

Consumer Credit Law Centre SA

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Submission to Australian Securities Investment Commission
CONSULTATION PAPER 316: Using the Product Intervention Power: Short term credit
Submission on behalf of Consumer Credit Law Centre SA

1. Background to Consumer Credit Law Centre SA (CCLCSA)

This submission is in response to Consultation Paper 316 (CP 316) seeking feedback on a proposal to use ASIC's product intervention power under Pt 7.9A of Corporations Act 2001 (Cth) to address some short term lending models. The submission is based on the Consumer Credit Law Centre SA's ("CCLCSA") experience advising consumers who have entered short term credit contracts with providers such as Gold-Silver Standard Finance Pty Ltd ("GSSF") and collateral service contracts with providers such as Cigno Pty Ltd ("Cigno").

The CCLCSA fully supports the making of an market-wide product intervention order by legislative instrument to prohibit credit providers and their associates using a 'short term lending model' to charge amounts that exceed the maximum permissible limits under short term credit exemptions.

The CCLCSA's view is that use of the product intervention power to prohibit specific short term lending models is the only option proposed in CP 316 that will adequately protect vulnerable consumers from significant detriment.

Consumer Credit Law Centre SA

The CCLCSA was established in 2014 to provide free legal advice, representation, legal education, advocacy, and financial counselling to consumers in South Australia in the areas of credit, banking, and finance. The CCLCSA is managed by Uniting Communities who also provide general community legal services, as well as a range of services to low income and disadvantaged people including mental health, drug and alcohol, and disability services.

Uniting Communities

Uniting Communities works with South Australian citizens across metropolitan, regional and remote South Australia through more than 90 community service programs. Our vision is: a compassionate, respectful and just community in which all people participate and flourish. We are made up of a team of more than 1500 staff and volunteers who support and engage with more than 20,000 South Australians each year. Recognising that people of all ages and backgrounds will come across challenges in their life, we offer professional and non-judgemental support for individuals and families.

Uniting Communities, through the CCLCSA, is particularly interested in ASIC's proposal to use product intervention powers due to our extensive involvement in the provision of financial counselling and ongoing advocacy on a raft of measures associated with financial matters, financial stress, and financial hardship for low and modest income households. Our particular focus is providing support to low income and disadvantaged households who have suffered significant detriment from high-cost low-amount credit such as the short term lending models.

2. Supporting Use of Product Intervention Power to prohibit specific short term lending models

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

Yes. The CCLCSA has assisted many consumers who have suffered significant detriment by entering loans provided by GSSF through Cigno, and other short term lenders. These loans are particularly harmful because particular lenders purport to exempt themselves from regulation under the *National Consumer Credit Protection Act 2009* (Cth) ("NCCPA"), and consequently, none of the normal legislative protections for consumers apply.¹ The result is that there is often:

- No cap on the cost of credit (c.f. regulated credit products, or if the short term credit exemption was strictly applied);
- No cap on fees payable on default;
- No hardship protection as provided in the *National Credit Code* ("NCC") (the CCLCSA experience is that consumers have been charged additional fees when they have asked for hardship assistance);
- No responsible lending assessments (including any of the rebuttable presumptions);
- No effective IDR process (compliant with ASIC's Regulatory Guide 165);
- No access to any EDR scheme.

¹ The CCLCSA notes that the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* was intended to protect consumers from the risk of financial harm or detriment when using high-cost credit¹.

The harm caused by short term lenders evading legislative consumer protections is compounded by the particular vulnerability and disadvantage already suffered by the vast majority of our clients. Consumers who receive assistance from the CCLCSA are often from low socio-economic backgrounds and typically fall into one or more the following categories:

- Centrelink recipient;
- Unemployed;
- Youth (18-25 years of age)
- Single parent;
- Consumers with disability and mental health issues (many Disability Support Pension recipients and some subject to administration orders).

Clients are often in severe financial hardship and unable to meet very basic living expenses.

