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31 August 2023

Senior Manager
Financial Services Group
Australian Securities and Investments Commission
Level 7, 120 Collins Street
MELBOURNE VIC 3000

By email only: product.regulation@asic.gov.au

Dear Sir/Madam

Product intervention order: short term credit and continuing credit contracts

Thank you for the opportunity to provide this submission to the Australian Securities and Investment Commission's (ASIC) consultation paper 371 (the consultation paper) on its product intervention power in Pt 7.9A of the Corporations Act 2001.

Background

LawRight is a not-for-profit, community-based legal organisation, which coordinates the provision of pro bono legal services to disadvantaged Queenslanders.

The Community & Health Justice Partnerships service (**CHJP**) was established in 2002 by LawRight to provide free legal assistance and representation to people experiencing or at risk of homelessness, refugees, and other vulnerabilities.

In the 2022/2023 financial year, LawRight's CHJP:

- met with 409 clients attending a community or health service in Brisbane or Cairns; and
- provided legal assistance in 1,332 matters for CHJP clients, of which 855 matters were related to a consumer credit and debt dispute.

Many CHJP clients experience several forms of disadvantage including mental illness, experiences of domestic violence, severe financial hardship, addiction, physical or intellectual disabilities and complex family backgrounds.

Our experience in assisting clients with credit provided by Gold-Silver Standard Finance, BSF Solutions Pty Ltd and its associate Cigno Loans Pty Ltd (**the Creditors**) demonstrates the need to restrict the operation of a short-term credit and continuing credit lending models.

Proposal B1 – Extend the short-term credit product intervention order

On 30 July 2019 and 20 January 2023, we provided the **enclosed** submissions in response to Consultation Paper 316 and Consultation Paper 355.

We continue to assist clients through our services who have experienced significant detriment due to loans offered prior to 15 July 2022 under the short-term lending model.

For the reasons discussed in our 2019 and 2022 submissions, we agree with ASIC's proposal to extend the short-term credit order. Given the Creditors' conduct in offering subsequent credit products after the initial short term credit order, we are of the view that extending the short-term credit order is necessary to prevent further harm to consumers. We also agree with the proposal that the short-term credit order should be extended to remain in force until it is revoked or sunsets, given the previous deliberate conduct by the Creditors to avoid regulatory measures.

We have reviewed our data to consider the impacts of the short-term credit order and have found no further clients who sought assistance from LawRight for short-term credit loans provided after the 15 July 2022 order. We consider this to indicate the efficacy of these orders.

For the reasons provided above, our response to the questions posed in the consultation paper is that:

- ***B1Q1*** *– We agree with ASIC's proposal to extend the 2022 short term credit order.*
- ***B1Q2*** *– We agree with ASIC's proposal that the 2022 short term credit order should be extended until is revoked or sunsets.*
- ***B1Q4*** *– In our view, the 2022 short term credit order has been effective to date in reducing the risk of significant detriment to retail clients in the continuing credits market.*

Proposal C1 – Extend the continuing credit product intervention order

After the making of the product intervention order on 15 July 2022, we have continued to assist clients impacted by the Creditors' lending behaviour. However, as with the impact of the short-term credit order, we consider the continuing credit order has been effective in stopping this type of lending conduct as we have had no clients seek assistance with a continuing credit contract obtained after 15 July 2022. Given the effect of the order in preventing consumers from being offered these products, we agree with ASIC's proposal to extend the continuing credit contracts order.

However, since the order was made on 15 July 2022, we have assisted three clients who were provided No Upfront Charge Loan Agreements by BSF Solutions Pty Ltd along with an Account Keeping Agreement by Cigno Australia Pty Ltd. These products were provided to clients in November and December 2022. All three clients obtained $250 of credit and have combined debt of $966.86. One client sought assistance from us after paying over $300 to Cigno Australia Pty Ltd who alleged they continued owing a further $603.84. This amounts to over 368% charged for the fees payable on the loan.

