

FEDERAL COURT OF AUSTRALIA

Cigno Pty Ltd v Australian Securities and Investments Commission [2020] FCA

479

File number: NSD 1555 of 2019

Judge: **STEWART J**

Date of judgment: 15 April 2020

Catchwords: **CORPORATIONS** – financial services and markets – product intervention orders in Pt 7.9A of the *Corporations Act 2001* (Cth) – judicial review of the ASIC *Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917 (PIO)* – exercise of ASIC’s power under s 1023D(3) of the *Corporations Act* – where the PIO prohibits the provision of credit under a short term credit facility where the fees and charges under the facility together with the fees and charges under a collateral services contract with the credit provider or an associate exceed the maximum amount of credit fees and charges allowed under s 6(1) of the *National Credit Code* in relation to the provision of credit under the short term credit facility – whether ASIC was satisfied that a “class of financial products” has resulted in or will or is likely to result in significant detriment to retail clients – whether the state of satisfaction required is that the products themselves result in the detriment or whether the circumstances of provision of the products resulting in the detriment is sufficient – construction of s 1023D(3) – where the detriment results from the sum of the fees and charges payable under a “short term lending model” comprising a short term credit facility (a financial product) and a collateral services contract (not a financial product) – whether ASIC’s delegate asked herself the correct question – whether the requisite state of satisfaction as a jurisdictional threshold to the exercise of the power was reached – whether ASIC’s delegate reached a state of satisfaction about a class of financial products rather than a particular financial product offered by one entity – meaning of “class” of financial products – whether a “class” of products is necessarily constituted by more than one product

ADMINISTRATIVE LAW – exercise of ASIC’s power under s 1023D(3) of the *Corporations Act* to order by legislative instrument that a person not engage in specified conduct – whether ASIC’s delegate asked the correct question – whether threshold state of satisfaction for the

exercise of the rule-making power was reached – whether ASIC’s delegate considered a requisite “class” of financial products when there was only one existing product

Legislation: *Acts Interpretation Act 1901* (Cth) s 13(1)
Australian Securities and Investments Commission Act 2001 (Cth) Div 2 Pt 2, s 12BAA
Australian Securities and Investments Commission Regulations 2001 (Cth) reg 2B
ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917 s 5
Corporations Act 2001 (Cth) Pt 7.9A, ss 11, 15, 1023A, 1023B, 1023D, 1023E, 1023F, 1023G, 1023L
Legislation Act 2003 (Cth) ss 15J, 17
National Credit Code (Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth) ss 6, 31A
Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 (Cth)

Cases cited: *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120; 169 FCR 211
Australian Securities and Investments Commission v Teleloans Pty Ltd [2015] FCA 648; 234 FCR 261
One.Tel Ltd (in liq) v Rich [2005] NSWSC 226; 190 FLR 443
Oreb v Australian Securities and Investments Commission (ASIC) (No 2) [2017] FCAFC 49; 247 FCR 323
Webb Distributors (Aust) Pty Ltd v Victoria [1993] HCA 61; 179 CLR 15

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Category: Catchwords

Number of paragraphs: 76

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Counsel for the Respondent: S Lloyd SC and S Patterson

Solicitor for the Respondent: Australian Securities and Investments Commission

ORDERS

NSD 1555 of 2019

BETWEEN: **CIGNO PTY LTD ACN 612 373 734**
Applicant

AND: **AUSTRALIAN SECURITIES & INVESTMENTS**
COMMISSION
Respondent

JUDGE: **STEWART J**

DATE OF ORDER: **15 APRIL 2020**

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The applicant is to pay the respondent's costs, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 The applicant, **Cigno** Pty Ltd, seeks judicial review of the *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2019/917 (PIO)* made by a delegate of the respondent (**ASIC**) on 12 September 2019 in the purported exercise of the power under s 1023D(3) of the *Corporations Act 2001* (Cth).

2 Part 7.9A of the *Corporations Act* empowers ASIC to make product intervention orders. In essence, if ASIC is 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, ASIC may order that a person must not engage in specified conduct in relation to the product or the class of products.

