

7 August 2019

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The response from Gain Capital Australia Pty Ltd to Consultation Paper 313, Product Intervention power

Gain Capital Australia Pty Ltd (Gain) is pleased to provide comments on the consultation paper for Product Intervention power.

Gain has the following general comments to make regarding the proposals outlined within the paper. Specific comments are considered further below when addressing the questions posed by the paper.

- ASIC should describe clearly and in further detail what constitutes 'significance' when addressing significant consumer detriment. By definition, something that is significant has to be greater than something else. ASIC should define this in detail and provide non-exhaustive examples of what is significant and what is not significant
- ASIC should provide a balanced view to substantiate the need for intervention, including any potentially positive aspects of the product. ASIC should assess whether there are any offsetting benefits of the products for the consumer. When considering consumer detriment, the amount of time that the product has been in the market should also be taken into consideration. It is unlikely a popular product, available for years, should suddenly be defined as causing 'significant' consumer detriment.
- ASIC should allow in the consultation process, the ability for respondents to comment on the need for delaying intervention for a period of time, and how long that timeframe should be. Gain has had experience in other jurisdictions globally regarding the time frames provided for implementing new rules and would like to note that this is a difficult topic that requires consultation.

Responses to the Proposals:

B1Q1 Are there additional factors that ASIC might take into account in determining whether a product has resulted, will result or is likely to result in significant consumer detriment?

Yes. Gain is of the view that when considering consumer detriment, the amount of time that the product has been in the market should also be taken into consideration. For example, if a product has been available to consumers for many years, with the market demand from consumers for that product expanding over that period of time, then ASIC should take these factors into account. It is unlikely a popular product, available for years, should suddenly be defined as causing 'significant' consumer detriment. In addition, it should also be considered whether the proposed consumer detriment in the long-standing market is due to the product itself or the actions of a few participants in that market. ASIC should justify why it feels that the product is inherently bad for consumers, rather than it being acceptable but in select cases twisted in such a way as to cause consumer harm.

Gain suggests that ASIC also assess the number of complaints or concerns received from consumers before acting on that product. The absolute number of complaints received should not be assessed in a vacuum, but rather in the context of the number of customers in the market overall, the number of transactions undertaken by such customers in a year or other relevant period and the size of the market for that product as a whole.

Gain is also of the view that there is not enough detail regarding the 'significance' test of the proposed consumer detriment definition. The proposed guidance suggests that this is examined on a case by case basis, however, Gain suggests that a framework regarding what is significant consumer detriment should be stated. Gain acknowledges the need for the guidance to be broad given the array of financial products that may need to be addressed, however, Gain would like to refer ASIC to issues that have also been highlighted regarding the 'significance' test for reporting breaches of the Corporations Act under s912D. It has been highlighted in the past that what one entity may consider to be a 'significant breach' another entity may be of the view that it isn't significant and shouldn't be reported. This leads to inconsistency in the application of 'significance'. In the case of Product intervention powers, what ASIC may consider to be 'significant' consumer detriment, may not be considered so by the wider community and even the consumers themselves. Gain requests that there should be further clarity in the guidance regarding what ASICs considers to be 'significant' consumer detriment. At present, the description of the considerations ASIC intends to consider, and the related analysis, included in the consultation paper are broad and general enough to swallow up any fact pattern one can imagine. ASIC should define significance in greater detail and provide non-exhaustive examples of what is significant and what is not significant.

Gain would also like to note that ASIC should consider all similar products to those subject to any intervention. In the interest of fairness, maintaining a level playing field and ensuring competition in the market, ASIC should have in place a process of assessing whether products of a similar nature, but not exactly the same structure, form, etc., cause the same level of consumer detriment and as such, also be subject to the intervention. Conversely, if ASIC is of the view that a similar product – allowing consumers to gain exposure to similar products or assets with similar terms or structures – does not cause significant consumer detriment, then ASIC should be required to justify why it would be singling out one structure or form of product, rather than another.

When proposing an intervention ASIC will have undertaken a process of collating information regarding the consumer detriment. ASIC will have used its information gathering powers to acquire the necessary data to form its opinion. Gain suggests that this information gathering process relating to product intervention should be included in the regulatory guide. The process

should also include a requirement for ASIC to define the nature of the consumer detriment they are collating information on, to prevent possible prejudicial outcomes.

