PRODUCT INTERVENTION ORDER NOTICE

ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648

Introduction

1. The Australian Securities and Investments Commission (***ASIC***) issues this notice under subsection 1023L(3) of the *Corporations Act 2001* (the ***Act***).

2. Subsection 1023L(3) of the Act requires ASIC to publish on its website, with each 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.

3. This notice accompanies *ASIC Corporations* (*Product Intervention Order-Continuing Credit Contracts Instrument 2022/648* dated 13 July 2022 (the ***order***). The order relates to continuing credit contracts as defined in the order and described in paragraphs 6-11 below.

4. The order comes into force on a day that is the second day after the order is registered on the Federal Register of Legislation.

A class of financial product

5. Under Pt 7.9A of the Act, ASIC may make a product intervention order in relation to a class of financial product as defined by the Act and the *Australian Securities and Investments Commission Act 2001* (the ***ASIC Act***).

6. The order is made in respect of the class of financial products that consists of continuing credit contracts where the continuing credit contract is provided:

    (a) by the continuing credit provider to a retail client; and

    (b) in conjunction with a separate collateral contract (other than a collateral non-cash payment facility) between the retail client and an associate of the credit provider, pursuant to which the associate charges the retail client significant fees or other charges;

but that does not include a continuing credit contract that forms part of a buy now pay later arrangement.

7. A 'continuing credit contract' is defined in the order as a contract, arrangement or understanding covered by paragraph 12BAA(7)(k) of the ASIC Act under which:

   (a) multiple advances of credit are contemplated; and

   (b) the amount of available credit ordinarily increases as the amount of credit is reduced.

8. Under the continuing credit exemption in subsection 6(5) of the National Credit Code (the ***continuing credit exemption***), the National Credit Code and the *National Consumer Credit Protection Act 2009* (the ***National Credit Act***) do not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, the National Credit Code applies if the charge is of a nature prescribed by the *National Consumer Credit Protection Regulations 2010* (the ***regulations***) or if the charge exceeds the maximum charge (if any) so prescribed.

   Note: The National Credit Code is Sch 1 to the *National Consumer Credit Protection Act 2009*

9. Regulation 51 of the regulations prescribes that the maximum charge in relation to a continuing credit contract, where the debtor is not already a party to a continuing credit contract with the credit provider or an associate of the credit provider when the continuing credit contract is entered into, is $200 for the period of 12 months commencing when the debtor enters into the continuing credit contract, and $125 for any subsequent period of 12 months during which the continuing credit contract is in effect.

10. The order does not apply in relation to continuing credit contracts that form a part of a buy now pay later arrangement, where each advance of credit under the continuing credit contract occurs as a result of the buy now pay later arrangement. The order defines a buy now pay later arrangement as an arrangement or series of arrangements comprising:

    (a) an arrangement between a person (the ***merchant***) and another person (the ***retail client***) in relation to the supply of goods or services by the merchant to the retail client; and

    (b) any of the following:

        (i) an arrangement between the merchant and a person (the ***BNPL provider***) in relation to which the BNPL provider pays the merchant some or all of the price for the supply of those goods or services to the retail client;

        (ii) an arrangement between the retail client and a person (the ***BNPL provider***) in relation to which, when the retail client is required to pay the merchant for the supply of those goods or services, the retail client pays the merchant some or all of the price by using a credit card or debit card identifier provided or made available by the BNPL provider to the retail client for such a purpose;

(iii) an arrangement between the retail client and a person (the ***BNPL provider***) in relation to which the BNPL provider pays, through a bill payment system specified by the merchant, some or all of a bill issued by the merchant to the retail client for the supply of those goods or services to the retail client; and

Note: For example, the bill payment system may be the BPAY bill payment system.

(c) an arrangement between the BNPL provider and the retail client which includes a continuing credit contract in relation to which the retail client pays the BNPL provider over time in relation to the supply of those goods or services;

but only where the principal business of the merchant is not the supply of administration, brokerage, management, collection, recovery or other services in relation to the provision of credit under continuing credit contracts.