The PIO

3 Section 5(1) of the PIO provides that a “short term credit provider” must not provide credit to a retail client under a “short term credit facility”, except in accordance with the condition in s 5(5) of the PIO. The condition in s 5(5) is that the total of the amount of credit fees and charges that may be imposed or provided for under the “short term credit facility” and the amount of collateral fees and charges that may be imposed or provided for under a “collateral contract” must not exceed the maximum amount of credit fees and charges allowed under s 6(1) of the *National Credit Code* (which is Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth)) in relation to the provision of credit under the short term credit facility.

4 “Short term credit facility” is defined in the PIO to mean a “financial product covered by both” s 12BAA(7)(k) of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) and s 6(1) of the *National Credit Code*.

5 “Collateral contract” is defined in the PIO to mean, in relation to a short term credit facility, a “separate contract between a retail client and a short term credit provider or an associate in relation to the short term credit facility”. A “short term credit provider” is a person who is purporting to rely on s 6(1) of the *National Credit Code*.

6 “Associate”, in relation to a primary person that is a short term credit provider, has the meaning given by ss 11 and 15 of the *Corporations Act*. This means that an “associate” of a short term

credit provider includes a related body corporate, a director or secretary of the provider, and also a person with whom the short term credit provider acts in concert, and a person with whom the short term credit provider is associated, formally or informally.

7 Section 6(1) of the *National Credit Code* provides that the Code does not apply to the provision of credit in certain circumstances, namely if the provision of credit is limited to a total period not exceeding 62 days, the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit and the maximum amount of interest charges that may be imposed or provided for does not exceed an amount equal to the amount payable if the annual percentage rate was 24% per annum. I shall refer to this as the **short term credit exemption**.

Background

8 Gold-Silver Standard Finance Pty Ltd (**GSSF**), between 2016 and 13 September 2019, provided short term credit to retail clients. The terms of the short term credit were such that GSSF had the benefit of the short term credit exemption. GSSF would therefore be a “short term credit provider” for the purposes of the PIO if it continued to provide such short term credit facilities.

9 During the same period, Cigno provided services to GSSF’s customers in exchange for fees including application, management and collection services. Cigno accepted that it may be assumed for the purposes of the application that if it continued to engage in such transactions it would be an “associate” of GSSF and would be providing services to retail clients under “collateral contracts” for the purposes of the PIO.

10 Other entities had previously relied on a similar credit model. In 2014, ASIC commenced civil proceedings against **Teleloans** Pty Ltd and Finance & Loans Direct Pty Ltd (**FLD**) which operated a short term lending model which relied on the short term credit exemption. Under their model, Teleloans assisted consumers to access credit provided by FLD. The short term credit exemption applied as the fees charged by FLD did not exceed 5% of the credit amount and the term did not exceed 62 days. Teleloans also entered into a services agreement with consumers, charging service fees for the credit which were considerably more than the fees permitted under the small amount credit contract cap in s 31A of the *National Credit Code*.

11 ASIC unsuccessfully contended that the overall arrangement between consumers, Teleloans and FLD amounted to a tripartite credit contract to which the *National Credit Code* applied:

Australian Securities and Investments Commission v Teleloans Pty Ltd [2015] FCA 648; 234 FCR 261. Teleloans and FLD in any event ceased to operate their model, but in 2016 Cigno and GSSF set up a similar model.

12 During 2019, ASIC engaged in consultation as part of a process of considering whether to make a product intervention order, as required by s 1023F of the *Corporations Act*. On 9 July 2019, ASIC published *Consultation Paper 316 – Using the product intervention power: Short term credit* and called for submissions.

13 The Consultation Paper sought feedback on a proposal to use ASIC’s product intervention power to address the significant consumer detriment perceived by ASIC as arising from “some short term lending models”. It then identified the relevant “short term lending model” which involves the provision of short term credit at high cost to consumers which operates in the following way:

- (1) The short term credit provider offers short term credit to consumers, mostly for small amounts up to \$1,000. The application process is advertised as taking about two weeks.
- (2) An associate of the short term credit provider offers collateral services under a separate services agreement for a ‘fast track application’ if the consumer wants the money immediately. The fees for the collateral services are very high relative to the amount borrowed – total fees and repayments can amount to up to 990% of the loan amount.
- (3) The money must be repaid within a maximum term of 62 days and sometimes a shorter period of time, increasing the risk of default as repayments are based on the term of the credit rather than being based on capacity to repay.

