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

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide a submission in response to ASIC Consultation Paper 330 – Using the Product Intervention Power: 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 lawyers provide advice and representation in banking and finance, credit and debt, insurance and consumer law including to clients who experience significant detriment from continuing credit contracts.

Recently LAQ has provided assistance to clients and financial counsellors in relation to continuing credit contracts with BHF Solutions Pty Ltd (BHS) and Cigno Pty Ltd (Cigno) who are currently using such contracts to avoid the consumer protections set out in the *National Consumer Credit Protection Act 2009* (NCCPA) and the *National Credit Code* (NCC).

Proposals

Proposal D1 We propose to make a product intervention order by legislative instrument under s1023D(3) of the Corporations Act to prohibit credit providers and their associates (including directors of such entities) from issuing continuing credit contracts except in accordance with a condition which limits the total fees that can be charged: see the draft product intervention order in the attachment to this paper. Your feedback D1Q1 Do you consider that continuing credit contracts, when issued to retail clients in the way described in paragraphs 16–22, have resulted in, or will or are likely to result in, significant detriment to retail clients? If so, please provide any relevant evidence which supports your views.

The detriment caused to consumers by this model is reflected in pages 8-12 of the Consultation Paper. The most significant issue is that the model targets vulnerable, low income consumers experiencing financial stress. The financial stress is then exacerbated by high fees which do not assist the consumer to resolve their difficult financial circumstances and often results in a further deterioration of the consumer's circumstances.

The consumer detriment caused by the continuing credit model is also highlighted by:

(a) lack of protections available to consumers under the model which is structured to avoid the regulation of the NCCPA and the NCC;

(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 overall cost of the continuing credit contract, including the costs under services agreements;

(d) the high fees under this model make it difficult for consumers to repay the debt and meet basic expenses;

(e) consumers experiencing high levels of stress and anxiety because they cannot access the protections of the existing NCC;

(f) the failure of companies using this model to responsibly assess a consumer's ability to meet repayments; and

(g) the high default rate on these loans.

D1Q2 Do you consider that continuing credit contracts, when issued to retail clients in the way described in paragraphs 16–22, have resulted in, or will or are likely to result in, significant detriment other than, or to a greater or lesser extent than, that identified by ASIC? If other or greater detriment, how should the proposed product intervention order be expanded to address this detriment? Please provide any evidence which supports your views.

ASIC has correctly identified the detriment that continuing credit contracts cause to consumers.

D1Q3 Are you aware of entities other than Cigno and BHFS that are issuing, or likely to issue, continuing credit contracts in the way described in paragraphs 16–22?

LAQ is not aware of any other entities engaging in the model described in paragraphs 16-22 of the Consultation Paper.

D1Q4 Do you agree with our proposal to make an intervention order by legislative instrument prohibiting credit providers and their associates (including directors of such entities) from issuing continuing credit contracts in circumstances where total fees exceed the maximum permitted under the continuing credit exemption and reg 51 of the National Credit Regulations? Please provide details of why, or why not.

LAQ supports this proposal as a way of addressing the significant harm and detriment caused by these products. However, in the longer term, LAQ submits that legislative change is required to ensure that these products are regulated by legislation.

D1Q5 What alternative approaches could ASIC take that would achieve our objectives of preventing the detriment to retail clients identified in this paper?

In LAQ's view, this type of product should be banned for retail clients. Alternatively, ASIC should be able to exercise its product intervention power in relation to such products.