



Law Council
OF AUSTRALIA

Business Law Section

20 June 2022

Retail Complex Products and Investor Protection
Market Supervision
Australian Securities and Investments Commission
GPO Box 9827
BRISBANE QLD 4001

By email: Market.Supervision.OTC@asic.gov.au

Dear Sir or Madam

ASIC CONSULTATION PAPER 362 *EXTENSION OF THE BINARY OPTIONS PRODUCT INTERVENTION ORDER (CP 362)*

1. The Financial Services Committee of the Business Law Section of the Law Council of Australia (**the Committee**) welcomes the opportunity to provide this submission to the Australian Securities and Investments Commission (**ASIC**) in response to CP 362, which was issued on 26 May 2022.

Background

2. ASIC Corporations (Product Intervention Order – Binary Options) Instrument 2021/240 (the **Binary Options Order**) was made on 1 April 2021 and prohibits the issue and distribution of binary options to retail clients. The Binary Options Order is currently due to lapse on 7 October 2022.
3. In CP 362, ASIC proposes to make an amending legislative instrument, the effect of which would be to amend the Binary Options Order so that it would remain in force until it is revoked or sunsets on 1 October 2031. This is subject to the feedback received in response to consultation and obtaining the approval of the Minister.

Responses to specific questions in CP 362

D1Q1 Do you agree with our proposal to extend the Binary Options Order until it is revoked or sunsets? If not, why not? Should the Binary Options Order be extended for a shorter period?

4. The Committee agrees with ASIC's proposal to extend the Binary Options Order for the proposed length of time.
5. The Committee agrees with ASIC that it is preferable to extend the Binary Options Order until the proposed sunset date of 1 October 2031 rather than making a short extension of three or five years.
6. The Committee does not consider that the continuation of the Binary Options Order is a controversial matter and therefore cannot see a strong justification for ASIC's decision to be revisited every three or five years. The Committee notes that consultation processes such as CP 362 consume the time of ASIC staff members and, rather than undertaking more frequent and uncontroversial consultation on CP 362, the Committee would prefer to see ASIC resources being used to pursue other important regulatory outcomes.

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7. The Committee notes that ASIC could seek to revoke or vary the Binary Options Order at any time if it wished to, subject to obtaining the Minister's approval.

D1Q2 In your view has the Binary Options Order been effective in reducing the risk of significant detriment to retail clients? Please provide evidence and data in support of your view where possible.

8. The Committee has reviewed the evidence presented by ASIC in CP 362 and is persuaded that it has been effective in reducing the risk of significant detriment to retail clients. This is because, were it not for the Binary Options Order, it is likely that (in spite of clear warnings about the risks of binary options trading published by ASIC) some retail clients would have entered into binary options, and many of them would be likely to have lost money had they done so.
9. The Committee is not in a position to provide any further evidence or data to ASIC.
10. The Committee does not seek to respond to:
- (a) questions D1Q3 to D1Q4, as these questions are targeted specifically at financial services businesses (in the case of D1Q3 to D1Q4);
 - (b) question D1Q5, as this question is targeted specifically at retail clients (D1Q5); or
 - (c) question D1Q6, as this question seeks feedback on competition in the financial system, which is a matter not strictly within Committee members' legal expertise.

General observations

11. The Committee considers that the introduction of the product intervention power has been a useful addition to ASIC's regulatory toolkit and commends ASIC for using its product intervention power under section 1023D(3) of the *Corporations Act 2001* (Cth) to make the Binary Options Order.
12. The Committee also notes that imposing a ban on the offering of binary options to retail investors is consistent with action taken by regulators in a number of other developed countries (the United Kingdom, Canada, Israel and a significant number of European nations, as noted in Appendix 1 to CP 362).

Contact

13. Please contact [REDACTED], Chair of the BLS Financial Services Committee on [REDACTED] or [REDACTED] in the first instance if you require information or clarification.

Yours sincerely

[REDACTED]

[REDACTED]
Chairman, Business Law Section