14 The Consultation Paper included details of three case studies. The consumer in the first case study obtained short term credit through Cigno for \$120. Under the contract, Cigno charged a \$90 financial supply fee and \$5.95 in weekly account keeping fees. GSSF charged a credit fee of \$6. The total amount to be repaid was \$263.60 by four fortnightly payments of \$66 (with the fourth payment being \$65.60). The consumer could not afford the repayments and immediately defaulted. She was charged various dishonour fees and ongoing weekly account-keeping fees. As a result, she became liable to repay \$1,189 on the original amount of \$120, or 990% more than she borrowed.

15 The Consultation Paper identified that the practical effect of Cigno charging consumers “financial supply” and account fees to obtain credit from GSSF results in the overall fees paid by the consumer being significantly higher than what is permitted under s 6(1) of the *National Credit Code*. It was also identified that because the contracts provided under “the product”

(i.e. the short term lending model) are not “small amount credit contracts”, consumers suffer significant detriment as they do not have various rights including not to be charged fees and costs in excess of the maximum allowed, not to be charged an establishment fee if they refinance, and not to be obliged to repay more than double the amount borrowed in the event of default.

16 After receiving and considering submissions in response to the Consultation Paper, on 12 September 2019 ASIC’s delegate made the PIO and published a Product Intervention Order **Notice** as required by s 1023L of the *Corporations Act*. The Notice states that the PIO relates to short term lending models which are used to charge consumers excessive fees and charges (collateral fees and charges) for short term credit.

17 ASIC also published an **Explanatory Statement** for the PIO. This is an explanatory statement as referred to in s 15J of the *Legislation Act 2003* (Cth) and required under that Act because the PIO is a legislative instrument. The Explanatory Statement is not a statement of reasons of the rule-maker. Like the Notice, the Explanatory Statement indicates that the PIO is designed to prohibit companies and their directors “from using a specific short term lending model that ASIC considers has resulted in, will result or is likely to result in significant detriment to retail clients.”

Cigno’s grounds of review

18 Cigno identifies three grounds of review in support of the relief sought.

19 In ground 1, Cigno contends that the delegate, in promulgating the PIO, asked herself the wrong question or failed to ask the correct question.

20 In ground 2, Cigno contends that there was an absence of a jurisdictional precondition to the promulgating of the PIO.

21 Grounds 1 and 2 are closely related. Their common premise is that the delegate did not form the requisite state of satisfaction before making the PIO. That is because, it is said, the delegate was wrongly focused on the detriment said to have been caused by the “short term lending model”, rather than any detriment identified in respect of the “financial products” being regulated, being short term credit facilities.

22 Cigno submits that ASIC is required to consider, and reach a state of satisfaction about, whether a “financial product” has resulted in, or will or is likely to result in, “significant detriment to

retail clients” having regard to the nature and extent of the detriment and the actual or potential loss to retail clients resulting from “the product”. Cigno submits that the delegate wrongly considered, and reached a state of satisfaction about, only the detriment and loss to retail clients caused by the “short term lending model”, and the “collateral fees and charges” in particular.

23 In ground 3, Cigno contends that the delegate did not form any state of satisfaction about any “class” of financial products, but was in substance concerned only with the particular financial product provided by GSSF, in association with the collateral services provided by Cigno.

The legislative scheme

24 The power to make product intervention orders is in Pt 7.9A, in Ch 7, of the *Corporations Act*. Pt 7.9A was inserted in the Act by the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth). The provisions of Pt 7.9A commenced on 6 April 2019.

25 Section 1023A provides that the object of Part 7.9A is “to provide ASIC with powers that it can use proactively to reduce the risk of significant detriment to retail clients resulting from financial products”.

26 Section 1023B sets out definitions that apply in Pt 7.9A. Most relevantly, “financial product” is defined to include an “ASIC Act financial product”. An “ASIC Act financial product” is then defined to mean a financial product within the meaning of Div 2 of Pt 2 of the *ASIC Act*. Section 12BAA of the *ASIC Act* (which is in Div 2 of Pt 2 of that Act) sets out definitions of a “financial product”. Those definitions include, in s 12BAA(7)(k), that a “credit facility (within the meaning of the regulations)” is a financial product.

27 Regulation 2B of the *Australian Securities and Investments Commission Regulations 2001* (Cth) sets out, for the purpose of s 12BAA(7)(k) of the *ASIC Act*, a list of things that are credit facilities. Relevantly, this list includes, at reg 2B(1)(a), the “provision of credit” for any period, with or without prior agreements between the credit provider and debtor, and whether or not both credit and debit facilities are available.

