Explanatory Statement

ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648

This is the Explanatory Statement for ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648 (the ***instrument***).

The Explanatory Statement is approved by the Australian Securities and Investments Commission (***ASIC***).

Summary

1. This instrument is a product intervention order made under Part 7.9A of the *Corporations Act 2001* (the ***Act***). The instrument prohibits continuing credit providers, their directors and associates from causing, authorising or providing credit to a retail client, and imposing or providing for certain fees and charges paid or payable by a retail client, in relation to a class of financial products (as set out in paragraph 7 below), that ASIC is satisfied:

   (a) is likely to be available for acquisition by issue to persons as retail clients; and

   (b) has resulted in, and is likely to result in, significant detriment to retail clients.

Legislative authority

2. The instrument is made under subsection 1023D(3) of the Act.

3. Under subsection 1023D(3) of the Act, if ASIC is satisfied that a class of financial product:

   (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and

   (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;

ASIC may, by legislative instrument, order that a person must not engage in specified conduct in relation to the class of financial products, either entirely or except in accordance with conditions specified in the order.

4. ASIC is satisfied that the class of financial products to which the instrument applies:

    (a) is likely to be available for acquisition by issue to persons as retail clients; and

    (b) has resulted in, and is likely to result in, significant detriment to retail clients.

5. A description of the significant detriment is set out in Attachment A, the Product Intervention Order Notice.

6. The instrument is a disallowable legislative instrument.

Purpose of the instrument

7. The purpose of this instrument is to reduce the risk of significant detriment to retail clients resulting from a class of financial products that consists of continuing credit contracts where the continuing credit contract is provided:

    (a) by the continuing credit provider to a retail client; and

    (b) in conjunction with a separate collateral contract (other than a collateral non-cash payment facility) between the retail client and an associate of the credit provider, pursuant to which the associate charges significant fees or other charges;

    but that does not include a continuing credit contract that forms part of a buy now pay later arrangement.

Operation of the instrument

Name

8. Section 1 of the instrument provides that the instrument is *ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648.*

Commencement

9. Section 2 of the instrument provides that the instrument commences on a day that is the second day after the instrument is registered on the Federal Register of Legislation.

Duration

10. Subsection 1023G(2) of the Act provides that a product intervention order remains in force for 18 months or any shorter period specified by the regulations or any

shorter period specified in the order. No relevant shorter period has been specified in the regulations or order.

11. The instrument remains in force for 18 months. The duration of the instrument may be extended beyond 18 months but only in accordance with section 1023H of the Act (which requires a declaration, by legislative instrument, and written approval by the Minister).

Legislative instrument and primary legislation

12. The subject matter and policy implemented by this instrument is more appropriate for a legislative instrument rather than primary legislation because:

    (a) the instrument utilises specific powers given to ASIC by Parliament that are intended to be used proactively to reduce the risk of significant detriment to retail clients resulting from a class of financial products. Commencing in April 2019, Part 7.9A of the Act sets out a framework and the procedural requirements for ASIC to make, amend, extend, remake and revoke product intervention orders;

    (b) the instrument is a timely way of reducing the risk of significant detriment to retail clients resulting from a class of financial products that ASIC has identified. A product intervention order may remain in force for up to 18 months and can only be extended by ASIC with the Minister's written approval, following a report to the Minister from ASIC on whether the extension should be made; and

    (c) the product intervention powers in Part 7.9A of the Act allow ASIC to amend a product intervention order, should the need arise, to respond in a flexible and timely way to changes to product features, issuance and sales practices, and significant detriment to retail clients.

Authority

13. Section 3 of the instrument provides that the instrument is made under subsection 1023D(3) of the Act.

Interpretation

14. The instrument defines the following key terms:

    the Act

    associate

    buy now pay later arrangement

    collateral contract

    collateral non-cash payment facility

    continuing credit contract

continuing credit provider

contract

makes non-cash payments

National Credit Code

non-cash payment facility

Application of the conditional prohibitions

15. The instrument prohibits continuing credit providers and their directors, and associates of the continuing credit providers and their directors, from causing or authorising prohibited conduct.

