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24 November 2020

By Email: product.regulation@asic.gov.au

Senior Manager, Credit & Banking
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Level 7, 120 Collins St
Melbourne VIC 3000

Dear Sir/Madam

Submission – Addendum to CP 330

1. We refer to the addendum to *Consultation Paper 330: Using the product intervention power: Continuing credit contracts* (**CP 330**) and the invitation for stakeholder feedback. This letter sets out Cigno Pty Ltd's (**Cigno**) submission in response to CP 330.

2. In this letter, we will first address the specific questions for feedback identified in the Addendum to CP 330 and then give general feedback in relation to the draft product intervention order.

Do you agree with the proposed changes to the draft product intervention order as attached to the Addendum to CP 330?

3. Cigno is concerned that the effect of the changes to the draft product intervention order is to narrow the operation of the draft product intervention order so that it applies only to the credit product and collateral services offered by BHF Solutions Pty Ltd (**BHFS**) and Cigno and not to other potentially high cost credit arrangements.

4. In CP 330 (at paragraph 20), the claimed significant detriment enlivening ASIC's power to make a product intervention order was identified as:

   (a) lack of access to external dispute resolution;

   (b) the credit provider and collateral service provider not holding a credit licence;

   (c) lack of coverage by the responsible lending obligations in the *National Consumer Credit Protection Act 2009* (**NCCP Act**);

   (d) high default fees; and

   (e) high cost of credit relative to the amount provided.

5. The draft product intervention order in its original terms attempts to ameliorate this claimed significant detriment by limiting the aggregate cost of certain arrangements involving continuing credit contracts to that which would be permitted under section 6(5) of the *National Credit Code* (**NCC**) and regulation 51 of the *National Consumer Credit Protection Regulations 2010* (**NCCP Regulations**). By exempting certain buy now pay later (**BNPL**) arrangements and non-cash payment facilities from its operation, the changes to the draft product intervention order will undermine its effectiveness in ameliorating the claimed significant detriment by allowing providers, other than BHFS and Cigno, to provide continuing credit contracts outside the coverage of the NCC and potentially not subject to external dispute resolution under high aggregate cost arrangements involving collateral services.

6. Cigno rejects the characterisation of the factors identified in paragraph 20 of CP 330 as resulting in significant detriment to retail clients and note that the analysis leading to this conclusion fails to take into account the benefits of the credit provided by BHFS and the services provided by Cigno to their customers – including fast payment and the convenience of a managed service – and our customers' ability to obtain credit from other sources. However, if those factors are to be treated as significant detriment to retail clients, Cigno is concerned that those factors are being applied only to BHFS's credit business and Cigno's services business and not to other products that may also cause those same outcomes. The changes to the draft product intervention order will have the effect of restraining BHFS and Cigno's businesses whilst allowing credit to be provided under arrangements that carry the claimed significant detriment to retail clients.

7. Cigno further submits that the characterisation of significant detriment arising from a lack of coverage of the responsible lending requirements under the NCCP Act should be viewed in light of the Treasurer's recent announcement concerning the removal of the responsible lending obligations.[1] This is therefore not an appropriate ground to for ASIC to claim significant detriment arises.

8. Cigno notes that the draft product intervention order in its original terms would permit BNPL arrangements that have an aggregate cost within the amount set out in regulation 51 of the NCCP Regulations, or are provided by a credit licensee, and collateral non-cash payment facilities (as defined in the draft product intervention order) which are similarly limited in cost to retail clients. Cigno is concerned that the changes to the draft product intervention order are proposed for the sole or dominant purpose of allowing competing credit products to be provided under a credit provider / service provider commercial arrangement whilst preventing BHFS from continuing to provide their credit product. The credit and collateral services provided by BHFS and Cigno seek to achieve the same objectives for customers as BNPL credit and collateral non-cash payment facilities: that is, to provide fast, convenient credit to customers to fund their immediate consumption, and to facilitate the repayment of that credit.

9. Cigno also notes that the changes to the draft product intervention order imply that credit provided under an arrangement for which the aggregate cost exceeds the amount set out in regulation 51 of the NCCP Regulations, by an unlicensed provider outside the coverage of the NCCP Act and external dispute resolution, does not necessarily result in significant detriment to retail clients. If this is the case, the basis for the making of the draft product intervention order – whether its original terms, the amended terms described in the Addendum to CP 330 or any other terms – does not exist. If there is a limit, higher than the amount set out in regulation 51 of the NCCP Regulations, above which the cost of an arrangement constitutes significant detriment to retail clients, the proposed product intervention order should be

[1] The Hon Josh Frydenberg MP, 'Simplifying access to credit for consumers and small business', Joint media release with The Hon Michael Sukkar MP (25 September 2020).

drafted to set out that limit, rather than to impose a low limit and then grant ad hoc exemptions from it.

10. In the Addendum to CP 330, the given rationale for excluding BNPL arrangements and collateral non-cash payment facilities from the draft product intervention order is that, on the evidence currently available, there is no significant detriment arising from such products. The apparent rationale for making the product intervention order by way of legislative instrument applying to a class of products under section 1023D(3) of the *Corporations Act 2001* rather than by notice applying to a particular product under section 1023D(1) is to preclude the future offering of continuing credit products in circumstances that result in the claimed significant detriment (see paragraphs 29-30 of CP 330). The changes to the draft product intervention order undermine this objective by allowing BNPL arrangements and collateral non-cash payment facilities to be offered in future under arrangements that have a similar cost to the current arrangement under which our clients' products are offered. This undermines the apparent rationale for proceeding by legislative instrument and suggests that the target of the legislative instrument is BHFS's credit business and Cigno's services business. If that is the case, we submit that the proper course of action for ASIC is to make a product-specific order under section 1023D(1) rather than a class-wide order under section 1023D(3).

