FINANCE INDUSTRY DELEGATION

Response to

ASIC

Consultation Paper 316
Using the product intervention power: Short term credit

Published July 2019

Attention: Senior Manager, Financial Services Group

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SUBMISSION TO ASIC

CONSULTATION PAPER 316

Introduction

This response is presented on behalf of the Finance Industry Delegation, a representative entity supported by 187 small, medium and large Australian Credit Licensees, both credit providers and lessors, across Australia, all of whom face an ever increasing and onerous burden of compliance regulation.

Finance Industry Delegation supporters continue to hold substantial concerns in regard to the product intervention powers vested in ASIC by the Parliament - particularly the lack of appeal opportunities to the Administrative Appeals Tribunal, concerning market-wide orders, and the opportunity for ASIC to make highly subjective decisions as to what constitutes "consumer detriment".

However, given the Parliament has already passed the relevant legislation, the Delegation notes that Consultation Paper 316, and the proposed product intervention order, are essentially about overturning the most unwise Federal Court decision in *ASIC v Teleloans Pty Ltd and Finance and Loans Direct Pty Ltd* (FLD) [2015].

This a decision that identified a "helper" model, while ignoring the fact that such a model was analogous to a broker (credit assistance provider) model. Further, the decision did not address any of the substantial issues associated with those companies ignoring the responsible lending processes mandated in the National Consumer Credit Protection Act (National Credit Act).

This was a decision that provided a competitive advantage to companies that structured their lending business model to avoid both responsible lending obligations, and cost of credit caps. It also provided an opportunity for continuing major consumer detriment.

The continuing legality of this model has been a major source of frustration for Delegation supporters who have chosen to be compliant in accordance with the fundamental spirit of and intentions behind the National Credit Act.

Overview

Supporters of the Finance Industry Delegation are very pleased that ASIC is now considering action that will impact on Cigno and its associated company, Gold-Silver Standard Finance Pty Ltd (GSSF), in regard to the particular short term lending model those companies and at least one other company have adopted.

We are aware that the current situation has emerged from the unfortunate conduct of the Federal Court proceedings against Teleloans and FLD, and the subsequent ASIC resolution not to appeal the decision in that case. Cigno and GSSF appear to have emerged out of those earlier companies.

The Delegation notes that Cigno offers a "premium service", by providing the consumer with the opportunity, "*You can request Cigno to put (you) in touch with the Lender, Gold-Silver Standard Finance Pty Ltd*". Cigno offers its "*premium service which includes quick processing and approval, same and next day deposits, payment reminders and direct debit facilities and managing and facilitating the entire process from the time you apply until you've successfully paid out*". The alternative of directly dealing with GSSF is presented as a process "*which can take a couple of weeks to finalise*".

It is particularly distressing for the many regulation compliant Delegation supporters to have had to put up with continuing complaints about the "Cigno model", since at least 2016, and to have the "Cigno model" considered by the media as a "payday loan".

This consideration has impacted on the image of all who lend small amounts of money entirely in accord with the content and spirit of the National Consumer Credit Protection Act, including the National Credit Code.

On many occasions since 2016, Delegation supporters have expressed their dismay when considering the bank statement of Cigno customers who have approached them for a loan, while still committed to paying off a Cigno loan.

We will welcome the registration of the Legislative Instrument as is intended by ASIC.

It is our view that ASIC has had a clear mandate in regard to its product intervention powers to act as it apparently intends, since at least April this year.

We trust that the consultation process will not unduly delay essential ASIC action.

The consultation process

The Delegation notes that, at paragraph 46, ASIC states that "*We will generally consult*".

It is of concern that this statement may be in conflict with Section 1023F of the Corporations Act, which demands that ASIC consult with "*persons who are reasonably likely to be affected by the proposed order*" or in addition, or in the alternative, "*invites the public to comment on the proposed order*".

A major omission

It is extremely unfortunate that ASIC has not seen fit to add another dimension to its proposed Legislative Instrument.

Given the disaster associated with the Teleloans/FLD decision and the history of the "Cigno model", we are at a loss to understand why the draft Legislative Instrument does not also include the requirement for companies using the "Cigno model" to also be subject to the responsible lending regime provided by Sections 128 to 131, inclusive, of the National Consumer Credit Protection Act.

The comment in the Consultation Paper, at paragraph 11, that the proposed Order will not extend to (other) consumer protection measures available in the National Credit Act, appears to be in conflict with paragraph 20, which lists the specific limitations to product intervention order content. ASIC does not include other consumer protection measures in that list. We acknowledge that the list is in accordance with Sub-section 1023D(4) of the corporations Act, 2001.

