ASIC Consultation Paper 355 – Product intervention orders: Short term credit and continuing credit contracts

Submission by Legal Aid Queensland

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Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to ASIC Consultation Paper 355 concerning product intervention orders for short term credit and continuing credit contracts. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

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. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services Unit lawyers have extensive experience providing specialist advice and representation to vulnerable clients on short term and continuing credit contracts, banking and finance, credit and debt, telecommunications, consumer law and insurance. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to responsible lending, insurance, mortgage stress, housing repossession, banking and financial issues, financial hardship, debt, contracts, loans, telecommunications, and unsolicited consumer agreements.

LAQ assists and represents clients with issues with short term and continuing credit contracts. This submission is informed by that knowledge and experience.

Short Term Credit Product Intervention Order

LAQ strongly supports ASIC's proposed Short Term Credit Product Intervention Order set out in Attachment 1.

LAQ previously submitted to Consultation Paper 316 where ASIC consulted on its original Short-Term credit product Intervention Order that expired on 13 March 2021.

In that submission, LAQ highlighted that over the years, in LAQ's experience, short term credit provided through the short-term lending model outlined in the Consultation Paper has caused widespread and significant detriment to the vulnerable consumers that LAQ assists.

In recent history, LAQ's lawyers have had significant experience in dealing with Gold-Silver Standard Finance (GSSF) and Cigno Pty Ltd (Cigno) who are currently using the short term lending model to avoid the consumer protections set out in the National Consumer Credit Protection Act 2009 and the National Credit Code. LAQ also works closely with financial counsellors in Queensland and has worked with Queensland Financial Counsellors on many cases assisting clients who are experiencing problems with lenders such as GSSF and Cigno.

In LAQ's experience, the significant detriment caused by this model is reflected on pages 6,7,11 and 12 of the Consultation Paper and the detriments highlighted in paragraphs 27 and 28 are not uncommon for the clients we assist.

In particular, the significant consumer detriment caused by the short-term credit model is highlighted by:

(a) the lack of protections available to consumers under the model which is structured to avoid the regulation of the *National Consumer Credit Protection Act* and National Credit Code.

(b) the difficulties faced by consumers accessing financial hardship assistance and then trying to work their way out of financial hardship under this model.

(c) the high fees under this model make it difficult for consumers to repay the debt and meet basic expenses such as rent and food.

(d) consumers experiencing significant stress and anxiety because they cannot access the protections of the existing National Consumer Credit regime.

(e) the failure of companies using this model to responsibly assess a consumer's ability to meet repayments on a short-term credit loan.

LAQ works closely with financial counsellors in Queensland. Case Study 1 is typical of the clientele LAQ assists facing issues because of these products.

Case Study 1

George receives a payment from Centrelink and was struggling to meet his basic expenses. He had several other small amount loans. He obtained a loan from Cigno of less than $200 to meet his basic expenses. He was unable to make any repayments on the Cigno loan. Fees and expenses meant that he now owed Cigno over $800.

Continuing Credit Contract Product Intervention order

LAQ is supportive of ASIC's proposal to make a product intervention order for continuing credit contracts.

LAQ has previously made submissions to ASIC CP 330 and Addendum to CP 330 outlining the significant detriment these products cause to vulnerable customers.

In recent history, LAQ's lawyers have had experience in dealing with BHF Solutions Pty Ltd (BHS) and Cigno Pty Ltd (Cigno) who are currently using the continuing credit model to:

(a) Avoid the consumer protections set out in the *National Consumer Credit Protection Act* 2009 and the National Credit Code.

(b) Avoid the effect of ASIC using its Product Intervention Power to regulate short term credit contracts that are not caught by the consumer protections set out in the *National Consumer Credit Protection Act* 2009 and the National Credit Code.

