of which were substantiated. Clarity of obligations was not obtained until 2011 when the High Court decision was given. Twelve billion pounds of compensation has now been paid.[166] Clearly if PIPs had been available huge losses could have been prevented and expensive litigation avoided.

Unlisted debentures: ASIC became concerned about unlisted debentures well before 2007 when it consulted on proposals to enhance disclosure to retail clients in respect of the $8 billion unlisted and unrated debenture market. Although a form of corporate borrowing by offering debt instruments, debentures were marketed using terms like 'account', 'deposit' or 'branch' in a way that misled consumers to overlook that debentures are not a

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[159] Consumer Action Law Centre, above n 153.
[160] Amy Bainbridge, 'Add-on Insurance in Corporate Regulator Spotlight', *ABC News* (online), 28 February 2014 ; ASIC, 'Consumer Credit Insurance: A Review of Sales Practices by authorised Deposit-Taking Institutions (Report 256, October 2011) 7.
[161] ASIC, 'Consumer Credit Insurance Policies: Consumers' Claims Experiences' (Report 361, July 2013).
[162] *British Bankers Associations v Financial Services Authority and The Financial Ombudsman Services* [2011] EWHC 999 (Admin) [46].
[163] Ibid.
[164] Financial Conduct Authority, 'Monthly PPI Refunds and Compensation' (12 March 2015) .
[165] Commonwealth of Australia, *Financial System Inquiry: Interim Report* (July 2014) 21-22.
[166] Note 162 above 22.

bank deposit. The most developed example of this was Banksia Securities Limited which even developed a branch network in Victoria. It collapsed in 2012 leaving 3,000 investors facing a potential loss of $650 million.[167]

Within its powers ASIC had taken action for a long time. In 2007 ASIC consulted[168] and a report and regulatory guide improving disclosure followed.[169] ASIC also issued of a list of the 15 largest unrated and unlisted debentures that it believed involved high risk.[170] In 2008, ASIC issued a further guide on unlisted debentures.[171] The policy was further adjusted in 2010.[172] Despite these disclosure initiatives, by 2012, 8 of the 15 largest debenture holders ASIC had rated as risky had collapsed.[173] If ASIC had PIPs available it could have required changes to advertising and product terminology before 2007 and also the use of warnings that debentures were risky compared with a bank deposit.

B. Complex Products

In a number of instances retail investors were sold unsuitable complex products. A lack of powers and a requirement for a breach of the financial services laws meant ASIC could not take action to avoid or mitigate investors' losses.

Westpoint Group: Between 2000-05 Westpoint, a property developer, offered retail investors promissory notes returning 12% return per annum on their investment. The underlying was a complex mezzanine property scheme. The only disclosure was an information memorandum. Financial advisers were earning up to 10% commission to sell the notes. During 2002-03, ASIC received complaints about the notes.[174] Investigation suggested a prospectus should have been issued,[175] and that the information memorandum contained misleading and deceptive statements. After prolonged and futile negotiations ASIC took action in 2004 on a technical interpretative breach of the *Bills of Exchange Act* (rather than the *Corporations Act),* the only basis for action.[176] The action was unsuccessful.[177] An appeal decision in 2006 was also unsuccessful.[178] ASIC's concerns were vindicated in 2005 when Westpoint collapsed leaving investor losses of $388 million.[179]

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167 Jonathan Shapiro and Matthew Drummond, 'Capital flaw breaks Banksia', *Australian Financial Review* (online), 30 October 2012 <http://www.afr.com/p/national/capital_flaw_breaks_banksia_SuYEWaz3uhUmVM23ElVOGP>.

168 ASIC, 'Unlisted Unrated Debentures: Improving Disclosure for Retail Investors' (Consultation Paper 89, 23 August 2007).

169 ASIC, 'Debentures – Improving Disclosure for Retail Investors' (Report 127, April 2008); ASIC, 'Debentures and unsecured notes – improving disclosure for retail investors' (Regulatory Guide 69, October 2007).

170 Michael Pascoe, 'ASIC finally names the riskiest names', *Crikey* (online), 27 August 2007 <http://www.crikey.com.au/2007/08/27/asic-finally-names-the-riskiest-names/?wpmp_switcher=mobile>.

171 ASIC, 'Investing in debentures? Independent guide for investors reading a prospectus for unlisted debentures' (ASIC Booklet, April 2008).