A copy of a No Upfront Charge Loan Agreement we have obtained copies of include the clause:

> *2.1 No interest charged or any other fees are payable by you for the provision of credit by us.*

These No Upfront Charge Loan Agreements appear to have been designed by the Creditors to continue to circumvent responsible lending provisions within the *National Consumer Credit Protection Act 2009* (Cth) ('the Credit Act') by relying on the requirement that credit include a fee for the provision of credit, per s 5(1)(c) of the *National Credit Code*. We understand that the 2022 Federal Court decision *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (2022) 293 FCR 330 has dealt with the issue of Cigno Pty Ltd charging consumers for the provision of credit.

We consider the No Upfront Charge Loan Agreement to be clear evidence from the Creditors that these companies are willing to redesign their credit products in an attempt to circumvent product intervention orders from ASIC and regulatory measures of the Credit Act.

While we understand that Cigno is no longer offering credit products to consumers, the behaviour of the companies involved and their directors, shows a persistent pattern of seeking to use exemptions in the Act to provide harmful products to vulnerable consumers.

Therefore, we agree that the 2022 continuing credit contracts order should be extended so that it remains in force until it is revoked or sunsets. We consider the lack of continuing credit contracts offered to our clients after 15 July 2022 to demonstrate the efficacy of the continuing credit contract order in preventing future harm to consumers.

For the reasons provided above, our response to the questions posed in the consultation paper is that:

- ***C1Q1** – We agree with ASIC's proposal to extend the 2022 continuing credit contracts order.*
- ***C1Q2** – We agree with ASIC's proposal that the 2022 continuing credit contracts order should be extended until is revoked or sunsets?*
- ***C1Q4** – In our view, the 2022 continuing credit contracts order has been effective to date in reducing the risk of significant detriment to retail clients in the continuing credits market.*

Thank you for considering these submissions.

Yours faithfully

[redacted] [redacted]

Karen Dyhrberg
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20 January 2021

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Dear Sir/Madam

Product intervention order: short term credit and continuing credit contracts.

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Background

LawRight is a not-for-profit, community-based legal organisation, which coordinates the provision of pro bono legal services to disadvantaged Queenslanders.

The Community Health Justice Partnerships program (**CHJP**) was established in 2002 by LawRight to provide free legal assistance and representation to people experiencing or at risk of homelessness, refugees, and other vulnerabilities.

In the 2020/2021 financial year, LawRight provided:

- legal assistance in 1329 matters for CHJP clients; and
- met with 548 clients attending a community or health service in Brisbane or Cairns.

Many CHJP clients experience several forms of disadvantage including mental illness, experiences of domestic violence, severe financial hardship, addiction, physical or intellectual disabilities and complex family backgrounds.

Our experience in assisting clients with credit provided by Gold-Silver Standard Finance, BHF Solutions Pty Ltd and its associate Cigno Loans Pty Ltd (**Cigno**) demonstrates the need to restrict the operation of a short-term credit and continuing credit lending models.

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Proposal D1 - Make the short-term credit product intervention order

On 30 July 2019, we provided the **enclosed** submissions to in response to Consultation Paper 316.

We continue to assist clients through our services who have experienced significant detriment because of loans offered prior to 14 September 2019 under the short-term lending model.

For the reasons discussed in our 2019 submissions, we continue to support ASIC's proposal to make an intervention order by 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.

Proposal D2 – Make the continuing credit product intervention order

After the making of the product intervention order on 14 September 2019, we have continued to assist clients who have been impacted by credit facilities offered through Cigno, which are now being described as continuing credit contracts.