28 Thus, the provision of credit, as described in reg 2B(1)(a), is a “financial product” in respect of which ASIC can make product intervention orders under Pt 7.9A of the *Corporations Act*.

29 Section 1023D contains the powers to make product intervention orders. In s 1023D(l), the power is in relation to “a financial product”, and the order is to be directed towards “a specified

person”. An order made pursuant to s 1023D(1) is declared, by s 1023D(2), not to be a legislative instrument.

30 The PIO was made pursuant to s 1023D(3), which provides as follows:

- (3) Subject to subsection (5), if ASIC is satisfied that a class of financial products:
 - (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
 - (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;

ASIC may, in accordance with this Part and by legislative instrument, order that a person must not engage in specified conduct in relation to the class of products, either entirely or except in accordance with conditions specified in the order.

Note 1: An example of conditions that may be specified in a product intervention order include that a product in a class of products not be issued to a retail client unless the retail client has received personal advice.

Note 2: Section 1023E specifies matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

Note 3: Section 1023N also provides that product intervention orders may include requirements for notifying retail clients.

31 Section 1023D(5), to which s 1023D(3) is subject, provides that conduct covered by a product intervention order must be limited to conduct in relation to a retail client.

32 Section 1023E makes provision in respect of the concept of “significant detriment to retail clients” referred to in s 1023D(3). Section 1023E provides as follows:

- (1) In considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients for the purposes of this Part, the following must be taken into account:
 - (a) the nature and extent of the detriment;
 - (b) without limiting paragraph (a), the actual or potential financial loss to retail clients resulting from the product;
 - (c) the impact that the detriment has had, or will or is likely to have, on retail clients;
 - (d) any other matter prescribed by regulations made for the purposes of this paragraph.
- (2) Subsection (1) does not limit the matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients for the purposes of this Part.

- (3) A financial product may result in significant detriment to retail clients even if a person has complied with the disclosure requirements in Chapter 6D or this Chapter, and with the person's obligations under Part 7.8A, in relation to the product.

33 Section 1023F(1)(a) provides that ASIC must not make a product intervention order unless ASIC has consulted persons who are reasonably likely to be affected by the proposed order. Section 1023F(2) provides that ASIC is taken to comply with s 1023F(1)(a) if it makes the proposed order, or a description of it, available on its website and invites the public to comment on the proposed order. Section 1023F(3) provides that a failure to comply with the consultation obligation in s 1023F(1) does not invalidate a product intervention order, and s 1023F(4) provides that s 17 of the *Legislation Act*, which imposes an obligation on rule-makers to consult before making legislative instruments, does not apply to the making of a product intervention order.

34 Section 1023G deals with the commencement and duration of product interventions orders. It provides that product intervention orders remain in force for 18 months, or any shorter period specified in the order. The PIO does not specify any shorter period, and so it remains in force for 18 months.

35 Section 1023L deals with requirements for ASIC to give notice of product intervention orders. It relevantly provides:

- (2) ASIC must publish each product intervention order, as in force for the time being, on its website.

Note: The *Legislation Act 2003* requires legislative instruments to be registered on the Federal Register of Legislation and provides for compilations of legislative instruments.

- (3) ASIC must also publish on its website, with the product intervention order, a notice that:
 - (a) describes the significant detriment to retail clients that has resulted from, or will or is likely to result from, the financial product or class of financial products to which the order relates, and sets out why the order is an appropriate way of reducing the detriment; and
 - (b) describes the consultation that ASIC undertook in relation to the order; and
 - (c) if the order comes into force after it is published—specifies the day it comes into force.

Grounds 1 and 2: the cause of the detriment

36 Cigno submits that the nature of the exercise required by ss 1023D(3)(b) and 1023E(1) is clear, namely that ASIC is required to consider, and reach a state of satisfaction about, whether a “financial product” has resulted in, or will or is likely to result in, “significant detriment to retail clients” having regard to the nature and extent of the detriment and the actual or potential loss to retail clients resulting from “the product”. Cigno submits that no attempt was made by ASIC’s delegate to consider the nature and extent of the detriment caused by “the financial product itself”.