172 ASIC, 'Debentures and unsecured notes–improving disclosure for retail investors' (Regulatory Guide 69, June 2010); ASIC, 'ASIC Strengthens Disclosure Requirements for Debentures and Unsecured Notes' (Media Release 10-132AD, 25 June 2010).

173 Matthew Drummond, 'ASIC cracks down on soft lenders', *Australian Financial Review* (online), 30 October 2012 <http://www.afr.com/p/business/financial_services/asic_cracks_down_on_soft_lenders_klCGmzgS5dnnN06f2BgpVM>.

174 Evidence to Senate Standing Committee on Economics, Parliament of Australia, Canberra, 31 May 2006, 62.

175 In accordance with the *Corporations Act 2001* (Cth) Ch 6D.

176 Evidence to Senate Standing Committee on Economics, Parliament of Australia, Canberra, 31 May 2006, 62.

If PIPs had been available ASIC would have been able stop distribution of the information memo since it was misleading and deceptive. It could have required a warning to be issued that the $50,000 face-value of the notes, the absence of a trustee for note holders and the high commissions to financial advisers all suggested the notes were high risk for retail investors. At the same time it could have investigated the recommendations being made by advisers to ensure the high commissions were not driving unsuitable recommendations. With PIPS ASIC could have done this in 2002-03 without a long court battle which delayed action until it was too late.

Storm Financial: On the face of it, investors at Storm Financial received the required disclosure documents. Storm Financial's strategy recommended highly geared investments for retirees who were retail investors.[180] Retail clients were recommended to take out equity loans against their homes at inflated values,[181] margin loans at a high percentage of the value of their portfolio, and to invest the lot in index funds in the share market. It was a single 'cookie cutter' strategy for Storm clients.[182] The loans and index funds central to the strategy, relied on long term embedded commercial arrangements between Storm and a number of large banks.[183] While arguably disclosure was technically compliant, the risks of the strategy were not disclosed in a way the clients were likely to understand.[184] Storm Financial collapsed in December 2008 leaving retired clients with no hope of replacing their retirement income.[185]

In 2006-07, ASIC received four complaints, none from Storm Financial clients. Inquiries and surveillance ASIC had undertaken, had not raised major issues.[186] Short of a judicial finding that personal advice provided to individual investors lacked a reasonable basis,[187] ASIC could not have taken action prior to the collapse of Storm: it argued 'neither the earlier surveillance work nor the more recent complaints on the work we have done so far provided ASIC with a smoking gun… the options to close down the business were very, very limited, if any'.[188] . ASIC had no power to withdraw Storm's financial services license, because it thought Storm's advising strategy and business model endangered its clients.[189]

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177 *Australian Securities & Investments Commission v Emu Brewery Mezzanine Ltd* (2004) WASC 241.

178 *Emu Brewery Mezzanine Ltd (In Liq) v Australian Securities and Investments Commission* [2006] WASCA 105 (15 June 2006).

179 ASIC, 'Westpoint' (Media Release, last updated 2 February 2015).

180 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Financial Products and Services in Australia* (November 2009) 21.

181 Ibid 35.

182 Ibid 27.

183 The Commonwealth Bank of Australia, Macquarie Bank and the Bank of Queensland.

184 Especially the foreclosure of their homes: Parliamentary Joint Committee, above n 180, 28-29.

185 Ibid 19 and 28-29.

186 Ibid.

187 In breach of then s 945A of the *Corporations Act 2001* (Cth).

188 Evidence to Senate Standing Committee on Economics, Parliament of Australia, Canberra, 25 February 2009, 185.

189 *Corporations Act 2001* (Cth) s 913B(1) and ASIC, note 180, 173-174.

The requirement for ASIC to find a breach of the law to take action is clearly the sticking point in this account. As in Westpoint it is probable that if complaints and ASIC surveillance had given ASIC grounds to investigate, there would have been a long period before ASIC obtained a remedy from a court. It seems to us that in the Storm case PIPs may have been most useful when the news broke on 8 October 2008, that Storm clients were receiving margin calls. Many Storm clients ended up in difficulty because of the chaotic administration of their margin accounts as between Storm and the CBA. PIPs may have allowed ASIC to intervene quickly, bringing all the providers to the table in a 'stand-still' while a resolution (such as cashing out all accounts) was hammered out. PIPs could have prohibited new recommendations or extensions of the strategy as well.

