Explanatory Statement

ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917

This is the Explanatory Statement for ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917 (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 companies, and directors of those companies, from using a specific short term lending model that ASIC considers has resulted in, will result or is likely to result in significant detriment to retail clients.

Purpose of the instrument

2. ASIC makes this instrument to address significant detriment it has identified through the use of a specific short term lending model. The purpose of the instrument is to prohibit companies, and directors of those companies, from using that short term lending model.

3. Under the short term credit exemption in the National Credit Code (the ***Code***), a provision of credit is not regulated by the Code if under the credit contract:

   (a) the provision of credit is limited to a total period that does not exceed 62 days; and

   (b) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and

   (c) the maximum amount of interest charged that may be imposed or provided for does not exceed an amount (calculated as if the Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum: see subsection 6(1) of the Code.

4. Under the short term lending model with which ASIC has concerns:

   (a) short term credit is provided to retail clients by a short term credit provider under a credit contract, where the credit provider charges fees consistent with the limits prescribed in the short term credit exemption in the Code; and

(b) an associate of the short term credit provider, providing collateral services (such as application, management and collection services) in relation to the provision of the credit, charges significant fees or other costs under a separate collateral contract.

Consultation

5. ASIC released Consultation Paper 316 – Product intervention power: Short term credit (***CP 316***) on 9 July 2019 allowing three weeks for submissions. CP 316 included an outline of the significant detriment ASIC considered has resulted from, or will or is likely to result from, the short term lending model and attached a proposed product intervention order.

6. ASIC received 35 submissions in response to CP 316 from aggrieved consumers, industry bodies and participants, community legal centres, community organisations, financial counselling services and a complaints authority.

7. There was broad support for ASIC's proposed product intervention order and agreement that the short term lending model has resulted in, or will or is likely to result in, significant detriment to retail clients. Only two submissions received, from the entities involved in the short term lending model, were opposed to ASIC's proposed product intervention order.

Operation of the instrument

8. The instrument relates to short term credit facilities. Short term credit facilities are financial products within the meaning of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001,* and are financial products for the purposes of Part 7.9A of the Act.

9. The instrument prohibits:

   (a) the provision of short term credit and the charging of collateral fees and charges by short term credit providers and/or its associates, in circumstances where the credit fees and charges under the credit contract and the collateral fees and charges under a collateral contract, together, exceed the limits set out in subsection 6(1) of the Code; and

   (b) directors of short term credit providers or associates from causing or authorising that prohibited conduct.

10. "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 short term credit. 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.

11. The instrument does not prohibit persons from providing short term credit relying on the exemption in subsection 6(1) of the Code.

12. Conduct in contravention of the instrument can result in criminal and civil penalties. For individuals, such as directors, the criminal sanctions can result in imprisonment for up to 5 years.

Commencement, application and duration

13. The instrument commences on a day that is the second day after the instrument is registered on the Federal Register of Legislation.

14. The instrument applies in relation to a short term credit facility entered into on or after the commencement of this instrument.

15. The instrument remains in force for 18 months: subsection 1023G(2) of the Act. 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 authority

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

17. Under subsection 1023D(3), if ASIC is satisfied that a class of financial products:

    (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.

18. A description of the significant detriment is set out in Attachment A, the Product Intervention Order Notice available in the Supporting Material.

19. The instrument is a disallowable legislative instrument.

Statement of Compatibility with Human Rights

20. 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*.

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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 short term credit except in accordance with certain conditions.

2. The objectives of the instrument are to:

   (a) prohibit short term credit providers and their associates from charging retail clients fees and charges which exceed the legislative cap on fees and charges in subsection 6(1) of the National Credit Code; and

   (b) reduce the significant detriment to retail clients that has resulted and is likely to further result from that conduct.

3. The prohibition is expected to:

   (a) produce better outcomes in the form of lower fees for retail clients who require unregulated forms of credit such as short term credit and do not receive the benefit of the consumer protection provisions under the *National Consumer Credit Protection Act 2009* (the ***National Credit Act***) and National Credit Code; and

   (b) deter the use of lending models which seek to avoid regulation under the National Credit Act.

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*.