11. The condition in the order does not apply to fees and charges that may be imposed or provided for under a collateral non-cash payment facility. The order defines a collateral non-cash payment facility in relation to a continuing credit contract as a non-cash payment facility operating in relation to a continuing credit contract where the issuer of the non-cash payment facility is the holder of an Australian financial services licence covering the provision of financial services in relation to the non-cash payment facility.

Consultations

12. This section describes the consultation ASIC has undertaken in relation to the order. ASIC has conducted three rounds of public consultation being:

(a) Consultation Paper 330 *Using the product intervention power: Continuing credit contracts* (***CP 330***) released on 9 July 2020, with submissions due 6 August 2020;

(b) The Addendum to Consultation Paper 330 *Using the product intervention power: Continuing credit contracts* (the ***Addendum to CP 330***) released on 10 November 2020, with submissions due on 24 November 2020; and

(c) Consultation paper 355: *Product intervention orders: Short term credit and continuing credit contracts* (***CP 355***) released on 9 December 2021, with submissions due on 21 January 2022.

CP 330

13. On 9 July 2020, ASIC released CP 330, which set out a proposal under Pt 7.9A of the Act to make a product intervention order in relation to continuing credit contracts (the ***Proposed order***).

14. The proposal and questions asked in CP 330 were as follows:

Proposal

D1 We propose to make a product intervention order by legislative instrument under s1023D(3) of the Corporations Act to prohibit credit providers and their associates (including directors of such entities) from issuing continuing credit contracts except in accordance with a condition which limits the total fees that can be charged.

Your feedback

D1Q1 Do you consider that the continuing credit contracts, when issued to retail clients in the way described in paragraphs 16-22, have resulted in, or will or are likely to result in, significant detriment to retail clients? If so, please provide any relevant evidence which supports your views.

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

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

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

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

15. In response to CP 330, ASIC received a total of 910 submissions which included six submissions from financial counselling services and community legal centres, 10 submissions from industry bodies, participants and a public policy consultancy, five from individuals and 889 submissions from Cigno Pty Ltd (***Cigno***) clients (via a survey conducted through Cigno's website).

16. The joint submission from Consumer Action Law Centre (***CALC***), Financial Rights Legal Centre (***FRLC***) and WEstjustice, and the submissions from Financial Counselling Australia (***FCA***), Legal Aid NSW, Legal Aid QLD, Consumer Credit Law Centre South Australia (***CCLCSA***), a financial counsellor, Finder.com.au, the Australian Financial Complaints Authority (***AFCA***), National Credit Providers Association (***NCPA***) and Cash Converters all supported ASIC's Proposed order and many provided evidence and case studies based on their clients' experiences with Cigno and BHF Solutions Pty Ltd (***BHFS***) to illustrate the significant detriment suffered, and the subsequent impact the detriment has had on retail clients.

17. Of the Cigno survey submissions (of which supported the making of the order):

(a) 42 considered the continuing credit contracts resulted in significant detriment;

(b) 52 considered the detriment was greater than what ASIC has described; and

(c) 58 supported ASIC's Proposed order.

18. The submissions received from the Australian Finance Industry Association (***AFIA***), Flexigroup and a further confidential submission, while supporting in principle ASIC's Proposed order, identified that the Proposed order may unintentionally capture certain sub-classes of continuing credit contracts that were not being issued in the way described in CP 330. ASIC received submissions that recommended that the Proposed order be amended to provide exclusions for buy now pay later arrangements and for fees charged for non-cash payment facilities, where the facility is used by the retail client to make payment towards a continuing credit contract and where the issuer of the non-cash payment facility holds an Australian financial services (***AFS***) licence.