Applying PIPs to the Storm case does indicate that they are not a panacea. Another obstacle for ASIC in 2006-07 was that when the complaints were received, the market was high and supporting the Storm strategy. If PIPs had been available ASIC would have had to argue a 'risk' of detriment, rather than having evidence of it. As there were many Storm clients nearing or at retirement, the high leverage and the residential mortgages key to the strategy, may have provided evidence of that risk. The success of the strategy then, may however have limited ASIC to posting warnings, or obtaining changes to disclosure. Finally, the issue of PIPs rules in this case would have given existing investors in the strategy, an opportunity to re-consider its suitability. That alone, may have saved many from crippling financial losses.

Agribusiness managed investment schemes: Agribusiness managed investment schemes are another example where even if the disclosure requirements were complied with, consumers were not helped to understand the risks. Agribusiness collapses since the GFC have revealed unsustainable business models in the offering entities.[190] They left a number of investors facing financial ruin. [191] As with other managed investment schemes, investors in agribusiness managed investment schemes pool their funds for a common purpose, here the financing of large scale agricultural operations.[192] The two largest schemes, Timbercorp and Great Southern, relied heavily on borrowed money. Tax benefits led many investors to borrow to buy their interest in the schemes.[193] Both Timbercorp and Great Southern also provided direct finance to investors or organised finance with other lenders.[194]

[190] With collapses at Environinvest Limited, Timbercorp Securities Limited (Timbercorp), Great Southern Managers Australia Limited (Great Southern), FEA Plantations Limited, Rewards Project Limited and Willmott Forests Limited: ASIC, Submission No 34 to Senate Standing Committee on Economics, Parliament of Australia, *Inquiry Into Forestry Managed Investment Schemes*, September 2014, 15.
[191] 'Investors Call on ANZ to Show Compassion over Timbercorp Debts', *ABC News* (online), 12 November 2014 <http://www.abc.net.au/news/2014-11-12/investors-call-on-anz-bank-to-show-compassion-over-timbercorp/5884646>.
[192] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Aspects of Agribusiness Managed Investment Schemes* (September 2009) 4, 13.
[193] Ibid, 31.
[194] Ibid, 15.

Court proceedings confirmed that these schemes complied with disclosure requirements.[195] The Court noted that the 'business of the group was reviewed, analysed and managed with apparent rigour… The evidence supports the conclusion that the directors and senior management performed their duties in good faith, with a genuine desire to comply with their statutory obligations and preserve and enhance the value of the group to all stakeholders.'[196] This decision was confirmed on appeal.[197] Likewise ASIC found no breach of law by Timbercorp.[198] Regardless the collapse of so many agri-business schemes raises questions about their appropriateness for consumers, and whether disclosure is sufficient.

If PIPs had been used, it would at least have permitted ASIC to require warnings highlighting the leverage risk within the agri-business provider's business model. This could have extended to the second level of leverage, consumers investing borrowed funds. Such warnings and the encouragement to obtain a further opinion of suitability, may have led some investors to un-wind their positions. If ASIC had considered particular schemes unsuitable for target classes, they may have prohibited the offering of interests.

Analysis: The regulatory shortcomings of disclosure are at least three-fold. First is the difficulty in establishing a breach permitting regulatory action. Second, is the time it takes to use courts or negotiation to get change by providers which reduces risk of detriment. Third and most important is that establishing a breach sets up adversarial relations with providers which can make negotiating improvement difficult to achieve. Winning (or losing) a court battle makes this worse. The disclosure setting does not address the change that is needed to encourage providers not to 'design and sell products that benefit from consumers not overcoming mistakes, or at times, exacerbating mistakes'.[199]

VIII Conclusion

In this report we have tried to achieve a number of goals. The first is to understand what contribution intervention powers might make to the wider philosophies and objectives advocated in the FSI Report. Given the scope of the FSI review it was inevitable that its recommendations would be fairly conceptual and with limited detail. The second aim of this report is therefore to suggest ways product intervention powers might be implemented, and to fill in some of the detail guided by the indications the FSI did provide. Designed to assist in this process is the third element, the review of jurisdictions comparable with Australia which already have intervention powers. That review was also to steer implementation towards a scheme with elements already 'road-tested' in other places, to minimise operational difficulties for both Australian and overseas providers. The fourth goal was to consider the

