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Submission re ASIC Consultation Paper 313

Product Intervention Power

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

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About Financial Counselling Australia and Financial Counselling

Financial counsellors provide advice to people with money and debt issues. Working in community organisations, their services are free, confidential and independent.

Financial Counselling Australia (FCA) is the peak body for financial counsellors in Australia. FCA's members are the State and Territory financial counselling associations.

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1 Introduction

Financial Counselling Australia (FCA) welcomes the consultation (consultation paper 313) from ASIC on its new product intervention power.

We welcome the introduction of a product intervention power for ASIC. We believe that a strong regulator must have access to an extensive regulatory toolbox to deal with misconduct.

This submission has answered the specific questions in the consultation paper.

2 General comments

We support the approach by ASIC on the implementation of the product intervention power. In legislating this power, the Parliament has recognised the need for ASIC to prevent or halt significant consumer detriment when it is identified.

We also support the high-level guidance included in the proposed Regulatory Guide attached to the consultation paper.

3 Significant consumer detriment

It is important that consumer detriment is defined widely. We agree that it should cover both financial and non-financial harm. This adequately covers personal consumer detriment. Consumer detriment should also cover structural detriment.[1] This occurs where consumers are considered in aggregate, with detriment often a result of market failure.

Subject to the inclusion of structural detriment, we support the current drafting of the regulatory guidance on the meaning of consumer detriment and the factors to consider in determining whether the product has resulted, will result, or is likely to result in consumer detriment.

The table of factors to consider (Table 1) is comprehensive. It strikes the right balance between detriment for a large number of people and detriment to a smaller group of vulnerable consumers.

Recommendation

The definition of consumer detriment should include both personal and structural detriment.

[1] See a detailed discussion of these issues in *An Analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it,* Final Report for DG Sanco by Europe Economics, July 2017 http://www.europe-economics.com/publications/study_consumer_detriment.pdf.

4 Determining how ASIC may intervene

We support the proposals at RG 000.55 and 000.56 on how ASIC will determine how it will intervene.

We also recommend that ASIC make it clear in the Regulatory Guide that there is a focus on prevention. It would be useful to include a discussion that covers:

a) That there will be a focus (where possible) on preventing significant consumer detriment. This is important as often it is difficult to provide an adequate remedy for harm after it has occurred and prevention is obviously a better option.

b) A specific part of the Regulatory Guide on how ASIC will assess possible harm when it is deciding whether to use the product intervention power.

c) An emphasis on acting early when there is significant consumer detriment identified.

Recommendations

Include further detail in RG 000 to cover an objective of prevention with details on how possible detriment will be assessed when the product intervention power is being used for prevention.

An emphasis on acting early to stop further consumer detriment where possible.

5 Consulting with affected persons

A consultation process is an important part of exercise procedural fairness in using the product intervention power. The consultation procedure outlined from RG 000.63 to 000.90 is supported. The process gives the financial firm (or person) the ability to respond to the proposed order and seek a review. It also gives other affected parties, for example people and consumer advocates, a chance to respond to the proposed orders and provide further evidence of harm.

We caution against providing a list of options that are unworkable. For example, for the short-term lending consultation taking place at roughly the same time as this one around a first use of the product intervention power (ASIC consultation paper 316) there are three options:

a) take action with an intervention
b) use warnings
c) do nothing

In our experience, warnings do not work. Similarly, doing nothing does not address the consumer detriment. In our view, there is no need to provide options. It is up to ASIC as to whether it takes action and the consultation process is to canvas all the issues.

Recommendation

Generally, the consultation process should not include a set of options. If options are included, they must be workable.

6 Describing significant consumer detriment at consultation

The process set out to describe consumer detriment will ensure that everyone is aware of what detriment is happening (or will happen). We do not have anything further to add to the proposed guidance.

7 Commencement date

ASIC should have the flexibility to determine the commencement date for a product intervention order. In most circumstances the order should occur urgently due to ongoing consumer harm. The Regulatory Guide should clearly state there will usually be a presumption that action is needed urgently where there is significant consumer detriment.

However, we note that an order may need to be delayed for other reasons including practical issues and/or for procedural fairness.

We agree with the examples of factors that may be considered in setting a commencement date.

8 Remedies

The Regulatory Guide should also include a discussion of remedies. It is a reasonable community expectation that if there is significant consumer detriment there should be a remedy. RG 000 should cover how possible remedies will work with the product intervention power.

Recommendation

RG 000 should cover how consumer remedies will work with the product intervention power.

9 Possible areas where ASIC should consider using the product intervention power

There are a number of products currently available which cause significant consumer detriment. ASIC should consider using the product intervention power for the following products.

9.1 Junk insurance

There are now several types of insurance that are “junk”. The insurance pays out rarely and it misleads the person into believing it is of some value when there is little or no value.

Examples of junk insurance are:

- Accidental death and accidental injury
- Pet insurance
- Extended warranties
- Funeral insurance with stepped premiums or sold into remote Aboriginal communities

All of the above insurance is not recommended and usually sold to people who do not know it is junk.

9.2 Timeshare

This is a well-known trap for consumers. Time share is sold through high pressure selling, is expensive, poor value, difficult to on-sell, sold with credit and often expires many years after death.

9.3 Debt management firms

ASIC has already done some research (Report 465) on the problems with debt management firms. Debt management firms include debt agreement brokers, budgeting services, settlement negotiation services and credit repair businesses. All of these services can cause significant consumer detriment.

9.4 Buy now pay later (BNPL)

These services are not regulated by the National Credit Act. Financial counsellors report that BNPL services do not lend responsibly and that this causes significant detriment. People using BNPL services have no access to enforceable financial hardship provisions and BNPL services are not required to be members of AFCA.

9.5 Payday lenders

There are still serious structural issues in the payday lending sector. There is still evidence of widespread failure to comply with the responsible lending laws.

9.6 Pawnbrokers

Pawnbrokers have some regulation under the National Credit Code (section 76 - unjustness) but then get an exemption for all the other remaining protections. Pawnbrokers have been causing significant consumer detriment for many years and are the highest cost loan available on the market. The interest rate is often between 25 and 30% per month. People go to pawnbrokers in utter desperation and often lose their possessions to high cost lending.