ASIC looks to target short term credit providers with first use of product intervention power

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Key issues:

- ASIC has recently released consultation paper 316, setting out its proposal to use its new product intervention power to restrict a specific short term lending model.
- In CP 316, ASIC targets a short term lending model which (in their view) is used to benefit from certain exemptions in the National Credit Act, which causes 'significant consumer detriment' to vulnerable consumers.
- If the intervention order proposed by ASIC takes effect, the short term lending model targeted will no longer be able to be used without severe restrictions on the fees and charges that may be imposed on consumers, which are in line with existing restrictions under the National Credit Act.

ASIC has recently released consultation paper 316 (*Using the product intervention power: Short term credit*) (**CP 316**), setting out its proposal to use its new product intervention power to restrict a specific short term lending model that it sees as causing 'significant consumer detriment' to vulnerable consumers.

In this article we outline:

- the short term lending model that ASIC is targeting;
- how ASIC’s general product intervention power works; and
- the effect of ASIC’s proposed product intervention for short term lending.

What product is ASIC targeting?

In CP 316, ASIC targets a short term lending model which (in their view) is used to benefit from certain exemptions in the National Credit Act. Under this short term lending model:

1. a short term credit provider offers short term credit, mostly for amounts up to $1,000, with an application process that is advertised to take about two weeks;
2. an associate of the short term credit provider offers as a collateral service, a ‘fast track application’ under a separate services agreement;
3. the fees for this collateral service are very high relative to the borrowed amount; and
4. the money lent must be repaid within a short timeframe, increasing the risk of default as repayments are based on the amount lent rather than the borrower’s capacity to repay.

ASIC is concerned that this model results in a provision of credit which falls within an exemption to the existing short term credit requirements under the National Credit Code. The National Credit Code does not apply to the provision of credit which is provided for no more than 62 days, where the maximum amount of fees and charges do not exceed 5% of the amount of credit and the maximum interest charges are no more than 24% per annum (section 6(1) of the Code). Under the short term lending model, the collateral service (which incurs the high fees and charges) is not offered by the credit provider but is instead offered by an associate, and therefore the credit itself can be provided under this exclusion. This means that consumers do not have a number of rights/protections which they would otherwise have available. These include limits on the amount they would be required to repay and the fees/costs they can be charged.

Examples given in CP 316 show consumers under the short term lending model being charged very high fees, up to 990% more than the amount they had borrowed. In CP 316, ASIC has named entities which it is aware of that previously used, or are currently using, this short term lending model.

How does the product intervention power work?

The product intervention power was introduced under the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (**the Act**), and came into force on 6 April 2019. The intervention order ASIC proposes against the short term lending model under CP 316 will be the first exercise of this power by ASIC.

The product intervention power is a proactive power allowing ASIC to intervene where a financial or credit product has resulted, or is likely to result in, significant detriment to consumers. There does not need to be a breach of law for ASIC to exercise this power. ASIC can make two types of product intervention orders:

1. an individual product intervention order, which applies to a specific person or persons, in relation to a product; or
2. a market-wide product intervention order, which applies to a person, in relation to a class of products.

Before making an intervention order, ASIC must consult with persons reasonably likely to be effected by the order, which ASIC can do by publishing the proposed order on its website and inviting the public to comment on the proposed power.

Applying these requirements to the short term lending model, CP 316 represents ASIC's consultation regarding the proposed order. In CP 316, ASIC note that it considers that the short term lending model "can and, on the evidence available to ASIC, does cause significant consumer detriment", because:

1. the target market is consumers in urgent need of relatively small amounts of money, which indicates the vulnerability of the target market;
2. the total cost payable under the credit contract and services agreement is significantly higher than the maximum charges permitted by the National Credit Act, which imposes caps on costs payable for short term and small amount lending;
3. there is no adequate assessment of a consumer's capacity to meet repayments and consumers who default are charged high fees; and
4. there are high levels of repeat use, so that some consumers who use the short term lending model end up in a high cost debt spiral.

Accordingly, ASIC are proposing to use the product intervention power to make an order addressing the significant consumer detriment caused by the short term lending model by way of a market-wide product intervention order.

ASIC's proposed intervention

ASIC's proposed industry wide intervention order would prevent:

1. a short term credit provider (being a person who is purporting to rely on subsection 6(1) of the National Credit Code - see above) from providing credit to a retail client under a short term

credit facility; and
2. a short term credit provider or an associate from imposing or providing for collateral fees and charges for the provision of a collateral service (being a service provided to a retail client in relation to an application by the retail client for the provision of credit by a short term credit provider under a short term credit facility) to a retail client,

   except in circumstances where the collateral fees and charges charged by a short term credit provider or an associate for the provision of a collateral service, in addition to the fees and charges imposed by the short term credit provider under the short term credit facility, do not exceed the maximum amount of credit fees and charges permitted under subsection 6(1) of the National Credit Code in relation to the provision of credit under the short term credit facility.

Timeframes

Feedback on CP 316 is due by ***Tuesday 30 July 2019***.

At this stage ASIC is still consulting on a draft regulatory guide on the proposed use of the product intervention power (under Consultation Paper 313: Product intervention power), which was released on 26 June 2019 and for which comments close on 7 August 2019. ASIC have stated they will not make a decision on the proposed exercise of the product intervention power in relation to short term credit until the close of the consultation on the regulatory guide under CP 313.

If you have questions about how the product intervention power might affect your business, or if you would like to discuss either matter further, please contact HopgoodGanim Lawyers' Corporate Advisory and Governance team.

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