[195] *Woodcroft-Brown v Timbercorp Securities Ltd (in liq) and Others* (2011) 85 ACSR 354.
[196] Ibid, 457.
[197] *Woodcroft-Brown v Timbercorp Securities Ltd (in liq) and Others* (2013) 96 ACSR 307.
[198] ASIC, 'Information for Timbercorp Growers' (Media Release, last updated 2 February 2015).
[199] Financial Conduct Authority, 'Applying Behavioural Economics at the Financial Conduct Authority' (Occasional Paper, April 2013) 21.

indigenous features of Australian consumer financial markets, its legal and regulatory settings and to make sure that intervention powers fit in and respond well to local conditions. Finally, this report hopes to demonstrate that even though product intervention powers are a step change, they are complementary to and not a substitute for the disclosure and market integrity approaches characterising the last 20 years. There are some examples of this type more substantive regulation in Australian consumer markets already and more overseas, where consumer financial markets continue to innovate and thrive.

Product Intervention Powers and the Wider Objectives of the FSI Report: The wider objective of the FSI closest to the recommendation of an intervention power for Australia is fairness. Fairness is recommended as one of three philosophies underpinning Australian financial regulation, along with efficiency and resilience. It is intended intervention be used where the consumer has been led to expect a product will perform in a way which its design or distribution means it is unlikely to do. Adding fairness to the trio of philosophies reflects the expectations of Australians that ‘what they see is what they get’ when they buy financial products. Likewise, that ASIC should be able to act quickly and effectively when this turns out not to be so. An intervention power is to remind providers of the limited financial capacities of consumers, and that it is fair to design and distribute products to serve consumer needs, not take advantage of their vulnerabilities. In a country where employee-citizens are compelled to invest whatever their capabilities, a fair approach to foster trust and confidence is even more important. As we have seen, fairness is a standard which applies to intervention to prevent consumer detriment, in the jurisdictions we have reviewed.

The FSI advocated the cause of information technology, as capable of delivering mass market low cost products and services, closely tailored to the needs of classes of consumers: ‘mass market customisation’ to use a ‘fin-tech’ contradiction in terms. This advocacy is an expression of the FSI’s efficiency philosophy, and of its wider objective to increase market competition. We embrace the benefits of fin-tech, but we are alert to the dangers, and to the difficulties of regulating this innovative and protean financial channel. Accordingly we see intervention powers as flexible, low level regulatory action, to target significant consumer detriment that might damage the consumer ‘fin-tech’ project more generally. As we have argued we also think that PIPs may contribute to the regulation of technology enabled consumer finance in a ‘graduated’ way as advocated by the FSI, so as not to chill innovation. We also think now is the time to consider how the product design and distribution obligations recommended by the FSI, should respond to fin-tech developments.

Product intervention powers operate on classes of consumers, providers and products. Accordingly, although the FSI intended their direct effect as promoting suitability and fairness and limiting losses, they may indirectly advance other FSI objectives. As Australian consumer financial markets are concentrated in all of ownership, control and product recommendation, intervention may head-off systemic consequences of concentration, and improve financial system resilience. This is especially where a product or service is wide-spread. An intervention which targets misleading or deceptive conduct may improve market integrity and disclosure. Finally, as we have pointed out in several places, the class nature of intervention may have pro-competitive effects by targeting market-wide conduct or facilitating 'graduated' regulation for new fin-tech start-ups.

Filling in the Details of the FSI's Recommendations 21 and 22: While the FSI was detailed about some elements of intervention such as not requiring a breach of law, it was understandably 'broad-brush' in other aspects. While the FSI justified PIPs as promoting suitability, fairness and mitigating risk of consumer detriment, it did not spell out how that might be translated to a legal standard for regulatory action. Nor did it signal what type of evidence and reasoned justification ASIC would need to intervene on behalf of a consumer class.

We have suggested a legal standard which combines fairness, suitability and risk of significant consumer detriment. The most obvious types of unfairness are misleading information and conduct or omission to explain a material risk. However unfairness also covers lack of value for money and pressing a product on a consumer who clearly does not understand the practical financial significance of what they are acquiring. Examples of these are discussed above: funeral insurance and consumer credit insurance. We think a product should be considered unsuitable where its risk is significantly greater than disclosed, including risk which may come from the promoter's business model not just the product features: examples of this include 'bank-like' debentures, agricultural schemes and highly leveraged property investments such as Westpoint. Again where risk is greater than disclosed, but derived from a bundled strategy of products and advice (general or personal), intervention should be through the suitability standard. Storm Financial exemplifies this aspect. These are merely examples: we do not think the categories of 'fairness' and 'suitability' are closed.

