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NEWS

ASIC consults on its product intervention power

In this article, senior associate Kristy McCluskey reviews ASIC's draft consultation paper and regulatory guide on its new product intervention power in respect of financial products offered to retail clients.

ASIC believes the new power will enable it to take a proactive approach to regulating the retail market, thereby reducing the risk of significant detriment to consumers. The power is broad and flexible, empowers ASIC to address market-wide problems, and is available without a demonstrated or suspected breach of the law.

Submissions on the consultation paper and draft regulatory guide closed on 7 August 2019, and the final regulatory guide is set to be released in September this year.

You can find more information explaining the background in our May 2019 edition of *Fundamental*.

PRODUCTS SUBJECT TO INTERVENTION

ASIC's power enables it to intervene in relation to a broad range of retail products, including—

- financial products regulated under the Corporations Act or specified under the Corporations Regulations
- credit products regulated under the National Credit Code
- financial products defined under the ASIC Act.

TYPES OF PRODUCT INTERVENTION ORDERS

There are two types of product intervention orders available to ASIC under the product intervention power:

- An individual product intervention order, which applies to a specified person (or persons) in relation to a product.
- A market-wide product intervention order, which applies to a person in relation to a class of financial products. ASIC explains that a market-wide intervention would be made via a legislative instrument to address a relatively widespread practice.

ASIC can make an order that a person not engage in specified conduct in relation to a product or class of products either entirely or subject to certain conditions.

LIMITATIONS

ASIC is subject to certain limitations on the types of product intervention orders it can make. For example, ASIC—

- cannot order a person to satisfy a standard of training other than prescribed for the person and the financial product under the Corporations Act or National Credit Code
- can only intervene prospectively (ie an order can only apply to a person or product sold after the date of the order)
- can only intervene where the conduct relates to consumers.

WHEN CAN ASIC EXERCISE ITS POWER?

ASIC may make a product intervention order when satisfied that a product (or class of products) has resulted, or will result or is likely to result, in severe consumer detriment.

The term 'detriment' is intended to take on its ordinary meaning. ASIC explains that, in relation to a consumer, it could include both harm that is financial in nature, such as actual or potential financial loss to a consumer resulting from a product, and harm non-financial in nature, such as the effect on a consumer's credit rating.

Whether consumer detriment is significant will depend on the individual circumstances of the matter. Importantly, it can occur even if a person has complied with all applicable disclosure requirements, and the design and distribution obligations when they commence.

ASIC can intervene when it considers a product is likely to result in significant consumer detriment, taking into account all of the circumstances, the apparent causes of the detriment, and whether there are particular factors that make significant consumer detriment more likely.

Before making an order, ASIC must consult with the persons who are likely to be affected by the order. ASIC can then make a product intervention order for an initial term of up to 18 months, which may be extended or made permanent with the approval of the Minister.

HOW CAN WE HELP?

We will keep you up to date with further developments. Please contact a member of our Funds Management team for more information about how we can help.

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