19. The submissions received from Cigno, BHFS, Nick Hossack from Benchmark Analytics (***Benchmark Analytics***), and 768 of the Cigno survey submissions (in response to D1Q4), opposed the Proposed order, and argued amongst other things that:

    (a) ASIC had not met the threshold for significant detriment;

    (b) ASIC's analysis of significant detriment was flawed;

    (c) ASIC should only use the product intervention powers as a tool of last resort;

    (d) the potential detriment caused by the product is less than ASIC has portrayed;

    (e) removing Cigno as an option will cause far greater detriment to a much larger number of people; and

    (f) ASIC should not intervene and should allow retail clients to make their own decisions regarding their own personal circumstances.

20. The submissions received are publicly available on ASIC's website, excluding the submissions which were marked as confidential.

Addendum to CP 330: Consultation

21. In response to CP 330, ASIC received several submissions which stated that the Proposed order would capture certain sub-classes of continuing credit contracts that were not being issued to retail clients in the way described in CP 330.

22. On 10 November 2020 ASIC released Addendum to CP 330 to address these potential unintended consequences.

23. Table 1 in the Addendum to CP 330 outlined proposed changes to the proposed intervention order as follows:

Table 1: Summary of proposed changes to the draft product intervention order

Section	Relevant change	Purpose of change
Section 4	Addition of definition of *'buy now pay later arrangement'*	To define *buy now pay later arrangement* for the purposes of subsection 6(3)

Section	Relevant change	Purpose of change
Section 4	Addition of definition of *'collateral non-cash payment facility'*	To define *collateral non-cash payment facility* for the purposes of subparagraph 5(5)(b)(i)
Section 4	Addition of definition of *'non-cash payment facility'*	To define *non-cash payment facility* which is referred to in the definition of *collateral non-cash payment facility*
Section 4	Addition of definition of '*makes non-cash payments'*	To define *non-cash payment* which is referred to in the definition of *non-cash payment facility*
Section 5	Addition of *'other than a collateral non-cash payment facility'* to the condition	To exclude the fees and charges imposed under a *collateral non-cash payment facility* from counting towards the condition in paragraph 5(5)(b)
Section 6	Addition of subsection 6(2): *'For the avoidance of doubt, where a continuing credit provider is not purporting to rely on subsection 6(5) of the National Credit Code in relation to a continuing credit contract, subsections 5(1) to (4) of this instrument do not apply in relation to the contract.'*	To clarify that this instrument does not apply to continuing credit contracts where the continuing credit provider is not purporting to rely on the exemption in s6(5) of the National Credit Code (Sch 1 of the *National Consumer Credit Protection Act 2009*)
Section 6	Addition of subsection 6(3): '*This instrument does not apply in relation to a continuing credit contract that forms a part of a buy now pay later arrangement.'*	To exempt *buy now pay later arrangements*, as defined in section 4

24. The proposal and questions asked in the Addendum to CP 330, were as follows:

(a) Do you agree with the proposed changes to the draft product intervention order as summarised in Table 1? Please explain the reasons for your view.

(b) Do you consider there is a significant risk of avoidance as a result of these changes? If so, what additional measures could be introduced by ASIC to address that risk?

25. In response to the Addendum to CP 330, ASIC received a total of 12 submissions namely three submissions from community legal centres and nine from industry bodies and participants.

26. Three of the submissions supported the proposed changes to the draft intervention order in full. Five submissions supported the proposed changes in part. Four submissions did not support the proposed changes.

27. Submissions received from AFIA and Payright were supportive of all the proposed changes to the Proposed order. Payright agreed with ASIC's view that the 'exclusion is appropriate as the significant detriment described in CP 330, does not, on the evidence currently available, arise from buy now pay later arrangements.'

28. Several submissions (including Zip and Citi) while supporting the policy intent of ASIC's proposed changes to the draft intervention order, provided recommendations for, or requested ASIC make, technical changes to the scope of the proposed exclusions for the buy now pay later arrangements and for certain fees charged for non-cash payment facilities.