The FSI's 'broad-brush' approach reveals some conundrums. One of these is how to implement the 'risk of significant consumer detriment' element for intervention. The FSI conducted a sustained and reasoned argument to justify and conclude that PIPs should cover both complex and simple products. Simple products are generally sold without personal advice and directly by the issuer (eg a bank). They are often 'pay as you go' products, rather than lump sum investments, and held by larger classes of consumers. Consumer credit insurance and 'bank-like' debentures are good examples. Although the FSI seems to recommend against intervention for these wide-spread products where relatively small amounts may be lost, we have been unable to find any policy support for this in the Final Report. It flies in the face of the FSI's argument for PIPs applying to simple and complex products alike. It also flies in the face of the fairness philosophy and the detailed suitability arguments in the Report. As it fits best with the FSI's wider objectives, we recommend that 'risk of significant consumer detriment' includes 'risk of wide-spread consumer detriment'. Our international review confirms this conclusion.

From our international review and in the light of the standard for intervention we propose, we think the evidence and reasons ASIC must bring to support intervention should be at large and responsive to the circumstances.

Important initial evidence would be of departure from the terms of any design and distribution obligation that is developed pursuant to the FSI's recommendation 21. As fairness, suitability and prevention of loss are central, the nature and capacities of the target class, the nature of the product and conduct of its distribution will be key. In Australia protecting superannuation assets rather than peripheral products is important. Eventually, what ASIC must prove is 'a risk' of consumer detriment – not the fact of it. Accordingly, the standard of evidence and reasoning is not such as might satisfy a court to a civil standard. ASIC needs a plausible or reasonable basis for its apprehension of 'significant consumer detriment' and that could be argument from experience or logic as much as from current evidence.

In common with other jurisdictions, the FSI refers to PIPs as *product* intervention powers. However, it is plain that distribution is included. Distribution commonly includes advice, whether general or personal. There is not a word in the FSI report suggesting that advice general or personal should not be included in PIPs. Indeed, many of the illustrations and the rationales relied on by the FSI are drawn from advising. As we have explained there are good reasons to include advice in PIPs for controlling 'close substitutes' of those under intervention. Also because of the 'bundling' of products and services into strategies sold to consumers. However, the decisive points are those of prevention, timeliness and class action. There is nothing in any ASIC powers, including the recent FOFA reforms which will allow ASIC to act quickly and preventatively as the FSI intends. All advice-regarding remedies and sanctions require proof of breach of the financial services laws and court or administrative action. All of them are cast as actions between an individual and a single provider. They do not allow ASIC to protect a class of consumers, quickly or effectively. Accordingly, we have recommended that product intervention powers include products, distribution and both general and personal advice. Similar reasoning justifies the inclusion of credit products. There are no jurisdictions in our international review which take a different approach.

The FSI was more forthcoming on the techniques of intervention. The FSI was clear: PIPs should not amount to product pre-approval. This is in line with all the jurisdictions we have reviewed, except for Belgium which sometimes adopts this. Generally, all jurisdictions we have reviewed permit a spectrum of techniques, allowing responsiveness to the case. In France intervention allows only warnings. In the EU and UK the wider range applies, including prohibition. The US relies on prohibition but other measures may be adopted too. We favour the FSI's suggestions for a menu of techniques from amendments to disclosure through to prohibition. We have also recommended that ASIC may prohibit a product feature rather than the entire product: we think this allows for a targeted and proportionate approach.

We have also given some thought to the position of existing product holders. Following the UK example, we think PIPs should not alter the rights and obligations of existing product holders. Instead they should be assisted to decide whether the product they hold remains suitable for them. All PIPs orders should contain conditions providing for this.

Finally, we have made some suggestions to tie FSI Recommendation 21 (design and distribution obligations) and Recommendation 22 (product intervention powers) together. The design and distribution obligations should be developed with the legal standard for intervention (fairness, suitability, avoiding consumer detriment) as central. As discussed in the context of evidence above, we see departure from design and distribution obligations as an indication of unfairness, unsuitability and risk of significant consumer detriment. Both the design and distribution obligations, and the evidence on which ASIC may act, should be reduced to regulatory guidance. It should be regularly reviewed in the light of implementation experience, and market changes. To maintain flexibility guidance should not be reduced to legislation, primary or delegated. Absolutely finally, we have discussed new approaches and resources that ASIC will need for the responsive approach which is at the heart of PIPs. We think PIPs will struggle to achieve their objectives without these changes at the regulator.