The state of satisfaction required to be reached

37 The first issue thrown up by grounds 1 and 2 is as to the construction of s 1023D(3)(b), viz. what is ASIC required to be satisfied of in being “satisfied that a class of financial products ... has resulted in, or will likely result in, significant detriment to retail clients”? The question is really as to the narrowness or breadth of what it is that must “result in” the “significant detriment”; is it:

- (1) narrowly, the class of financial products, or a financial product within that class, “itself”; or
- (2) more broadly, the class of financial product, or a financial product within that class, in combination with something else that is not a financial product (in this case, the collateral contract with its fees and charges)?

38 Put differently, must the financial product or the class of financial products *directly* cause the significant consumer detriment, or is indirect causation sufficient?

39 Both Cigno and ASIC’s submissions proceed on the basis that s 1023E applies to ASIC’s assessment under s 1023D(1) of whether *a financial product* has resulted in, or will or is likely to result in, “significant detriment to retail clients”, *and* its assessment under s 1023D(3) of whether *a class of financial products* has resulted in, or will or is likely to result in, “significant detriment to retail clients”. Given the clear and deliberately different treatment of PIOs in respect of particular financial products, on the one hand, and classes of financial products, on the other, in ss 1023D and 1023L and the use of the language of “a financial product” and not “a class of financial product” in s 1203E, one might have doubted whether the latter section applies to an assessment of a class of financial products.

40 However, Note 2 to s 1023D(3), which is identical to Note 2 to s 1023D(1), states that s 1023E specifies the matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients. The notes form part of the Act and must be considered in interpreting the provisions to which they relate: *Acts Interpretation Act 1901* (Cth) s 13(1); *One.Tel Ltd (in liq) v Rich* [2005] NSWSC 226; 190 FLR 443 at [54] per Bergin J; *Oreb v Australian Securities and Investments Commission (ASIC) (No 2)* [2017] FCAFC 49; 247 FCR 323 at [46] per Rares, Davies and Gleeson JJ. It is thus tolerably clear that s 1023E applies to the making of s 1023D(3) product intervention orders.

41 Cigno relies on s 1023E in support of its submission that the jurisdictional requirement is that ASIC is satisfied with respect to the detriment caused by the financial product itself, rather than by something extraneous to the product. In this case, that is the collateral contract with its fees and charges, whether on their own or in combination with the fees and/or interest charges attached to the short term credit financial product itself. ASIC merely refers to s 1023E as a source of meaning for the expression “significant detriment to retail clients”.

42 In my view, Cigno’s approach too narrowly casts what it is that ASIC must be satisfied of. There are a number of indications that it need not be a financial product or a class of financial products that “itself” directly causes the detriment, and that detriment caused indirectly by the financial product or a class of financial products in the sense of there being something in the circumstances of the availability of the product or the class of products to retail clients that causes the detriment. The causal requirement is satisfied if the detriment would not have occurred but for the financial product or the class of financial products being made available in those circumstances. There are a number of considerations that lead me to this conclusion.

43 *First*, as submitted by ASIC, the power in s 1023D(1) (in respect of a financial product) and in s 1023D(3) (in respect of a class of financial products) is nuanced; its exercise does not require a blanket prohibition of the product or the class once the requisite state of satisfaction has been reached, but allows for the prohibition of “specified conduct in relation to” the product or the class, “either entirely or except in accordance with conditions”. This means that the prohibition or conditions need not relate to a feature of the product or products in the class of products themselves.

44 That the prohibition or conditions can relate to “conduct in relation to” the product or the class goes to show that the significant detriment that the prohibition or conditions must seek to avoid

is not detriment necessarily caused by the product itself, or products in the class of products themselves. “In relation to” is an expression of wide import, its ultimate breadth depending on the context: *Australian Securities and Investments Commission v Narain* [2008] FCAFC 120; 169 FCR 211 at [68]-[69] per Jacobson and Gordon JJ. Here it requires that there be a connection between the conduct and the class of products, but the conduct is not, nor is it required to be, inherent in or a feature of the class of product or of products in the class. It is extraneous to such products. Thus that which can be prohibited or restricted is not inherent in or a feature of the products. Naturally the prohibition or restriction is expected to be directed at that which causes the detriment, and so it is that the finding of significant detriment that enlivens the power need not be detriment that results from something inherent in or that is a feature of the products themselves.