We understand that Cigno amended its business model by offering continuing credit contracts after 14 September 2019 to ensure the services it provided were not prohibited by the product intervention order that had been made. In an email received from Cigno on 22 July 2020, Cigno stated "*All loan[sic] under the FUA model which is our new model are as per the new Continuing Credit Contract and is not affected by the ban. … All loans done before and after September 14, 2019 does not apply the ban either, so it only applies to new loan done under our old model after the said date*. In our experience, the loans offered through Cigno after 14 September 2019, although now continuing credit contracts, in practice, were not materially different to how our clients had previously received credit through Cigno.

Since our previous submissions provide to ASIC on 30 July 2019, we have assisted 56 people who have sought assistance with a combined total pursued debt from Cigno of $22, 903.79. All these clients connected with us through specialist homelessness services and were relying on incomes from Centrelink benefits.

Of the 56 clients we assisted, 17 sought assistance with a debt for a loan they had obtained through Cigno after 14 September 2019 or for a loan described as a continuing credit contract by BHF Solutions Pty Ltd or Gold Silver Finance Pty Ltd. These clients were alleged to owe a combined amount of $13, 538.45, with the average alleged debt when a client sought assistance from our service being $796.40. The average amount advanced to our clients was between $200 and $250.

Case study 1

Natalie sought assistance to resolve a debt after she entered contracts with BHF Solutions Pty Ltd and Cigno Pty Ltd in October 2020. Although the contract was stated to be a continuing credit contract, Natalie received a single advance of $200.

In September 2021, we met with Natalie at a specialist homelessness service in Brisbane. Natalie sought our help as Cigno was trying to collect over $900 under the contract. Of the sum alleged to be owed, $879.10 was attributed to fees. Natalie was not aware the contract she had entered was a continuing credit contract.

Case study 2

Maddy sought assistance to resolve a debt after she entered contracts with BHF Solutions Pty Ltd and Cigno Pty Ltd in June 2020. Although the contract was stated to be a continuing credit contract, Maddy received a single advance of $200.

On 17 May 2021, we met with Maddy at a specialist youth homelessness service. At the time we met her, Maddy was pregnant, at risk of homelessness and relied on homelessness support services for her meal and laundry needs. She had recently left a violent relationship and her income was derived from Youth Allowance.

By May 2021, Cigno were asserting that she owed over $1200, of which $1090.10 was attributed to fees. Maddy told us that when she applied to Cigno it was very easy to access the money which she needed for her car registration and she only had to be receiving a Centrelink income to be eligible. When we discussed the terms of the contract with Maddy, she informed us that she had not been aware that she was entering a continuing credit contract, nor had she understood the relationship between Cigno and BHF Solutions Pty Ltd.

In preparing this submission, we also sought feedback from community services we work with about the impact these loans have on the wellbeing of the vulnerable communities that they work with. Ariyan Jadidi, a youth worker at the Brisbane Youth Service (**BYS**) explains:

… While working with BYS, I have supported countless young people who have been impacted by the predatory practices offered by Cigno. Unfortunately, their processes allow those who are already at risk of exploitation to receive inappropriate financial assistance without assessments as to whether the young people would be able to repay the principal, let alone the massive fees associated. Furthermore, Cigno have demonstrated repeatedly that they will continue to withdraw money from young people's accounts, even after instructions provided to banking organisation to cease withdrawal, and legal negotiations with Cigno directly. This predatory practice places young people further into financial distress. … I do not believe how Cigno operates is ethical, and I have witnessed firsthand the detriment it has caused the young people I support…

As evidenced by the above case studies and the comments from Mr Jadidi, the continuing credit contracts offered to our clients has had the same detriment as the contracts offered by Cigno and BHF Solutions prior to 14 September 2019.

Clients have reported to us that the loans were easy to access, no apparent assessment of their ability to repay the loans was done and they were not aware of the relationship between Cigno and BHF Solutions Pty Ltd or other lenders used by Cigno when entering the contracts. As explained in Maddy's (Case study 2) circumstances, many clients did not understand or were not aware, that the contracts offered by Cigno and BHF Solutions Pty Ltd were continuing credit contracts.