It is the CCLCSA's view that the short-term lending model is targeted at, and takes unfair advantage of, consumers who are most financially vulnerable and on very low incomes. These are the consumers who are excluded from regulated credit because a proper credit assessment would reveal the proposed contract is unsuitable. When a consumer enters into a short-term loan agreement, their existing financial stress is compounded by the frequently onerous conditions imposed by the lender, and they suffer further detriment. For instance, in the CCLCSA's experience:

- upfront fees are very high in comparison to the borrower's income and the sum of money borrowed;
- consumers do not understand that they are entering a separate services agreement with Cigno Loans and/or that Cigno Loans is not the lender;
- consumers are generally unable to distinguish the difference between a short term lending model arrangement and regulated pay day loan;
- it provides credit to consumers who never had capacity to repay from the outset²;
- default fees and other charges are uncapped and no maximum limit applies to default fees and other charges that can be added;
- the debt rapidly grows if the consumer does or cannot make scheduled repayments;
- it targets consumers who are typically not familiar with their rights with respect to debt collection;
- debt collection tactics are aggressive and making a complaint to IDR has not reliably stopped collection activity;
- consumers feel pressured to prioritise Cigno Loan repayments to avoid further uncapped default fees;
- there is no way for consumers to escalate complaints or have their complaint properly assessed;
- clients who pay unaffordable repayments are left without adequate funds to pay rent, buy food and medical expenses;

² Consumers would otherwise not qualify for a credit contract or consumer lease as a responsible lending credit assessment would deem the credit as unsuitable.

- consumers are paying an even higher cost for credit in a short term lending model compared with other regulated credit products³.

The CCLCSA's Financial Counsellors have reported that clients are seeking emergency relief for food and accommodation as they are left with insufficient funds to buy food or pay rent due to Cigno direct debit repayments. Other clients who have chosen to prioritise basic living expenses, and opted to default on the Cigno repayments, receive frequent contact from collections threatening to send the account to an external credit collection agency.

It is the CCLCSA's view that the short term lending model causes significant detriment by imposing a cost of credit and other terms and conditions that would otherwise be disallowed under the NCCPA. This harm is greatly augmented by the particular vulnerabilities of the consumer group who are likely to apply for short-term credit, and who cannot access regulated credit. These consumers who are most in need of assistance are then unable to rely on any legislative consumer protections under the NCCPA.

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?

The significant detriment in short term lending models as identified in the Consultation Paper includes absence of rights to hardship, legitimate IDR and EDR processes, caps on fees and charges and failing to assess capacity to repay. However, the CCLCSA is of the view that short term lending models cause detriment to a greater extent than already identified by ASIC.

The CCLCSA is particularly concerned about Cigno's debt collection activities, which can best be described as a form of financial terrorism, and the lack of any satisfactory dispute resolution process.

Debt Collection

Consumers are told that if they do not make repayments, their debt will be forwarded to a debt collector. Many consumers do not know how to manage the rapidly increasing debt and are not familiar with debt recovery and legal enforcement processes. The CCLCSA's view is that Cigno takes advantage of the lack of experience of many of their customers to 'extort' repayments, fees and default penalties, which invariably exceed what is permitted under the NCCPA for other payday lenders.

The debt collection tactics reported to and seen by the CCLCSA are unacceptable and are used to frighten people into making payments. The combination of rapidly increasing debt with threats to refer the debt to debt collectors means many consumers are frightened and intimidated into making the repayments at significant detriment. For clients who

³ Such as small amount credit contracts as already outlined in Consultation Paper 316.

never had capacity to make the scheduled payments, this tactic extorts borrowers to prioritise and channel available funds to Cigno as a preferred creditor to all other creditors. Consumers suffer significant harm and detriment when they default on other bills, jeopardising their health and security of accommodation. As the consumer never had capacity to make repayments, they are left with inadequate funds to pay for basic expenses such as food, rent, medication etc. The trickle-down consequences cannot be ascertained in financial terms for the most financially vulnerable borrower.