It is unfortunate that there is no explanation as to why Section 1023D of the Corporations Act, which presents the concern to stop "*significant detriment*" to consumers by prohibiting "*specified conduct*", and any following section, extends only to the amount consumers are charged and ignores all the issues of responsible lending. The Delegation notes that the Draft Regulatory Guide 000, attached to Consultation Paper 313, at paragraphs 000.39 and 000.40, express a view that product intervention is "*intended to cover a broad range of harm or damage*".

We are unable to discover anything in this section or the subsequent sections in Part 7.9A of the Act that supports this more limited approach.

In particular, it is apparent that Section 1023E of the Corporations Act, detailing what must be taken into account when ASIC considers if there has been "*significant detriment*", does not provide any bar to the inclusion of responsible lending obligations.

One lender model v general applicability

The Finance Industry Delegation cautions ASIC to not rush to generally apply a perceived model response based on an investigation of one or two lenders.

This submission refers to the "Cigno model" and directs any comment made to that company and that model <u>only</u>.

No assumptions should be made as to the applicability of the proposed treatment of Cigno to other lenders who appear to be utilising the same legislative exception regime, without careful and comprehensive analysis of the business model actually being adopted by those other lenders.

An inspection of the other lenders' models may well reveal a very different total picture, where responsible lending rules are applied, collection is limited to 200% of the adjusted credit amount and the interest/fee rates are far more conservative than those charged by Cigno and its associated company.

In such a circumstance, product intervention may not be justified and certainly not justified for the reasons it is justified for Cigno.

Comments concerning the detail of the Consultation Paper 316

Paragraph 1 -

The high cost of the loans under scrutiny, as observed in consumers' bank accounts by Delegation members, has been extraordinary.

Paragraphs 4 and 42 and following -

The financial circumstances of the "Cigno model" revealed to Delegation members who have been approached by consumers with "Cigno model" loans, confirms ASIC's concerns with regard to significant consumer detriment.

Paragraph 8 and following -

The Delegation strongly encourages the adoption of Option 1 and as detailed in paragraph C1. The Delegation agrees with ASIC's views as expressed in Paragraph 71.

Encouraging the involvement with alternative products will not work. "Cigno model" consumers have had much cheaper alternative products available throughout and apparently ignored them.

To do nothing would be immoral.

Paragraph 39 -

The Delegation does not regard the service/s offered by Cigno to have any merit. These services are available (in a regulated fashion and at much lower cost) from compliant standard model lenders.

Response to the questions presented

C1Q1

The Delegation considers that the model causes unnecessary consumer detriment.

C1Q2

The proposed product intervention order should be expanded to embrace a requirement for responsible lending, as mandated for other lending models in the National Consumer Credit Protection Act.

C1Q3

The Delegation agrees with the proposal to limit fees that can be charged to reflect:

(a) what was obviously originally intended on the face of the wording in Section 6(1);

(b) the opportunities available in the National Credit Code to provide a lending model in keeping with the spirit of the legislation; and

(c) the issues raised in the relevant Explanatory Memorandums to avoid blatant consumer exploitation and provide a competitive level playing field, acknowledging the many compliant lenders who have never attracted the criticism that has been levelled at the model in question.

C1Q4

Apart from the Parliament passing appropriate legislation focused on achieving the same anticipated outcomes as are offered by Option 1, with the exception of adding the responsible lending requirements to the initiative, there is no appropriate alternative.

Conclusion

The Finance industry Delegation now waits for similar ASIC recognition of the consumer detriment being caused and the necessary regulatory action needed in regard to the buy now/pay later sector.

Just because this sector is dominated by the big end of town, ASIC must not forget its November 2018 report, which identified one in six buy now/pay later customers in financial trouble.

Nor should ASIC overlook the evidence given to the 2018/19 Senate Reference Committee Inquiry by the Delegation. This evidence being that Delegation members were seeing bank statements from buy now/pay later customers trying to borrow a loan from them to repay their buy now/pay later debt, of up to 18 buy now/pay later transactions.

Although it was presented that consumers “paid no interest”, and that buy now/pay later was “good credit” - the Inquiry completely overlooked the trend for retailers to increase purchase prices to cover their buy now/pay later fees.

Now that the “Cigno model” has generated ASIC attention, this more recent wholesale avoidance of the entire Commonwealth credit regulatory regime, including every rule of responsible lending, should not continue to be overlooked.

We thank you for your consideration of this response.

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July 2019