45 *Secondly*, Note 1 to ss 1023D(1) and 1023D(3) also supports the proposition that the detriment to retail consumers can arise from the circumstances in which the product or the class of financial products is issued. The notes provide an example of conditions that may be specified in a PIO as being that “a product in a class of products not be issued” to a retail client unless the retail client has received personal advice. This indicates that it is not the product or the class that necessarily directly causes the detriment, but it is rather the issuing of the product or products within the class to retail clients without the clients having received personal advice and therefore in circumstances potentially detrimental to them. For example, ASIC might be satisfied that, in respect of a particular financial product or class of financial products, *uninformed* clients are likely to suffer significant detriment, but that *informed* clients are not. Thus, it is not the financial product or class of financial products itself that is likely to cause significant detriment, but the issue of such products in circumstances where retail clients are not properly or adequately informed about the products.

46 *Thirdly*, the Revised **Explanatory Memorandum** for the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019* (Cth) offers some indications with regard to the nature of the detriment and its causes which are intended to enliven the product intervention order power.

47 Chapter 2 of the Explanatory Memorandum deals with the product intervention power introduced as Pt 7.9A of the *Corporations Act*. It explains (at [2.5]) that the Financial System Inquiry (Final Report, November 2014) (**FSI**), considered the scope of ASIC’s powers in the context of past situations where consumers had suffered significant consumer detriment and

ASIC had exhausted its regulatory toolkit. The FSI found that early intervention by ASIC could be more effective in reducing harm to consumers compared with waiting for a breach to occur. It recommended providing ASIC with a proactive intervention power that would enhance the regulatory toolkit available where there is risk of significant consumer detriment.

48 The Explanatory Memorandum (at [2.7]) states that the intervention power will allow ASIC to regulate or, if necessary, ban potentially harmful financial and credit products where there is a risk of significant consumer detriment. The power is intended to enable ASIC to take action before harm, or further harm, is done to consumers.

49 Paragraph [2.33] of the Explanatory Memorandum, in a section of the Explanatory Memorandum headed “When can the intervention power be used?”, includes the following:

The meaning of detriment is intended to take its ordinary meaning in the context of the new provision. However, it is intended to cover a broad range of harm or damage that may flow from a product. The harm or damage may arise from any number of sources associated with the product, including the product’s features, defective disclosure, poor design, or inappropriate distribution.

50 The final sentence of that quote indicates that the phrases “resulted in” and “result in” in s 1023D(3)(b) are not intended to require a direct causal link between the class of financial product and the identified detriment – the detriment can arise from indirect sources associated with the product including, for example, defective disclosure or inappropriate distribution. In the latter regard, paragraph [2.34] also refers to significant detriment arising from the distribution of a product.

51 Further, paragraph [2.38], in a section of the Explanatory Memorandum headed “What is the content of the new intervention power and how is it exercised?”, gives some examples of the breadth of possible product intervention orders. These include “directing that a particular product or class of product only be offered by way of issue to particular classes of consumers or in particular circumstances” and “directing that a product or class of product not be distributed unless accompanied by an appropriate warning or label”. These examples indicate that the type of relevant detriment may not be something inherent in the product or the products in the class of product, but rather to do with the particular class of consumer amongst the classes of consumer to whom the product or class of product is issued, the absence of a particular warning or label accompanying the product or class of product, or other particular circumstances in which the product or class of product is issued.