Case Study 2

Connor entered a contract with Cigno in mid-October 2019, soon after the PID in relation to the previous Cigno model came into effect. He borrowed $300. The loan documentation required him to repay more than $500 over a period of six weeks. Repayments were $90 per week. At the time he sought assistance from Legal Aid Queensland, he had paid $990 to Cigno and they were demanding a further $400.

At the time Connor entered the loan with Cigno he already had four other small amount loans. All these loans were in arrears. He was 20 years of age, and his sole source of income was wages from his apprenticeship, approximately $500 after tax per week. His weekly loan repayments across the other payday loans were approximately 65% of his income. With the Cigno loan repayments of $90 per week, 80% of Connor's income was directed to repayment of loans. The failed direct debits also resulted in weekly fees payable to the bank because of the overdrawing of his account. This was unsurprising given his low income.

The one aspect of the product intervention order for continuing credit contracts that LAQ does not support is the proposed exemption of continuing credit contracts that form a part of a Buy Now Pay Later (BNPL) arrangement.

In LAQ's submission to the Addendum to ASIC CP 330, LAQ highlighted that 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 relevantly include:

(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 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

(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

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

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 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.

D1 Subject to consultation and the Minister's written approval, we propose to make the industry-wide short term credit product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 1 to this paper.
D1Q1 Do you consider that short term credit facilities, when issued to retail clients in the way described in paragraph 23, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response.

For the reasons outlined above, LAQ considers that these products cause significant detriment to consumers and supports the issuing of the Product Intervention order for short term credit contracts.

D1Q2 Do you consider that ASIC should make the order, which is in substantially the same terms as the 2019 order (i.e. ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917)? Please give reasons to support your response, including whether you consider that there have been any significant changes in matters relevant to ASIC's decision (such as the financial circumstances of retail clients) since 14 September 2019.

For the reasons outlined above, LAQ supports the issuing of the Product Intervention order for short term credit contracts.

D1Q3 Are you aware of entities, including BSF Solutions and Cigno Australia, that are currently issuing, or likely to issue, short term credit facilities in the way described in paragraph 23? If so, please provide any relevant evidence to support your response.

Please see above, LAQ is aware of entities including Cigno and BSF Solutions issuing short term credit facilities in the way described in paragraph 23.

D1Q4 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

LAQ supports ASIC's proposed approach of issuing a Product Intervention order and is not aware of any alternative approaches that would be as effective in addressing the significant detriment that has been caused by these products.

D2 We propose to make the industry-wide continuing credit contracts product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 2 to this paper.
D2Q1 Do you consider that continuing credit contracts, when issued to retail clients in the way described in paragraph 48, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response.

For the reasons outlined above, LAQ considers that these products cause significant detriment to consumers and supports the issuing of the Product Intervention order for continuing credit contracts.

D2Q2 Are you aware of entities, including Cigno and BHFS, that are issuing, or likely to issue, continuing credit contracts in the way described in paragraph 48? If so, please provide any relevant evidence to support your response.

Please see above, LAQ is aware of entities including Cigno and BHFS issuing products as described in paragraph 48

D2Q3 Are you aware of any changes in the continuing credit contracts market—including changes to the continuing credit contracts that were issued in the way described in paragraph 48—since the publication of CP 330 (July 2020) and the Addendum to CP 330 (November 2020), which may be relevant to ASIC's proposal to make a continuing credit contracts production intervention order? If so, please provide any relevant evidence to support your response

LAQ is not aware of any changes to the market. The problems experienced by LAQ's clients reflect what is set out in ASIC CP330 and the Addendum to ASIC CP 330.

D2Q4 Do you agree with our proposal to make a continuing credit contracts product intervention order by legislative instrument as set out in the draft product intervention order in Attachment 2 to this paper?

As outlined above, LAQ supports in general the Product Intervention Order for continuing credit contracts but does not support the proposal to exempt BNPL products.

D2Q5 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

LAQ supports ASIC's proposed approach of issuing a Product Intervention order and is not aware of any alternative approaches that would be effective in addressing the significant detriment that has been caused.