Consumers have also reported that Cigno has attempted to withdraw funds from their bank account on different days to what they authorised direct debits to be processed (i.e. varied repayment dates without notification). CCLCSA has in the past noted contractual terms on Cigno standard form agreements purporting that a consumer agrees for the direct debit payment to be scheduled one day earlier, after making two defaults. Consumers report that they were not given notice of the change to repayment dates to avert the compounded detriment of direct debit dishonour fees or overdrawn fees on their savings or debit account. Cigno do not take reasonable steps to bring attention of this onerous clause to the attention of a consumer.

CCLCSA's Financial Counsellors have reported that some clients have resorted to borrowing money from regulated credit providers to pay out their Cigno Loan to stem further default fees and charges. In the CCLCSA's view, it is absurd that clients are resorting to entering other regulated credit contracts for the purpose of discharging and containing the increasing debt with Cigno. The added detriment is that the consumer then pays further costs to obtain credit for the purpose of refinancing the Cigno debt which charged a very high cost for the credit advanced from the initial Cigno/GSSF loan.

Dispute Resolution

Cigno does not provide a satisfactory dispute resolution process. If a consumer wishes to dispute the amount owing, apply for hardship, or complain about the conduct of debt collectors, they are left without any remedy or assistance. Not only do they not have access to any external dispute resolution ("EDR") body, Cigno's internal dispute resolution ("IDR") often leaves the consumer confused and left with the impression nobody will address their complaint. Further, when consumers have contacted Cigno's IDR, they have continued to be harassed by the collections team working for Cigno. In some cases, this has happened even where the dispute has ostensibly been resolved in IDR. Due to the high level of tenacity that is required for the consumer to continue with the dispute, the CCLCSA suspects the model is designed to encourage consumers to abandon any complaint through sheer fatigue.

For instance, clients report contacting Cigno for hardship assistance only to be charged a further fee to defer payment to a different date. Consumers seeking hardship assistance have instead received communication from Cigno outlining their new varied repayment dates and amounts as unilaterally imposed and decided by Cigno. The new repayment dates and amounts are provided at a fee and without any regard to the consumer's

capacity to meet the revised payment. This causes detriment by giving consumers who have not dealt with other credit products, the wrong idea about hardship protections and processes that apply to other credit contracts.

Financial Counsellors trying to negotiate hardship have also reported that collectors for Cigno have misrepresented to the client that the Financial Counsellor agreed to the new repayment dates and amounts unilaterally set by Cigno. This constitutes misleading and deceptive conduct and undermines the relationship between the client and their Financial Counsellor.

Case Study 1

Dylan, who had recently separated from his wife and son, was made redundant and was receiving Newstart Allowance. He entered two small amount credit contracts as he was desperate to see his son and wanted to keep making Child Support payments to appease his former wife in order so that he could still have contact with his child. Dylan then applied for a third pay day loan but was declined by the pay day lenders that he had previously borrowed money from. Unbeknownst to Dylan, the small amount credit providers most likely declined Dylan's application on the basis of the rebuttable presumption that, as he already had two payday loans in the preceding ninety days, he could not meet repayments without substantial hardship.

Dylan ended up getting a loan believing that he was applying for an ordinary pay day loan, but the lender was in fact Cigno and GSSF.

Dylan received a sum of \$350.00 in short term credit from Cigno and GSSF. Within 49 days, the balance had more than tripled to \$1171.00.

Dylan was not able to afford the first repayment. He asked for hardship assistance and was charged \$20.00 to change the payment date. After he failed to make two repayments, Dylan noticed that Cigno had changed the date of processing the direct debit; the third repayment date had been brought forward one day without notice to him. Dylan did not have adequate funds and was charged \$30.00 Payment Reschedule Fee and a \$49.00 Dishonour Fee. Dylan also incurred direct debit dishonour payments from his bank.