16. The condition in section 5 of the instrument prohibits the total of the amount of fees and charges that may be imposed or provided for under:

    (a) the continuing credit contract;

    (b) a collateral contract (other than a collateral non-cash payment facility); or

    (c) a contract, arrangement or understanding belonging to a series or combination that constitutes the continuing credit contract;

    from exceeding the maximum charge permitted under subsection 6(5) of the Code or the regulations made for the purposes of that subsection, where the fees and charges are paid or payable by a retail client.

17. “Associate” is defined by reference to sections 11 and 15 of the Act. This will ensure that the coverage is broad and will extend to a related body corporate as well as a person who is acting in concert with the primary person, or a person who is or proposes to become associated, whether formally or informally, in any other way in respect of the provision of continuing credit contracts. The exclusions in section 16 of the Act do not apply. The purpose of the broad coverage is to ensure that avoidance opportunities through phoenixing are minimised.

18. The instrument relates to continuing credit contracts and collateral contracts between a retail client and the continuing credit provider and/or associate, where the fees and charges are paid or payable by the retail client. If the retail client is not a party to a particular contract (for example a contract between a continuing credit provider and a third party) the contract will not be considered a continuing credit contract or collateral contract for the purpose of the instrument.

19. The instrument does not prohibit persons from providing continuing credit contracts relying on the exemption in subsection 6(5) of the Code, rather it simply limits the total fees and charges that can be charged under the continuing credit contract and collateral contract to not exceed the limits prescribed in subsection 6(5) of the Code or regulations made for the purposes of that subsection.

20. The instrument only applies in relation to continuing credit contracts entered into on or after the commencement of the instrument.

Exclusions to the application of the instrument

21. Subsection 6(2) of the instrument clarifies that the instrument does not apply to continuing credit contracts, where a continuing credit provider is not purporting to rely on subsection 6(5) of the Code in relation to a continuing credit contact.

22. This means that the instrument only applies to continuing credit contracts where the continuing credit provider relies on the exemption in subsection 6(5) of the Code for that particular contract. For example, a continuing credit provider may rely on the exemption in subsection 6(5) of the Code for Contract A, but not for Contract B. In these circumstances the instrument will only apply to Contract A and not to Contract B.

23. Subsection 6(3) of the instrument clarifies that it does not apply to a continuing credit contract if:

    (a) the continuing credit contract forms part of a buy now pay later arrangement; and

    (b) each advance of credit under the continuing credit contract occurs as a result of the buy now pay later arrangement.

24. This means that if a continuing credit contract forms part of a buy now pay later arrangement, the instrument will not apply to the continuing credit contract, or any collateral contract in relation to that continuing credit contract. However, if there is an advance of credit under a continuing credit contract that does not occur as a result of a buy now pay later arrangement (notwithstanding that other advances of credit under the contract are as a result of a buy now pay later arrangement) then the instrument will apply to that continuing credit contract.

25. The definition of buy now pay later arrangement in the instrument covers the following arrangements:

    (a) an arrangement between a person (the ***merchant***) and another person (the ***retail client***) in relation to the supply of goods or services by the merchant to the retail client; and

    (b) any of the following:

        (i) an arrangement between the merchant and a person (the ***BNPL provider***) in relation to which the BNPL provider pays the merchant some or all of the price for the supply of those goods or services to the retail client;

        (ii) an arrangement between the retail client and a person (the ***BNPL provider)*** in relation to which, when the retail client is required to pay the merchant for the supply of those goods or services, the retail client pays the merchant some or all of the price by using a credit card or debit card identifier provided or made available by the BNPL provider to the retail client for such a purpose;

(iii) an arrangement between the retail client and a person (the ***BNPL provider)*** in relation to which the BNPL provider pays, through a bill payment system specified by the merchant, some or all of a bill issued by the merchant to the retail client for the supply of those goods or services to the retail client; and

Note: For example, the bill payment system may be the BPAY bill payment system.