- 52 This indicates that the product intervention power contemplates that a financial product or class of financial products might be likely to cause significant detriment because of the particular circumstances in which it is issued or offered, and not because of something inherent in the product or the products in the class of product concerned. Thus, significant detriment indirectly caused by the product or the class of product is sufficient to enliven the power.
- 53 It is also apparent from the Explanatory Memorandum, and the FSI that preceded it, that Pt 7.9A of the *Corporations Act* is “a fundamental piece of remedial and protectionist legislation” and as such “should be construed broadly so as ‘to give the fullest relief which the fair meaning of that language will allow’”: *Webb Distributors (Aust) Pty Ltd v Victoria* [1993] HCA 61; 179 CLR 15 at 41 per McHugh J writing about the *Trade Practices Act 1974* (Cth). There is nothing in the language of s 1023D(3) to suggest that the power, or the circumstances in which it is enlivened, should be narrowly construed. Indeed, I have explained that in my view there are indications to the contrary. The broader construction which I have favoured is consistent with the remedial nature of the power.
- 54 Cigno pointed out that the product intervention power impinges on parties’ freedom of contract and submitted that for that reason it should be narrowly construed, or at least that the fact that it is remedial legislation is neutral in its construction. As with so much remedial legislation, I accept that the product intervention power interferes with freedom of contract. That is what it was intended to do. The question is, what enlivens the power? Having regard to the mischief sought to be addressed, there is nothing to suggest that the basis for the power to be enlivened should be narrowly construed and, indeed, in order for certain identified mischief to be addressed it is necessary that that basis is more widely construed than what Cigno contends for. Such mischief includes detriment resulting from the product in question being offered to a particular class of consumer or in particular circumstances. That serves to justify the broader construction that the text in any event points to.
- 55 *Fourthly*, I do not regard s 1023E as having a particular bearing on the problem at hand. It is true that it uses the language of whether “a financial product” has resulted in, or will or is likely to result in, significant detriment to retail clients, but it does not say anything, explicitly or otherwise, about the quality of the causal connection that is encompassed in the phrase “resulted in”; it does not say or indicate whether there must be a direct causal relationship between the product and the detriment or whether it can be indirect.

The state of satisfaction actually reached

56 The second issue thrown up by grounds 1 and 2 is whether ASIC's delegate reached the requisite satisfaction. As I understand Cigno's submissions, if I am against it on the construction point, as I am, then it accepts that the delegate reached the requisite satisfaction on that construction. However, for the sake of completeness, and in case I have misunderstood the submissions, I will deal briefly with this aspect.

57 The Notice is obviously the key source of the delegate's process of reasoning as s 1023L requires that the Notice describes the significant detriment to retail clients that has resulted from, or will or is likely to result from, the class of financial products to which the order relates. However, the Consultation Paper, which preceded the Notice, and the Explanatory Statement, also offer insight into the delegate's reasoning and what she was satisfied of.

58 Material aspects of the Consultation Paper are identified above (at [13]-[15]). To those aspects I would add the following. The opening page of the Consultation Paper identifies that it sets out ASIC's proposal for using the product intervention power "in relation to short term credit". That would indicate that the relevant class of financial products that ASIC had in mind was short term credit financial products. It then went on to identify that the provision of short term credit as part of the identified short term lending model, which model includes the provision of collateral services under a separate services agreement with its own fees and charges, results in a high cost to consumers.

59 In identifying the significant consumer detriment, the Consultation Paper stated that "the total cost payable under the credit contract *and* services agreement is significantly higher than the maximum charges permitted by the National Credit Act" (emphasis added). Thus, it is the provision of credit under a credit contract in combination with a collateral services agreement with an associate which was at that time identified as resulting in significant consumer detriment.

60 The Notice identifies that the PIO relates to short term lending models which are used to charge consumers excessive fees and charges "for short term credit". This too indicates that the class of financial product that the delegate had in mind was short term credit. However, more specifically, it was short term credit provided as part of the identified short term lending model.

61 The Notice states that "ASIC is satisfied that the collateral fees and charges charged through the short term lending model, as described in [the Consultation Paper], has resulted in

significant consumer detriment to retail clients”. That is an unambiguous statement of satisfaction that was reached. The Notice identifies the short term lending model as involving two services or products provided to a retail client. The one is the provision of short term credit by the short term credit provider who charges fees consistent with the limits prescribed in the short term credit exemption. The other is the provision of collateral services, such as application, management and collection services, by an associate of the short term credit provider who charges significant fees or other charges under a separate collateral contract.

62 The Notice then states that ASIC considers that the short term lending model results in significant detriment because of the combination of a number of factors including that “the *overall* fees and charges charged under the model are significantly higher than what is permitted under the short term credit exemption” (emphasis added). ASIC’s illustration, in the Notice, of the “significant fees” that are charged to the consumer includes the fee charged by the short term credit provider under the short term credit facility, i.e. it is the sum of the fees and charges including the lender’s fee that causes the detriment.

63 The Explanatory Statement, as indicated, identified that the PIO addresses significant detriment that ASIC has identified through the use of a specific short term lending model. The short term lending model is identified as being comprised of the provision of short term credit to retail clients by a short term credit provider under a credit contract and the provision of collateral services in relation to the provision of the credit by an associate of the short term credit provider who charges significant fees or other costs under a separate collateral contract. Thus, the identified class of financial products is short term credit or, more specifically, short term credit provided in particular circumstances, namely under the short term lending model, i.e. in conjunction with the provision of services by an associate.