Concerned at how rapidly the debt was growing and the changing payment dates, Dylan contacted Internal Dispute Resolution (IDR) for Cigno and outlined his complaint. Dylan felt stressed when he realised he would never have capacity to make the repayments. He was unable to meet the demands of Cigno without not paying rent and risking eviction.

However, while Dylan was awaiting a response from IDR, he continued to be contacted by the collections section of Cigno, who continued to demand that Dylan make payments and to process direct debits from his account.

The response from IDR was that a full review for affordability had been undertaken and that he was only approved for an amount that was deemed to be repayable based on his income and expenditure. Cigno then referred Dylan to the terms of the contract that stated he agreed he was of sound mind and judgement to make decisions regarding his finances. Cigno presented Dylan an offer to settle the dispute for \$512.00 but Dylan made a counter-offer to settle the dispute for the sum of money borrowed.

Dylan did not hear back from IDR regarding his counter offer.

Cigno collections continued to contact Dylan threatening to forward the debt to an external collections agency if he did not make payment within three days. Cigno then contacted him and said they would either accept payment for the full outstanding amount of \$1171.00 in lowered repayment amounts or alternatively accept a reduced amount of \$820.00 if he made four weekly payments of \$205.00. Dylan asked whether the response from collections was a response to his earlier counter-offer email to IDR. Later that same day, IDR sent an email offering to settle the dispute for \$512.00.

Two days later, Cigno sent an email advising that his account had been forwarded to an external collection agency, Ilion and Milton Graham.

Dylan reported that the contact from Cigno was confusing, unprofessional and that he felt harassed.

Dylan also felt he had been tricked as he did not realise that Cigno were different to a regulated small amount credit contract provider and was shocked at the very high-cost of credit.

Dylan then received weekly emails from other online lenders. When he applied for other loans, he was declined. However, the decline emails directed him to an online business that he believed used the same phone number as Cigno.

The vast majority of enquiries received by the CCLCSA are related to excessive upfront fees and default charges. Many consumers report feeling despair and hopelessness when they realise they are caught in a vicious cycle of debt from which they are not able to escape without foregoing basic living requirements.

Case Study 2

Claire was a single parent of a pre-schooler and receiving Centrelink benefits. Claire needed funds to purchase text books for her university studies.

Claire entered into short term credit with GSSF and Cigno for \$300.00. Claire did not realise that Cigno was not the lender of the funds advanced.

A few months after Claire was provided credit, she realised that Cigno were attempting to recover a total sum of \$1300.00 for the amount she borrowed. Claire had already paid \$600.00 but Cigno were demanding a further \$700.00.

Claire had already defaulted on other bills and entered variations with other creditors in order to ensure there were sufficient funds available to repay the Cigno loan. Claire had not bought any winter clothing for her daughter and had sought emergency relief to obtain food for her daughter. Claire was worried she had reached her quota for emergency relief and the stress and lack of food made it hard for Claire to focus on her study.

The CCLCSA notes that the sole director for Cigno Pty Ltd is reported to be a relative of the sole director of GSSF⁴. The conduct of these companies, attributed to the sole directors, falls short of community standards⁵ and CCLCSA would encourage ASIC to review the scope for any enforcement action in addition to the proposed product intervention order to send a strong deterrent message where lenders and associates structure their business arrangements with clear intent to avoid the law.⁶ The detriment suffered involves the whole community including families and children dependent on the borrower.

In addition to a market-wide product intervention orders applying to short term lending models, the CCLCSA is of the view that an individual product intervention order should also apply to the specified companies identified, Cigno and GSSF.

The CCLCSA would also encourage further legislative amendment to make it clear that “helper” contracts and short term lending model contracts are not intended to be exempt under s 6(1) of the *Consumer Credit Code*.

The CCLCSA continues to advocate for legislative reform to require other business models such as Debt Vultures, Helper Services, Buy Now Pay-Later to hold a licence and membership to EDR schemes.