29. The consumer groups and community legal representatives did not support the policy intent behind the exclusions for buy now pay later arrangements and for certain fees charged for non-cash payment facilities. The joint submission from CALC, FRLC and WEstjustice, did not support a blanket exception for buy now pay later arrangements and the exclusions for certain fees charged for non-cash payment facilities, and recommended that ASIC should consider exempting particular fees which are reasonably charged.

30. Legal Aid QLD and the NCPA also considered in their submissions that buy now pay later arrangements should not be exempted as they submit that there is evidence that buy now pay later arrangements result in, or have the potential to cause, significant detriment to retail clients. CCLCSA expressed concern about the buy now pay later sector's self-regulation and the lack of consumer protection.

31. Cigno disagreed with the proposed amendments to exclude buy now pay later arrangements and non-cash payment facilities as they narrowed the operation of the Proposed order to only apply to the credit product and collateral services provided by BHFS and Cigno, and not to other potentially high-cost credit arrangements.

32. The submissions received are publicly available on ASIC's website, excluding the submissions which were marked as confidential.

CP 355 Consultation

33. On 9 December 2021, ASIC released CP 355, which included the proposal to make the Proposed order.

34. The proposal and questions asked in CP 355, that relate to the order, were as follows:

Proposal

D2 We propose to make the industry-wide continuing credit contracts product intervention order by legislative instrument under s1023D(3) of the Corporations Act: see the draft product intervention order in Attachment 2 to this paper.

Your feedback

D2Q1 Do you consider that continuing credit contracts, when issued to retail clients in the way described in paragraph 48, have resulted in, or will or are likely to result in, significant detriment to retail clients? Please provide any relevant case studies and evidence (including qualitative and quantitative data) which support your response.

D2Q2 Are you aware of entities, including Cigno and BHFS, that are issuing, or likely to issue, continuing credit contracts in the way described in paragraph 48? If so, please provide any relevant evidence to support your response.

D2Q3 Are you aware of any changes in the continuing credit contracts market — including changes to the continuing credit contracts that were issued in the way described in paragraph 48—since the publication of CP 330 (July 2020) and the Addendum to CP 330 (November 2020), which may be relevant to ASIC's proposal to make a continuing credit contracts production intervention order? If so, please provide any relevant evidence to support your response.

D2Q4 Do you agree with our proposal to make a continuing credit contracts product intervention order by legislative instrument as set out in the draft product intervention order in Attachment 2 to this paper?

D2Q5 What alternative approaches could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

35. In response to CP 355, ASIC received nine submissions from a broad cross-section of stakeholders including:

(a) consumer advocates and community legal centres;

(b) financial counselling organisations; and

(c) industry participants.

36. The submissions generally supported ASIC's view of significant detriment resulting from the continuing credit contracts issued in the manner described in paragraph 48 of CP 355 and the making of the Proposed order.

37. The submission from AFIA, whilst supporting the policy intent behind the Proposed order, recommended some drafting changes to broaden the scope of the exclusion provided for buy now pay later arrangements and non-cash payment facilities. In response to this feedback,

and further responses received from three industry participants, ASIC adjusted the exclusions for buy now pay later arrangements and non-cash payment facilities.

38. The joint submission from CALC, FRLC, WEstjustice, the Indigenous Consumer Assistance Network (***ICAN***), and the Victorian Aboriginal Legal Service (***VALS***) did not support the exclusion of buy now pay later arrangements and non-cash payment facilities stating that they were unreasonably and unnecessarily broad and suggested that ASIC impose a cap on fees permissible under these arrangements. Legal Aid QLD also did not support the buy now pay later arrangement exclusion on the basis that it considered that these products also resulted in significant detriment, citing levels of financial distress as reported in Report 672: Buy now pay later: an industry update.

39. The submissions received in response to CP 355 are publicly available on ASIC's website, excluding confidential submissions.

