

**Addendum to ASIC
Consultation Paper 330 –
Using the Product
Intervention Power:
Continuing Credit Contracts**
Submission by Legal Aid Queensland



ASIC Consultation Paper 330 – Using the Product Intervention Power: Continuing Credit Contracts

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a further submission in response to the addendum to ASIC Consultation Paper 330 – Using Product Intervention Power: Continuing Credit Contracts.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day to day application of the law in courts and tribunals.

LAQ's Civil Justice Services Unit lawyers provide advice and representation to vulnerable clients in banking and finance, credit and debt, insurance and consumer law including clients who experience significant detriment as a result of these type of products.

1. Do you agree with the proposed changes to the draft product intervention order as summarised in Table 1? Please explain the reasons for your view.

LAQ does not agree with the proposed changes to the draft product intervention order (PIO) exempting buy now pay later (BNPL) arrangements operating under the exemption in subsection 6(5) of the National Credit Code.

Before making a PIO, ASIC must be satisfied that a financial product, or a class of financial products, has resulted in, or will or is likely to result in, significant detriment to retail clients. The criteria for making this assessment are summarised at paragraphs 15 to 16 of the consultation paper and include, relevantly:

- (a) the nature and extent of the detriment; and
- (b) the impact that the detriment has had, or will or is likely to have, on retail clients.

LAQ notes the view expressed in the Addendum to the consultation paper that the exclusions for BNPL later arrangements (and non-cash payment facilities) are proposed on the basis that current evidence does not show that these arrangements give rise to the significant detriment described in the consultation paper.

LAQ submits that there is compelling evidence that BNPL arrangements, including those that rely on the exemption within subsection 6(5) of the National Credit Code, result in significant detriment to retail consumers. For example, the research presented in ASIC Report 672 *Buy now pay later: An Industry update*¹ included findings that of the BNPL users surveyed:

- (a) 20% reported cutting back or going without essentials to meet repayments;
- (b) 20% reported missing or being late paying other bills to meet repayments; and

¹ <https://download.asic.gov.au/media/5852803/rep672-published-16-november-2020-2.pdf>

- (c) 15% reported taking out further credit to meet repayments.

The report suggests there is a significant proportion of buy now pay later users who experience significant financial detriment in connection, at least in part, with their use of BNPL. The findings on BNPL users who made repayments using credit cards suggest that there is a relatively constant proportion of users who are financially overextended and in financial distress. This is consistent with LAQ's experience of consumers who present in financial difficulty, for example, with difficulty repaying a credit card or bill, and have overcommitted their income to multiple BNPL arrangements.

The detriment identified specifically in the consultation paper arises where continuing credit contracts are offered in a range of particular circumstances. Many of these are applicable to BNPL arrangements:

- (a) Although some BNPL providers are members of AFCA, it is not required. While there is an opportunity for regulatory arbitrage, there is a risk that new providers will enter the BNPL market and undercut existing providers by avoiding this cost, leaving retail consumers without recourse to an effective external dispute resolution scheme.
- (b) Retail consumers of BNPL products do not have access to the consumer protections under the National Consumer Credit Protection Act.
- (c) BNPL providers are not subject to responsible lending requirements and are not required to test whether retail clients can afford the repayments. Consumers tend to overextend themselves as barriers to accessing credit from BNPL providers are lower comparative to regulated credit subject to responsible lending. This results in retail consumers prioritising BNPL repayments as they shift their consumption to these products.

In LAQ's submission, there is sufficient evidence to demonstrate significant detriment to retail customers as a result of BNPL arrangements operating under the continuing credit contract exemption in subsection 6(5) of the National Credit Code. LAQ does not support exempting these arrangements from the proposed PIO.

2. Do you consider there is a significant risk of avoidance as a result of these changes? If so, what additional measures could be introduced by ASIC to address that risk?

LAQ submits that these changes can only increase the risk of avoidance. The most effective measure is likely to be monitoring and proactive use of the product intervention power.