The change in the type of credit contracts offered by Cigno and BHF Solutions Pty Ltd have provided no practical difference to our clients.

For the reasons provided above, our response to the questions posed in the Consultation paper is that:

- ***D2Q1*** *– We consider that continuing credit contracts, when issued to retail clients in the way described in paragraph 48, have significant detriment to retail clients.*
- ***D2Q2*** *– We are aware that Cigno and BHFS are issuing continuing credit contracts in the way described in paragraph 48 of the Consultation paper.*
- ***D2Q4*** *– We agree with the proposal to make a continuing credit contracts product intervention order by legislative instrument as set out in the draft product intervention order*

Thank you for considering these submissions.

Yours faithfully

[redacted]

Stephen Grace
Managing Lawyer
Community Health Justice Partnerships

LawRight Submission 30 July 2019

Submission to Australian Securities and Investment Commission's consultation paper on its product intervention power in Pt. 7.9A of the *Corporations Act 2001*

About LawRight

LawRight is an independent community legal centre and the leading facilitator of pro bono legal services in Queensland, directing the resources of the private legal profession to increase access to justice.

About the Homeless Person's Legal Clinic

The Homeless Persons' Legal Clinic was established in 2002 by LawRight to provide free legal assistance and representation to people experiencing or at risk of homelessness. Our outreach model has since expanded and we now also coordinate the Mental Health Civil Law Clinic and the Refugee Civil Law Clinic.

In the 2018/2019 financial year, Homeless Persons' Legal Clinic provided ongoing legal assistance in 434 matters and 186 advices to clients attending a drop-in clinic.

Many HPLC clients experience several forms of disadvantage including mental illness, severe financial hardship, addiction, physical or intellectual disabilities and complex family backgrounds.

Summary of submissions

Our experience in assisting clients with credit provided by Gold-Silver Standard Finance and its associate Cigno Loans Pty Ltd (collectively **Cigno**) poignantly demonstrates the need to restrict the operation of a short term lending model. Our submissions include direct insights into the impact short term credit can have on vulnerable members of our community.

Informed by the experiences of our clients, LawRight:

- considers the short term lending model causes detriment to consumers and that the detriment is significant;
- supports ASIC's proposal to make a product intervention order by legislative instrument under s1023D(3) of the *Corporations Act* 2001 in relation to short term lending models;
- recommends ASIC adopt Option 1 as outlined in Consultation Paper 316 Using the product intervention power: Short term credit (the **Consultation Paper**).

Submissions

1. Detrimental impact of the short term lending model

C1Q1: We consider the short term lending model causes detriment to consumers and that the detriment is significant.

C1Q2: We consider that ASIC has accurately indentified the detriment caused by the short term lending model as outlined in the Consultation Paper.

The detrimental impact of small amount, short term lending at high cost is well established. Counterintuitively, these types of loans often leave the borrower in a worse financial position[1]. Any influx of cash is short-lived, with consumers required to take on additional credit to meet the high costs of the loan, creating a cycle of hardship[2]. Unable to meet their obligations under the loan, borrowers can be left in substantial financial hardship, unable to pay for basic living expenses.

The negative financial impacts of small amount, short term credit is born out by both the research and our anecdotal experience assisting clients through the Homeless Persons' Legal Clinic.

The negative impacts are not limited to a person's financial circumstances. Financial pressures and debt can lead to poor health outcomes, including increases in depression, reduced psychological well-being, obesity and anxiety[3]. This is particularly true for unsecured debt, such as debt related to small amount, short term credit[4].

The short term lending model is designed to avoid the restrictions placed on lenders by the *National Consumer Credit Protection Act (2009)* (**Act**) and the Credit Code, deliberately circumventing protections afforded to vulnerable consumers, a point conceded by Cigno[5]. By evading these protections, the short term lending model causes additional detriment to vulnerable consumers, above and beyond the negative impact of other forms of small amount lending.