Drafting changes to the Proposed order

40. Following the receipt of feedback to CP 355, ASIC has made a small number of technical drafting changes to the Proposed order, which include:

    (a) expanding the definition of *buy now pay later arrangement* to include arrangements where a buy now pay later provider pays a bill on behalf of a retail client; and

    (b) amending paragraph 4(b)(ii) in the definition of *buy now pay later arrangement* to specify that the relevant identifier that is provided or made available by the BNPL provider to the retail client to pay the merchant for the supply of goods or services, must be a debit card or credit card.

Significant detriment to retail clients

41. This section describes the significant detriment to retail clients.

42. Subsection 1023E(1) of the Act provides that ASIC must take into account the following factors in considering whether a financial product has resulted in, or will or is likely to result in significant detriment to retail clients:

    (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, will have or is likely to have, on retail clients; and

    (d) any other matter prescribed by regulations.

Note: As of the date of this notice, no matters are prescribed by regulations.

43. The significant detriment to retail clients is described below by reference to the matters referred to in paragraphs 1023E(1)(a)-(c) of the Act.

44. As outlined in CP 330 and CP 355, ASIC considers that continuing credit contracts:

(a) are likely to be available for acquisition by issue to retail clients in the manner described in paragraph 6, and

(b) have resulted in, and are likely to result in, significant detriment to retail clients because of the combination of the following factors:

i. the overall high cost of both the continuing credit contract and the collateral contract, relative to the loan amount, which many retail clients cannot afford;

ii. the significant number of retail clients who have been issued this product; and

iii. the particular target group of retail clients the product is issued to, many of whom are vulnerable and suffering from financial instability and hardship.

Nature and extent of the detriment, including actual financial loss to retail clients

45. The nature of the detriment to retail clients from continuing credit contracts is in the form of both financial losses and non-financial losses. Information available to ASIC indicates that continuing credit contracts, provided in the manner as described in paragraph 6, have resulted in significant financial losses to retail clients. ASIC has observed that the nature of the significant detriment also comprises of non-financial losses.

46. The extent of the detriment to retail clients that has resulted from continuing credit contracts provided in the manner as described in paragraph 6, is evidenced by the volume of retail clients who have been issued this product and the quantum of the financial losses to these retail clients.

47. ASIC has identified the following financial losses resulting from the continuing credit contracts issued in the manner described in paragraph 6:

(a) retail clients are being charged significant upfront, ongoing and default fees, in excess of what is permitted under the continuing credit exemption;

(b) additional fees from third parties are often incurred, including bank charges in relation to dishonoured direct debits and overdrawn fees; and

(c) as a result of the significant fees and charges and subsequent increase in overall debt, retail clients are often unable to meet other financial commitments and suffer financial hardship.

48. Based on confidential data ASIC has received, ASIC is aware that a significant volume of retail clients have been issued continuing credit contracts in the manner described in paragraph 6, and have suffered significant financial losses as a result.

49. As outlined in CP 330 at paragraph 18, the fees that were charged by Cigno to a retail client under the collateral contract that was issued in conjunction with a continuing credit contract (in the manner described in paragraph 6) include:

(a) financial supply fees ($13 plus a percentage of the loan amount);

(b) account keeping fees ($5.95 per week);

(c) default fees ($79 per default);

(d) change of payment fees ($22 per change); and

(e) drawdown fees (if applicable).

50. In CP 330, ASIC provided four case studies of retail clients who had suffered significant detriment as a result of the continuing credit contracts issued by BHFS and Cigno in the manner described in paragraph 6. For example:

Case study 1

Client A used Cigno's services to apply for and obtain a continuing credit contract from BHFS for a loan of $350 in September 2019.

Client A was only able to make $150 in repayments over the preceding three months.