(c) an arrangement between the BNPL provider and the retail client which includes a continuing credit contract in relation to which the retail client pays the BNPL provider over time in relation to the supply of those goods or services;

but only where the principal business of the merchant is not the supply of administration, brokerage, management, collection, recovery or other services in relation to the provision of credit under continuing credit contracts.

26. Paragraph (b)(i) of the definition of buy now pay later arrangement covers arrangements where a retail client purchases a good or service from a merchant and a BNPL provider pays the merchant on behalf of the retail client under a pre-existing arrangement between the merchant and BNPL provider. This includes arrangements where the BNPL provider makes, causes or authorises payments to the merchant on behalf of the retail client, through an intermediary (including through a contractual arrangement with the intermediary). An example of this arrangement may include an arrangement with a payment gateway provider.

27. Paragraph b(ii) of the definition of buy now pay later arrangement covers arrangements where a retail client enters into an arrangement directly with a BNPL provider and receives or uses a credit card or debit card identifier provided by or made available from the BNPL provider, which allows the retail client to make and finance purchases from any merchant.

28. Paragraph b(iii) of the definition of buy now pay later arrangement covers arrangements where a retail client enters into an arrangement directly with a BNPL provider, where the BNPL provider pays through a bill payment system specified by the merchant on behalf of the retail client, a bill issued by a merchant to the retail client for a good or service.

Consultation

29. ASIC has conducted consultations in accordance with section 1023F of the Act, as section 17 of the Legislation Act does not apply.

30. In July 2020, ASIC published Consultation Paper 330: *Using the product intervention power: Continuing credit contracts* (***CP 330***) proposing to make an industry-wide product intervention order by way of legislative instrument in

relation to continuing credit contracts to address significant detriment to retail clients resulting from continuing credit contracts.

31. In response to CP 330, ASIC received over 900 submissions from interested and affected stakeholders including retail clients, industry bodies and participants, a comparison site, a complaints authority, consumer organisations and community legal centres.

32. Several of the submissions to CP 330 which ASIC received, stated that the proposed continuing credit contracts product intervention order would capture certain sub-classes of continuing credit contracts that were not being issued to retail clients in the way described in CP 330.

33. To address any potential unintended consequences, ASIC made changes to the draft product intervention order to provide certain exclusions for:

    (a) buy now pay later arrangements; and

    (b) collateral non-cash payment facilities.

34. ASIC sought feedback on these proposed changes by publishing an Addendum to CP 330 in November 2020.

35. On 9 December 2021 ASIC published Consultation Paper 355: *Product intervention order – Short term credit and continuing credit contracts* (***CP 355***) proposing to make the short term credit product intervention order (in substantially the same terms as the short term credit product intervention order made in 2019) and the continuing credit contracts product intervention order.

36. In response to CP 355 ASIC received a further nine submissions.

37. The submissions to CP 330, the Addendum to CP 330 and CP 355 were taken into account when making the instrument. The submissions are publicly available on ASIC's website, excluding confidential submissions.

Statement of Compatibility with Human Rights

38. The Explanatory Statement for a disallowable legislative instrument must contain a Statement of Compatibility with Human Rights under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011.* A Statement of Compatibility with Human Rights is in Attachment B.

Attachment B

Statement of Compatibility with Human Rights

This Statement of Compatibility with Human Rights is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648

Overview

1. The instrument is a product intervention order made under Part 7.9A of the *Corporations Act 2001*, which prohibits specified conduct in relation to the provision of continuing credit contracts except in accordance with certain conditions.

2. The purpose of this instrument is to reduce the risk of significant detriment to retail clients resulting from a class of financial products that consists of continuing credit contracts where the continuing credit contract is provided:

   (a) by the continuing credit provider to a retail client; and

   (b) in conjunction with a separate collateral contract (other than a collateral non-cash payment facility) between the retail client and an associate of the credit provider, pursuant to which the associate charges significant fees or other charges;

   but that does not include a continuing credit contract that forms part of a buy now pay later arrangement.

Assessment of human rights implications

4. This instrument does not engage any of the applicable rights or freedoms.

Conclusion

5. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.