

From: [REDACTED]
To: [REDACTED]
Cc: [REDACTED]
Subject: ASIC and Inquiry into the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 [DLM=Sensitive]
Date: Thursday, 8 November 2018 3:47:22 PM

Dear Committee Secretariat,

In relation to the inquiry into the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018, there are two separate issues that ASIC would like to provide the Committee with further information on:

- that the Product Intervention Power applies prospectively; and
- that ASIC in its submission to Treasury on the revised exposure draft legislation, sought a provision to be included in the Design and Distribution Obligations similar to s12GNB and 12GNC of the ASIC Act, which allow ASIC to take action in relation to loss or damage suffered by a class of persons who are non-party consumers.

Product Intervention Power: applying prospectively

On the first issue, we think it is appropriate that the Product Intervention Power only enables ASIC to intervene prospectively.

The power is intended to be forward-looking – to enable ASIC to put in place proactive interventions to improve consumer outcomes where it identifies a risk or occurrence of significant consumer detriment. However this does not mean that consumers who were in those products before ASIC intervened are unable to access compensation in all cases.

We provide details of the availability of compensation for those consumers below.

Case A – lawful conduct

There are some cases where we might intervene in relation to consumer detriment which was caused by conduct that was completely lawful at the time. In these cases, we will not be able to go back and declare that such conduct was unlawful and require compensation to be paid. We think this is appropriate.

Case B – lawful conduct that drives unlawful conduct

In other cases we might intervene in relation to lawful conduct that was driving unlawful conduct. For example, in our recent [intervention](#) into flex commissions (through a legislative instrument), these commissions were not unlawful, but the skewed incentives they put in place did drive some unlawful conduct such as misleading and deceptive conduct or unconscionable conduct. In such cases, we could intervene prospectively to address the lawful conduct driving the harm (i.e. by banning flex commissions), and in relation to the unlawful conduct, if we can gather evidence of that conduct, then we can seek compensation on behalf of consumers in relation that conduct (i.e. the misleading and deceptive conduct or unconscionable conduct). Alternately the consumers impacted by the unlawful conduct could directly seek compensation, either through AFCA or through the courts.

Case C – unlawful conduct

When the Design and Distribution Obligations come into force, it is likely that in at least some cases where there has been detriment such that we have needed to intervene using the PIP, this will have been caused by the financial product being inappropriately distributed to consumers due to a breach of the Design and Distribution Obligations. In such cases again, as well as intervening prospectively using the PIP, ASIC will be able to take action to seek compensation on behalf of consumers for the breach of the Design and Distribution obligations, or consumers can seek compensation through AFCA.

It is also worth noting that if ASIC receives a directions power (which the Government has agreed to in-principle), this will enable ASIC to require a remediation program where ASIC suspects a licensee has engaged in conduct that constituted a contravention of financial services laws, including the Design and Distribution Obligations. This will obviously facilitate the process for consumers obtaining compensation.

Design and Distribution Obligations: Non-party consumers

On the second issue, ASIC did in its submission to Treasury, suggest that it would also be beneficial to include a provision in the Design and Distribution Obligations similar to s12GNB and 12GNC of the ASIC Act which allow ASIC to take action in relation to loss or damage suffered by a class of persons who are non-party consumers, and obtain court orders requiring a range of different remedial actions.

We wish to note that absent such a provision, consumers *can* still seek compensation in relation to a breach of the Design and Distribution Obligations either through the courts or through AFCA. It just means that where ASIC is seeking compensation on behalf of consumers, we will need to obtain consumers' consent to joining proceedings before being able to seek compensation on their behalf. The purpose of seeking a provision similar to s12GNB and s12GNC of the ASIC Act was to make it easier for ASIC to seek compensation for consumers, particularly where a breach of the Design and Distribution Obligations impacts a large number of consumers. Again the proposed Directions power noted above, would facilitate the establishment of a process for the remediation of customers outside a court based process.

Can you please communicate these messages to committee members? We are also happy to discuss any of these issues in more detail and or respond to any questions committee members may have. I can be contacted on [REDACTED]

Many thanks in advance.

Mary

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