In that time period, Client A was charged almost $1,100 in fees, including almost $300 in upfront fees (lender fee and financial supply fee), almost $80 in ongoing account-keeping fees, and $720 in default fees (including change of payment fees). By December 2019, Client A still owed Cigno and BHFS over $1,200.

In total, the overall repayments were approximately 410% of the original loan amount.

Case study 2

Client B used Cigno's services to apply for and obtain a continuing credit contract from BHFS for a loan of $250 in September 2019.

Client B was charged almost $1,000 in fees, made up of over $215 in upfront fees (lender fee and financial supply fee), almost $80 in ongoing account-keeping fees, and $685 in default fees (including change of payment fees).

Client B was only able to make $309 in repayments and as at December 2019 still owed Cigno and BHFS over $900.

In total, the overall repayments were approximately 490% of the original loan amount.

51. In response to CP 330, aggrieved retail clients, financial counselling and community legal centres provided more than 35 retail client case studies supporting their submissions which evidenced significant detriment being suffered by retail clients due to this class of financial products. Common themes in the submissions and case studies include:

(a) charging excessive and unreasonable fees, including uncapped default fees (in one example, the debt with Cigno reached over 625% of the original credit provided under the continuing credit contract);

(b) significant higher up-front costs than other regulated products;

(c) payments required via direct debit, which may result in account overdrawn fees;

(d) retail clients' general inability to afford repaying the debt, defaulting on repayments quickly and then being charged further high fees;

(e) retail clients' lack of understanding or ignorance of the fees and charges levied under this class of continuing credit contracts;

(f) retail clients entering a spiral of debt by entering more than one continuing credit contract or drawing down on a continuing credit contract on a regular basis to pay for essential household and living expenses including food, medical bills, car registration and household items for their children; and

(g) retail clients' financial dire straits and hardship being exacerbated by the availability and use of these continuing credit contracts.

52. For case studies provided in CP 330 submissions that are non-confidential, refer to the joint submission from CALC, FRLC and WEstjustice and the submissions from FCA, Financial Counsellor Sandra Blake, Legal Aid NSW and the individual consumer submissions.

53. In response to CP 355, financial counselling and community legal centres provided more than 20 case studies supporting their submissions which evidenced significant detriment suffered by retail clients. Common themes in the submissions and case studies include the:

(a) vulnerability of the class of retail clients who obtain these products, in particular retail clients in financial hardship, who have low levels of financial literacy and/or do not understand the terms of the loans;

(b) lack of adequate affordability assessments to consider retail clients' capacity to repay;

(c) excessive overall cost of the products (upfront, ongoing and default fees); and

(d) lack of protections under the National Credit Code and National Credit Act, such as access to hardship processes and the lack of a free and independent external dispute resolution (***EDR***) scheme.

54. The joint Consumer Group submission further confirmed that:

(a) continuing credit contracts and associated collateral contracts used in arrangements described in paragraph 48 of CP 355 formed a significant portion of the loans arranged by Cigno for which consumers sought advice and were causing significant detriment;

(b) the significant detriment caused by these types of contracts as detailed in their submission to CP 330 equally apply to each of the more recent cases involving Cigno; and

(c) they were concerned that loans involving continuing credit contracts can exacerbate the economic hardship that some people are suffering as a result of the COVID-19 pandemic.

55. CCLCSA in its submission also expressed concern that COVID-19 supplements paid to Centrelink recipients were directly being targeted as a revenue stream by predatory third-party service providers like Cigno.

56. LawRight in its submission to CP 355 provided two case studies of vulnerable clients who entered continuing credit contracts for small loans, where the fees far exceeded the credit amounts (e.g., $1,090 fees on a loan of $200). They assisted 17 clients who had entered continuing credit contracts since 30 July 2019. The average debt for these clients was $796.40 while the average amount advanced was between $200-$250.

57. A case study provided by Consumer Credit Legal Service (WA) in its CP 355 submission showed a client taking a loan of $350 and repaying over $1,100.