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. The CCLCSA supports ASIC's proposal to use the product intervention power under Pt 7.9A of the *Corporations Act 2001* (Cth) to prohibit credit providers and their associates from providing short term credit and charging for additional or collateral services where the total fees that can be charged exceed the maximum permitted under the short term credit exemption.

⁴ Liam Walsh ‘The day a payday lender cried poor’, *The Australian Financial Review*, 29 July 2019, p 15.

⁵ Referring to standards of community expectations as covered in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

⁶ The CCLCSA notes that Cigno and GSSF have continued to refer to *Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648 despite the introduction of Regulation 50A.

The CCLCSA also supports intervention to restrict future use of the short term lending model by preventing associates charging fees beyond what is permitted under the short term exemption. The CCLCSA's view is that this would produce the best outcome by protecting vulnerable consumers from the significant detriment caused by short term lending models.

The CCLCSA supports ASIC making the two types of orders that it can under the production intervention power:

1. An order directed at specific persons, namely GSSF/Cigno with respect to their contracts; and
2. A market-wide product intervention of 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.

The CCLCSA supports to make these intervention orders as soon as possible to proactively prevent future harm to consumers. The CCLCSA supports these interventions in order to prevent industry from developing new models to evade protective limits.

In conjunction with the exercise of these powers, the CCLCSA advocates for an increase in funding to Financial Counselling and Consumer Credit Legal Centres. Further, funding should also be given to better promote alternatives No Interest Loans and Step-up Loans to reduce any anticipated increase use of small amount credit contracts when these Product Intervention Orders are made. The CCLCSA believes that for reducing access to credit for consumers who are not eligible for a small amount credit contract will prevent financial hardship due to the provision of unaffordable loans to consumers.

The CCLCSA understands that a product intervention order cannot require a provider to join membership with any External Dispute Resolution scheme. Notwithstanding, the CCLCSA is of the view that enforcement action should be considered to prosecute GSSF for contravening the requirement to apply for a credit licence and hold membership to an External Dispute Resolution Scheme⁷. Whilst the CCLCSA fully supports the proactive approach to prevent further harm to consumers, the CCLCSA is concerned about consumers who have already suffered significant detriment and would support a remediation scheme for those consumers.

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?

The CCLCSA does not support Option 2 or 3.

The CCLCSA believes Option 2 will not achieve the objective of preventing consumer detriment. Evidence demonstrates that disclosure on its own is not sufficient to prevent

⁷ National Consumer Credit Protection Regulations 2010 50A.

consumers from avoiding unsuitable products⁸. In CCLCSA's experience, warning statements have not stopped all consumers from entering small amount credit contracts in situations where another more suitable alternative exists such as a No-Interest Loan, Step-up loan or Centrelink Advance. This is because consumers are often seeking short term loans in stressful circumstances and the warning statement often occurs after a consumer has already made a decision to borrow money from the lender. In the consumer decision making model, consumers who have been declined credit from a regulated pay day lender, often choose a Cigno loan regardless of any warning statement as they are not aware of any other credit provider offering credit. When a consumer decides that they need immediate credit and there are no other regulated alternatives other than short term lending model loans, evidence suggests that they are likely not take into account any warning statements.

Consumers often report that they did not recall receiving a warning statement before entering a small amount credit contract. Similarly, customers of Cigno report that they did not even realise Cigno were only offering a "helper" service and that the lender in fact was GSSF. If consumers do not understand the complexity of the short term lending model, it is unlikely they will understand the risks involved entering those transactions.

The CCLCSA is concerned that any warning statements will not make any material difference in consumer behaviour to reduce the number of consumers who enter into a short term loan.

Option 3 will not be an effective solution and the significant detriment identified will continue to harm consumers.

⁸ Omri Ben-Shahar and Carl E. Schneider, *The failure of mandated disclosure*, 159 University of Pennsylvania Law Review 687, 2011; T. Gillis *Putting disclosure to the test: Towards better evidence-based policy*, 2015, p. 47.