11. Cigno disagrees with the draft product intervention order entirely and dispute the basis of its imposition. However, if ASIC is determined to make a product intervention order in any case, Cigno submits that it should be competitively neutral and capture all arrangements that are capable of causing the claimed significant detriment to retail clients set out in CP 330.

Do you consider there is a significant risk of avoidance as a result of these changes?

12. Cigno makes no submission as to the risk of avoidance in relation to the changes to the draft product intervention order.

General feedback

13. The Final Report of the Financial System Inquiry (**FSI Report**) in 2014 recommended ASIC be given a product intervention power, and that such a power "is not intended to address problems with pricing of retail financial products, where consumers might be paying more than expected for a particular product or where a large number of consumers have incurred a small detriment".[2] The proposed product intervention order is evidently inconsistent with this recommendation in specifically targeting the pricing of a retail financial product.

14. The FSI Report's recommendations were to focus the power on complex products, by reducing "significant detriment arising from consumers buying financial products they do not understand".

15. Throughout its consultation process, ASIC has not claimed that the Loan Agreements or Services Agreements in question are complex and that the fees and charges that will be payable under the respective contracts are incapable of comprehension by a retail client. It is not the role of ASIC to interfere in a consumer's freedom to choose a product or service that is capable of comprehension.

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[2] *Financial System Inquiry, Final Report* *http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf Recommendation 22, 206.*

16. ASIC has come under recent scrutiny for “confirmatory bias”[3] in its enforcement approach.

17. Treasury’s growing unease with ASIC’s strict interpretation of the law was demonstrated by the Treasurer’s intervention in the regulation of the responsible lending obligations, punishment for overreach and not sufficiently appreciating the real world effect of its approach.[4]

18. Further, Senator Bragg, chairman of the Senate Select Committee on Financial Technology and Regulatory Technology has publically stated that he does not “want to see ASIC inflict damage on the market which risks undermining innovation and choice”.[5]

19. Such is evident from the significant number of submissions received by ASIC in support of Cigno and BHF Solutions. In continuing to pursue the product intervention power in light of this support, question is raised as to whether ASIC is adequately taking consideration of the actual desire for BHFS and Cigno’s respective businesses in the market.

20. The impact of COVID-19 has meant a shift in priorities from the Government to facilitate better access to credit. The effect of the proposed product intervention order will stifle this priority, with many of Cigno and BHFS’ customers utilising their businesses as a last resort to access credit.

21. In his virtual address to the AFR Banking and Wealth Summit on 18 November 2020, Treasurer Frydenberg noted the need for mechanisms to hold ASIC to account in “pursuing their mandates in a manner that is consistent with the will of the Parliament”.[6]

22. Frydenberg noted that:

> *“It is the Parliament who determines who and what should be regulated. It’s the role of regulators to deliver on that intent, not to supplement, circumvent or frustrate it.”*[7]

23. The commercial arrangement between BHFS and Cigno pursued by the proposed product intervention order is not currently subject to regulation by the NCCP Act. The Government has not made an indication of an intention to regulate BHFS and Cigno’s commercial arrangement, 14 months after the introduction of the Short Term Lending product intervention order targeting the arrangement. It is proposed that ASIC should not continue to intervene in the operation of BHFS and Cigno’s respective businesses if it is not the Parliament’s intent to regulate such persons.

24. Further, the question of whether ASIC’s delegate has satisfied themselves as to whether a “financial product” has resulted in, or will or is likely to result in, significant detriment to retail clients for the purposes of Part 7.9A, arises in the same manner as is currently on appeal in the Full Federal Court in the matter of *Cigno Pty Ltd v Australian Securities and Investments Commission* NSD 531/2020 (the **Appeal**).

25. As outlined by Cigno in the Appeal, Cigno rejects the proposition that the commercial arrangements between BHFS and Cigno whereby Cigno may provide support services to

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[3] Australian Securities and Investments Commission v Mitchell (No 2) [2020] FCA 1098, Beach J at [9].
[4] Hewett, Jennifer, ‘ASIC shamed in the political dock as Frydenberg considers shake-up’, Australian Financial Review (27 October 2020).
[5] Gluyas, Richard, ‘Regulatory urged not to curtain BNPL’, The Australian (20 November 2020).
[6] The Hon Josh Frydenberg MP, ‘The Role of Australia’s Financial System in Supporting the COVID-19 Recovery’, Virtual address to the AFR Banking and Wealth Summit, Melbourne (18 November 2020).
[7] Ibid.

BHFS customers upon request, is a ‘model’. Cigno asserts that this term is false and misleading in an attempt to characterise the two distinct, independently owned and operated businesses as a single model.

26. CP 330 identifies the significant detriment to be addressed by the proposed product intervention order to be:

“the overall high cost of both the continuing credit contract and the services agreement”[8]

27. The proposition of significant detriment raises the same question as the Appeal, being whether ASIC’s delegate will ask themselves the wrong question (by asking whether the commercial lending arrangement and, in particular, the collateral services, has resulted in (or will or is likely to result in) significant detriment to retail clients) and will fail to ask the correct question (whether the Loan Agreement has resulted in… significant detriment to retail clients).

28. It is submitted that ASIC should refrain from making a further product intervention order imposing restrictions on BHFS and Cigno’s businesses until after a decision is made in the Full Federal Court Appeal.

Yours faithfully,

Mark Swanepoel
Director

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[8] *CP 330, [23].*