FSI Recommendations Compared with Product Intervention Powers Elsewhere: Generally, our comparative review has demonstrated that there is significant equivalence between jurisdictions in the nature, effects and mechanics of PIPs. Generally too, the FSI's recommendations echo the policy and mechanics of intervention powers in other places. There are some very close resonances (eg the standard proposed by the FSI 'risk of significant consumer detriment' is shared word for word with the UK) and some variations (eg Belgium's product pre-approval in some instances; US requirement of breach of law). There are two instances where the FSI appears to depart from international arrangements. The first, no PIPs for wide-spread small losses, we have discussed above and put aside. It does not reflect the philosophy, objectives or argument of the FSI. The second is the requirement that PIPs be a 'last resort'. We have explained that the only resolution of this requirement with the pro-active, preventive and timely rationale for intervention is that PIPs come after failure of attempts by ASIC to resolve matters with providers by guidance, persuasion and negotiation. PIPs make no sense if 'last resort' means at the end of the formal enforcement road.

Setting Product Intervention Powers in the Australian Financial Consumer Market and Regulatory Context: Last and by no means least, we have looked at the indigenous Australian market and legal conditions to make sure PIPs fit with and complement existing arrangements. First, while PIPs are clearly a change in substantive regulation and designed to protect consumers, they should be used in the context of existing disclosure and market integrity regulation. By comparison with some jurisdictions such as Belgium and even the UK, the consumer regulatory settings in Australia are 'pro-risk'. The discretionary use of PIPs should be implemented with this in mind, tempered by the underlying philosophy of 'fairness'. PIPs should promote better disclosure, and be used infrequently when disclosure or conduct standards fail.

Second, Australian consumer markets are very concentrated. We have already pointed out the ways in which we think intervention can address this market structure in terms of promoting resilience, market integrity and competition including in the emerging 'fin-tech' area.

Third, the outstanding indigenous market feature is compulsory superannuation. This makes Australia's consumer market very large for the population, and an important institution of public policy for retirement income. Any new regulatory tool such as PIPs should address superannuation particularly. We have already said that in the decision to intervene, the central importance of superannuation as opposed to more peripheral products (perhaps CFDs), may weigh in favour of action. Superannuation is long term, opaque, complex and tests the capabilities of ordinary consumers. These factors too, may be a reason why disclosure fails and it is fair to intervene. We do not think that just because a product is designed or distributed for acquisition by a self managed super fund that all trustees are very capable and intervention unjustified. In fact, we take a lead from the substantive regulation of superannuation already in place and the FSI's recommendation that funds should not borrow, as indicative of the opposite. Superannuation too, is one of the circumstances where it is likely that there may be wide-spread holdings with relatively modest detriment, and where we think PIPs would be particularly helpful, despite what may be a contrary view in the FSI report. Finally, we think that if there is any circumstance in which it may be appropriate to use PIPs in the wholesale market, it would be in superannuation. If there are wholesale market disclosure or conduct failures which would affect a class of superannuation members unfairly, leading to significant or wide-spread consumer detriment, we think intervention may be justified.

Fourth, it is necessary to consider how PIPs might be created and exercised and to provide for accountability by ASIC. This should be done so that intervention powers fit well with existing regulatory arrangements and avenues of accountability. We have recommended the creation of intervention powers by Parliament: we think these should be placed in the *Australian Securities and Investments Act 2001* (Cth) and in the *National Consumer Credit Protection Act 2009* (Cth). The PIPs powers should be to make rules or administrative decisions as appropriate to the case. ASIC should be accountable for PIPs rules under the *Legislative Instruments Act 2003* (Cth) and in the Federal Court of Australia under s 39B(1A) of the *Judiciary Act 1903* (Cth). Where ASIC makes an administrative decision to intervene, it should be reviewable under the *Administrative Appeals Tribunal Act, 1975* (Cth). The FSI recommended that interventions should be effective for 12 months, and either extended or converted to permanent rules. These too should be made as legislative instruments and reviewable by the Federal Court of Australia. None of these processes (except for the initial legislation of the intervention power) require Parliamentary time for the rules to be effective.