Joint Submission –

ASIC
Update to CP316: Use of product intervention power: Short term credit

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Table of Contents

Background Information....3

Introduction....3

Continued and repetitive use of pejorative term 'payday'....4

Section C – Responses to questions raised....5

C1Q1 5

C1Q2 5

C1Q3 6

C1Q4 6

Background Information

This submission is made on behalf of the Financiers Association of Australia (“FAA”) and Min-It Software (“Min-It”) clients.

We welcome the opportunity to submit this submission on Treasury’s consultation on the design, distribution obligations and product intervention powers of financial and credit products in regard to short term credit products.

The FAA, having been established since the 1930’s, is an organisation for individuals and companies involved in the fields of finance and credit provision. The FAA’s members are either non-ADI credit providers, providing loans up to $5,000 over terms of up to 2 years, mortgage financiers or business financiers.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-IT Software is a leading loan management software supplier to the micro-lending sector of the Australian market. Additionally, it has a number of clients providing motor vehicle finance as well business loans and consumer leases.

The vast majority of Min-It’s clients are not affiliated with any industry association.

Introduction

FAA members and Min-it clients welcome the news that ASIC is finally considering taking action against use of the Section 6(1) exemption under the National Credit Code (“NCC”) under the model as used by Cigno Pty Ltd (“Cigno”) and the associated lender Gold-Silver Standard Finance Pty Ltd (“GSSF). These companies employ the same model (the “Teleloans model”) used previously by Teleloans Pty Ltd (“Teleloans”) and Finance Direct Limited Pty Ltd (“FLD”).

We note this consultation paper seeks to overturn the Court’s findings and apply legal requirements that currently do not exist in a more general sense to anyone using a “helper” model

as Logan JJ described it[1], than take proactive action specifically targeted at Cigno and GSSD. ASIC could have consulted and issued this consultation to Cigno months ago. We are also aware of the Senate Economics Reference Committee's Inquriy ("SERCI") into credit and financial products targeted at Australians at risk of financial hardship's final report issued earlier this year that did not come out in favour of amending the legislation as we suggested.

ASIC must take some responsibility for the ongoing consumer detriment that has occurred to the large number of vulnerable consumers affected by the Teleloans model by:

1. its failure to appeal the decision in Australian Securities and Investments Commission v Teleloans Pty Ltd [2015] FCA 648. Both the author and a number of credit specialist lawyers believed there were errors in the judgment that warranted appeal; and
2. its decision only to require credit providers providing credit regulated under the NCC to be licenced under the National Consumer Credit Protection Act 2009 ("NCCP"). Had ASIC required Cigno and GSSF to hold Australian Credit Licences, it may have been possible to take action much quicker.

The Teleloans model has also caused grief to compliant and licenced credit providers where the consumer had loans with both the credit provider and Cigno. Consumer repayment failures often affected both parties. Loans issued under the model by Cigno also affected responsible lending requirements with the result that licenced credit providers could not lend to these consumers without breaching the NCCP and NCC requirements. In effect, for some affected consumers at least, unless a debt consolidation loan could be raised or they secured a Centrelink advance, legislation virtually locked these consumer into dealing with Cigno because they had almost nowhere else to turn.

Continued and repetitive use of pejorative term 'payday'

In addition to responding to the questions asked, we note ASIC's continued use of the word "payday" in regard to Small Amount Credit Contracts ("SACCs"). There have been numerous submissions to both Senate Committees, the SACC Review Panel, Treasury and ASIC, both by ourselves and others, that have highlighted the fact that industry does not regard SACCs as being

[1] [32] Australian Securities and Investments Commission v Teleloans Pty Ltd [2015] FCA 648

payday loans and regards the use of the word as pejorative. We respectfully request ASIC take note and cease using this terminology immediately.

Short term credit contracts are the nearest form of credit to what is regarded world-wide as a “payday” loan as they were traditionally issued and repayable by the consumer on their next pay day. In the SECRI submissions and hearings, for example, there were numerous instances cited of consumer advocates and financial counsellors regarding SACCs as payday loans but when examined properly, the vast majority of confusion came from the fact these were loans issued by Cigno.

Section C – Responses to questions raised

C1Q1 Do you consider that the short term lending model causes detriment to consumers and that this detriment is significant?

We consider and have publicly stated that the Teleloans model and now used by Cigno and GSSF has caused a great deal of detriment to a limited section of the community and caused harm to both members and clients businesses.

The harm to our members and clients’ businesses arises where consumers with existing contracts, whether it be other loans or consumer leases and the consumer elects to pay Teleloans in priority to meeting those existing contractual arrangements.

C1Q2 Do you consider that the short term lending model does or might cause detriment other than that identified by ASIC, or to a greater or lesser extent? If additional or greater, how should the proposed product intervention order be expanded to address this significant detriment?

We are aware of another entity that previously used a helper model. The entity charged for additional services provided but did undertake a proper assessment, did restrict the total payable to no more than Twice the Adjusted Credit Amount as though it were a SACC loan and provided

for hardship. This entity no longer provides these loans because of the adverse publicity of Cigno and the Teleloans model.
On the face of it, this entity may have caused no more detriment than would occur under a SACC loan assuming that the assessment process was as rigorous as required under the NCCP and NCC.

Consequently, we would argue the significant consumer detriment caused under the Teleloans model is restricted to the model used by Teleloans and FLD as well as Cigno and GSSF. That said, we can appreciate why ASIC wants to utilise Option 1 as its preferred choice for the Legislative Instrument.

C1Q3 Do you agree with our proposal to make an intervention order by way of legislative intervention prohibiting credit providers and their associates from providing short term credit and collateral services except in accordance with a condition which limits the total fees that can be charged? Please provide details of why, or why not.

Yes, we agree with the proposal, as it would:

1. stop any further significant consumer detriment from occurring;
2. create a level playing field for compliant and licenced credit providers; and
3. ensure that the spirit of the NCCP intention is retained.

C1Q4 What alternative approaches (including Options 2 and 3) could ASIC take that would achieve our objectives of preventing the consumer detriment identified in this paper?

As this type of product is supplied online, it should not be too difficult to also require a strong and concisely worded warning advising "This product may cause significant consumer detriment" be required.

However, capping the fees as per the requirements of s.6(1) does not go far enough to stop detriment. The vast majority of detriment generally occurs due to the lender or its associate

charging large unascertainable fees as detailed in the consultation paper in Table 3 on page18. These should be capped as well and we suggest that a similar approach to what's legislated under s.39B(1) of the NCC as applies to SACCs should apply to all contracts using the s.6(1) exemption. In general, the amounts lent are small because of the need to repay within the 62 day limit and so restricting unascertainable fees will prevent any lender coming into the market and charging high dishonour and other unascertainable fees to make up for their inability to charge associate fees.