64 For the above reasons, in my view ASIC’s delegate identified the relevant class of financial products as being short term credit or short term credit provided in particular circumstances, namely as part of the short term lending model. It is true that the short term lending model is not itself a financial product or class of financial products, and that the collateral services contract offered by the associate of the short term credit provider is not a financial product. However, short term credit provided in a particular way, namely as part of a short term lending model which has as an element the provision of the collateral services by an associate of the short term credit provider, is a class of financial products.

65 Further, although the delegate did not reach a state of satisfaction that the fees charged for the financial product itself, namely the short term credit product, or by the short term credit provider, resulted in the detriment, she was satisfied that those fees in combination with the collateral fees and charges of the associate of the short term credit provider results in significant detriment to retail clients.

Conclusion on grounds 1 and 2

66 For the above reasons, I am satisfied that the delegate asked herself the correct question and the requisite jurisdictional threshold to the making of the PIO was satisfied. Accordingly, review grounds 1 and 2 must fail.

Ground 3: class of financial products

67 Cigno submits that ASIC did not form any state of satisfaction about any “class” of financial products, but was in substance concerned only with the particular financial product provided by GSSF in association with the collateral services provided by Cigno. Cigno submits that the ordinary meaning of the phrase “class of financial products” requires identification of a number of products which can be grouped together as a “class” by reason of their common characteristics.

68 Cigno submits that ASIC did not reach the requisite state of satisfaction with respect to a “class of financial products” resulting in significant detriment and it did not consider why the existence of a particular financial product (i.e. GSSF/Cigno’s product) provided a basis to conclude that a “class” of financial products was available or likely to be available. Cigno submits that ASIC adverting to the mere possibility of the same financial products being provided by others through “phoenixing” is not the same as reaching a state of satisfaction that a class of financial products is or was likely to be available, or that such a class has resulted in, or will or is likely to result in, significant detriment.

69 Cigno’s reference to phoenixing is to the statement in the Explanatory Statement that “the purpose of the broad coverage [of the PIO] is to ensure that avoidance opportunities through phoenixing are minimised.”

70 The submission that it is necessary for there to be more than one product (or provider of a product) of a particular type for there to be a “class” of products of that type for the purposes of s 1023D(3) cannot be accepted. That would require an unduly narrow construction of the provision.

71 *First*, with reference to the text of s 1023D, the relevant distinction is between “a financial product” (sub-s (1)) and “a class of financial products” (sub-s (2)). There is nothing in the word “class” that requires there to be more than one financial product presently existing that is within the class. The relevant meaning of class is “a set or category of things having some related properties or attributes in common, grouped together, and differentiated from others under a general name or description; a kind, a sort”: *Oxford English Dictionary Online* (Oxford University Press, March 2020).

72 Thus, “class” is a taxonomical tool; it is a set or category with common characteristics. It is not necessary to the concept that there be more than one, or even one, existing thing within the class. There may be only an expectation that there might be a thing or things in the future with the characteristics of the class which will cause them to be categorised as part of the class if and when they come into existence.

73 It is apparent from s 1023A of the *Corporations Act* that the object of Pt 7.9A is to provide ASIC with powers that it “can use proactively” to reduce the risk of significant detriment to retail clients resulting from financial products. Also, s 1023D(3) provides for the exercise of the product intervention order power on the basis not only of detriment that has actually occurred, but also detriment that “will or is likely to” occur as a result of a class of financial products. Thus, there need be no existing product, let alone more than one, for the power to be able to be exercised.

74 In any event, ASIC’s delegate was not only concerned with the short term lending model operated by GSSF and Cigno. As indicated, the delegate identified that Teleloans and FLD had previously operated the same model. Therefore, there had been at least two products within the class. ASIC also identified, with reference to phoenixing, that others might use the model in the future.

75 In the circumstances, ground 3 must fail.

Conclusion

76 For the reasons given, each of the grounds of review fails. There is no apparent reason why the costs should not follow the event, and no submission was made to the contrary. The applicant should therefore pay the respondent’s costs.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart.

Associate:

A handwritten signature in cursive script, appearing to read "Phoebe Zentes".

Dated: 15 April 2020