Specifically, the short term lending model avoids two key protections provided by the consumer credit legislation. The model allows a lender to:

- provide credit without assessing the borrowers capacity to meet their repayment obligations; and

[1] Financial Counselling Australia, Submission No 57 to the Senate Standing Committee on Economics, Inquiry into Credit and Financial Services Targeted at People in Financial Hardship (November 2018), 5; Paul Holmes, Legal Aid Queensland, cited in the Senate Standing Committees on Economics report '*Credit and financial services targeted at Australians at risk of financial hardship*', February 2019.
[2] J Gathergood, B Guttman-Kenney and S Hunt, 'How do payday loans affect borrowers? Evidence from the U.K market' (2018) 32 (2) *The Review of Financial Studies*, 496, 520.
[3] E Sweet, CW Kuzawa and TW McDadeT, 'Short-term lending: Payday loans as risk factors for anxiety, inflammation and poor health' (2018) 5 *SSM - Population Health,* 114, 114.
[4] Ibid, 115.
[5] In correspondence with our office, Cigno Pty Ltd stated the design of their service means 'the protections offered by the "Act" are not available to the client'.

- impose unreasonable fees and charges, above the amounts allowed by the Act.

By avoiding these protections, the short term credit model causes significant detriment to vulnerable consumers. We have discussed this in more detail below.

Failure to assess capacity to pay

Through our legal work, we have seen multiple clients provided with loans that would likely be considered unsuitable had an appropriate assessment of the consumer's capacity to repay been undertaken. The below examples illustrates this pattern of lending.

David* connected with LawRight through a homelessness support agency in a regional area. He had been homeless for a significant period, sometimes sleeping rough and sometimes staying in homeless hostels. Related to his period of homelessness and experience of trauma, David's physical and mental health was poor. Unemployed, David's only income was a basic Centrelink payment. He lived day-to-day and was in significant debt.

Cigno gave David $175 without completing an assessment of his capacity to repay the loan or its suitability under the Act. David defaulted immediately but made sporadic payments when he could.

By the time he saw LawRight, David had paid Cigno over $400. However, the various dishonour and account keeping fees amounted to over $1,400. David was asked to pay over $1,200 to finalise the debt, approximately 700% of the original loan.

A failure to adequately assess the suitability of a loan has two significant consequences:

- consumers can be provided loans for amounts they cannot repay or that do not meet their needs; and
- the repayment arrangements can be structured in inappropriate and unaffordable ways, without regard to a consumers ability to meet their repayment obligations.

The short term lending model limits the length of the loan to a maximum of eight weeks. The service provider is not required to consider whether the consumer is able to make these payments or if a different arrangement with a lower fortnightly repayment may be in the consumer's interest.

Cigno further limits the loan length to four weeks for new clients. This reduces the service fees but increases the individual payment amounts. Existing clients may choose six or eight week repayment options, but pay higher fees, which incentivises consumers to take shorter loans with higher fortnightly payments.

Higher individual repayment amounts increase the likelihood the consumer would be unable to meet their obligations, increasing the chance the consumer will incur additional costs for defaulting under the agreement. The costs charged for default ensure that consumers are unable pay down the loan, thereby incurring more fees and charges: the debt spiral begins.

Lesley* is a single mother with significant, multiple heath concerns. She was a survivor of domestic violence and raised her child on a NewStart allowance.

At the time Cigno gave her a loan of $175 it completed an assessment of her bank account that showed she was overdrawn for 30% of the prior three months.

Despite this, under her agreement with Cigno Lesley was required to make four fortnightly payments of $93. Unsurprisingly, Lesley defaulted immediately.

By the time she saw LawRight, Lesley had paid Cigno $175. However, the various dishonour and account keeping fees amounted to over $950, which Lesley was asked to pay to finalise the debt, approximately 550% of the original loan.