ASIC may consider forming a committee of industry representatives from a broad spectrum of financial sectors to initially assess ASIC's reasons for intervention and provide feedback.

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

Yes. Gain notes that the focus of ASIC when determining the type of intervention is purely the consumer detriment. Gain suggests there should be a balanced approach when considering the intervention to be used. ASIC should also assess whether there are any offsetting benefits of the products for the consumer.

Gain notes that ASIC has the ability to now ban an entire class of products. Gain suggests that when considering banning any product, more stringent tests for significant consumer detriment should be applied, such as direct consultation with a sample of consumers affected.

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

With regard to the identity of the product, Gain would like to seek clarity on whether this identification will also involve publishing in the consultation the identity of the product issuers affected, with particular regard to when an intervention addresses a class of product. Whilst Gain has no issue with being published in a list of those providing a particular product, there is a risk that not all of the relevant entities are included in that list. Most likely those that are unregulated yet are still providing the product. That may provide those unregulated entities with a competitive advantage over those named in the consultation, both during and after the consultation period has finished.

Gain would like to suggest that when ASIC provides the description of the significant consumer detriment, ASIC should have a separate section detailing why it considers the detriment to be 'significant' in each case.

When ASIC is providing the details of the intervention to take place, a proposed commencement date should be noted in the consultation. If no specific date can be provided ASIC should at the least note, and allow for consultation on, whether the commencement date will be immediately after the intervention is published or delayed.

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

Yes. Gain suggests that when consulting on a particular product intervention ASIC should ensure all aspects of that product and its effect on consumers, especially any benefits to the consumer that may offset any detriment, are considered. ASIC should ensure that it provides a balanced argument regarding the need for intervention. ASIC should then consider this balanced viewpoint when determining the proposed intervention to be imposed. ASIC should also explain why less draconian measures will not be sufficiently effective to address the concerns that ASIC cites.

Whilst it is inferred in the guidance, Gain would like to ensure that all information and data analysis that ASIC used when assessing the need for product intervention is provided in the consultation. The guidance should clearly state that ASIC will provide all of the data used to form its view within the consultation.

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

Yes. As noted above, ASIC should clearly describe its reasons for considering the consumer detriment 'significant' in each case, as opposed to non-significant consumer detriment.

ASIC should, at least in the short term, address in any consultation why, just because it now has powers to intervene, it is doing so. This is particularly the case when looking at products that may have been available to consumers for a long period of time without anyone in the industry stating that those products cause detriment. ASIC should also describe why intervention is needed, as opposed to a lesser step by ASIC.

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

No. The proposed approach does not state whether there will be consultation on delayed commencement of an intervention order. As noted above, Gain would expect that when ASIC is providing the details of the intervention to take place, a proposed commencement date should be noted in the consultation. If no specific date can be provided, ASIC should at the least note, and allow for consultation on, whether the commencement date will be immediately after the intervention is published or delayed.

For intervention orders related to a class of products across a particular sector, participants may need a significant amount of time to change internal systems to accommodate the details of the intervention order. As such, ASIC should be open to allowing consultation on the time periods involved for implementation. A small implementation period could significantly increase costs to a particular sector, and potentially inadvertent breaches of an order if changes cannot be made in time. Gain has had experience in other jurisdictions globally regarding the time frames provided for implementing new rules and would like to note that this is a difficult topic that requires consultation

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

Yes, however Gain would also like to add that financial costs of implementation in a short period, that may be of detriment to a whole sector, should also be considered.

The negative impact on existing clients using the product should also be considered. Those clients would have become accustomed to the functionality of the product and will have to change their own practices to accommodate changes to the product.

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

As noted above, ASIC should consider the extent of any changes that may be needed for participants to comply with the intervention, the costs that may be increased as a result of a short implementation period and finally that ASIC should also consult on timeframes when first consulting on the proposed product intervention.

ASIC should also consider the effect a delay or immediate commencement would have on competition within the market place, particularly between similar products that are not subject to the intervention, and other markets in global jurisdictions.

Thank you for the opportunity to participate in this consultation process. We are happy to engage in further discussion and please do not hesitate to contact us for any further assistance.

Yours sincerely,

A handwritten signature in dark ink, appearing to be "John Blundell".

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