Without an appropriate consideration of a consumer's capacity to repay, there is an increase in the likelihood of an unsuitable loan and the significant detriment caused by that loan. This is consistent with our experience representing vulnerable consumers.

Unreasonable fees and charges

The Consultation Paper outlines the fees and charges imposed under Cigno's service agreement. These fees are consistent with the fees and charges we have seen through our casework.

The cost of these loans is significantly more than that charged by lenders regulated by the Act. For example, in the event of default, a consumer can be charged $50 for a default letter plus a $49 default payment fee. Consumers are charged fees for phone contact and payment rescheduling. Unlike other lenders, these fees are not capped at twice the amount of the original loan[6].

Kurt* is a young aboriginal man with a long history of homelessness. He had been accessing homelessness services since the age of 16 after leaving a historically disadvantaged Aboriginal community.

Cigno failed to provide any evidence it had completed an assessment of Kurt's capacity to repay the loan or its appropriateness.

Kurt was unable to make any payments under the agreement. By the time he saw LawRight, Cigno was asking Kurt to pay over $900 to finalise the debt, approximately 500% of the original loan.

The fees charged under the small term lending model are exorbitant. For clients unable to meet the high repayment costs, the amount owed under the agreement can increase significantly over a short period of time. A vulnerable consumer can very easily find themselves in significant debt, which exacerbates their existing social, legal and financial problems.

[6] *National Credit Code* section 39b.

When she connected with LawRight, Jenny* was over $8,000 in debt to a variety of non-traditional lenders including small amount credit providers, high interest lenders and pawnbrokers.

Her income was a Newstart allowance, she was supported by a women's support service and she spoke English as a second language. Her financial position had been dire for some time.

Cigno gave Jenny $120 without a formal assessment of her capacity to repay the loan or its suitability under the Act. Jenny defaulted immediately but made sporadic payments when she could.

By the time she saw LawRight, Jenny had paid Cigno $180. However, the various dishonour and account keeping fees amounted to over $1,200. Jenny was asked to pay over $1,150 to finalise the debt, approximately 900% of the original loan.

2. Alternative options: accessing other services

C1Q3: We agree with ASIC's 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.

C1Q4: We consider the alternative options proposed by ASIC in the Consultation Paper would be unlikely to achieve the identified objectives of preventing detriment to vulnerable consumers.

Many of our clients access short term credit to fund everyday living costs such as food, accommodation, bills or outstanding accounts, and clothing. This is further supported by the research in this area[7]. When accessing credit to meet basic and immediate needs, a consumer's priorities are for easy and fast access to necessary funds. Given this, a consumer will preference arrangements that provide immediate relief over options on more favourable terms.

In our experience, the alternative options presented by ASIC in the Consultation Paper do not provide a genuine alternative for vulnerable people seeking small amounts of credit in times of emergency. Many of our clients will already have accessed a Centrelink advance when seeking additional credit to cover basic living costs. Consumers are unlikely to take other options, including the No Interest Loan Scheme (NILS), where they are unable to access funds immediately.

Consumers typically access small amount credit to meet an immediate need despite knowing these loans are expensive or that other, less immediate, options may be available. This is evident in the short term lending model: consumers elect a more expensive option that provides immediate relief despite being made aware of an existing service where they

[7] Glasgow Centre for Population Health, 'Public Health Implications of payday lending' (2016) *Briefing Paper 48*, 9.

can access credit for a minimal cost (5% of the loan amount). The existing disclosure documents provided by Cigno clearly identify a cheaper but slower option. When you need to meet immediate essential needs, a notification or warning is unlikely to dissuade you from entering into an agreement, even if that agreement will inevitably place you in greater financial hardship.

We consider the alternative options proposed by ASIC in Consultation Paper would be unlikely to achieve the identified objectives of preventing detriment to vulnerable consumers.

We support ASIC's 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.

Submissions made on 30 July 2019 to:

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