Reports

58. Between 7 October 2019 and 6 July 2022, there have been 194 reports made to ASIC against Cigno in relation to the continuing credit contracts issued by BHFS.

59. The majority of these reports relate to excessive fees and unaffordability.

60. For example, a report received in June 2020 reported that a retail client had been issued three continuing credit contracts and associated collateral contracts from Cigno and BHFS and was each time required to repay almost double the original loan amount. Specifically, the retail client was issued loans of:

(a) $350 in September 2019 and repaid $619.35;

(b) $350 in October 2019 and repaid $619.35; and

(c) $300 in February 2020 and had no capacity to repay the $734 owing.

Potential financial loss to retail clients

61. Whilst ASIC is aware that the continuing credit contracts may not currently be available for acquisition by issue to retails clients in the manner described in paragraph 6, ASIC has concerns of potential financial losses to retail clients that are likely to result from continuing credit contracts if they are issued to retail clients in the manner described in paragraph 6 in the future.

62. On 13 July 2022, ASIC made *ASIC Corporations (Product Intervention Order–Short Term Credit) Instrument 2022/647* (***the short term credit order***), which will come into force two days after its registration. The short term credit order was made with the written approval of the Minister under paragraph 1023M(b) of the Act, in substantially the same terms as *ASIC Corporations (Product Intervention Order–Short Term Credit) Instrument 2019/917* (***the 2019 order***). The 2019 order was made on 12 September 2019, came into force on 14 September 2019 and expired on 13 March 2021.

63. The short term credit order was made in respect of the class of financial products that consists of short term credit facilities where the short term credit facility is provided:

(a) by the short term credit provider to a retail client; and

(b) in conjunction with a separate collateral contract between a retail client and an associate of the credit provider, pursuant to which the associate charges the retail client significant fees or other charges.

64. Following the expiry of the 2019 order, ASIC understands that continuing credit contracts ceased to be offered to retail clients in the manner described in paragraph 6, and separately new entities started to issue short term credit facilities in the manner described above in paragraph 63, which is a very similar model to how continuing credit contracts were issued to retail clients, as described in paragraph 6.

65. The short term credit order will come into force two days after its registration. While the short term credit order is in force, persons will be prohibited from issuing short term credit facilities in the manner described above in paragraph 63.

66. Given the matters referred to above, ASIC considers that:

(a) continuing credit contracts are likely to be available for acquisition by issue to persons as retail clients in the future in the manner described in paragraph 6; and if so

(b) the nature and extent of the potential financial losses to retail clients are likely to be of the same nature and extent as ASIC observed as detailed above in paragraphs 45 to 60.

67. Both the actual and potential financial losses to retail clients are likely to be exacerbated when continuing credit contracts are provided in the manner described in paragraph 6, as retail clients:

(a) are not given access to EDR schemes such as AFCA, which would make it possible for them to complain free of charge to the EDR scheme in the event of a dispute; and

(b) do not have the various consumer protections under the National Credit Act and National Credit Code (such as responsible lending assessments and the ability to apply for financial hardship and be given the relevant protections under section 72 of the National Credit Code).

Non-financial losses

68. Retail clients have also been reported to suffer physically and mentally due to the financial stress, distress and anxiety caused by the continuing credit contracts issued in the manner described in paragraph 6. These impacts are discussed in the section below.

The impact the detriment has had, or will or is likely to have on retail clients

69. In determining whether a financial product has resulted in, or will or is likely to result in significant detriment, ASIC must also take into account the impact that the detriment has had, or will or is likely to have on retail clients: paragraph 1023E(1)(c) of the Act.

Types of retail clients impacted

70. Information available to ASIC, including CP 355 submissions and reports provided to ASIC, indicates that the types of retail clients affected by the significant detriment include:

(a) vulnerable retail clients from low socio-economic groups, including unemployed retail clients, sole parents, retail clients with intellectual disabilities, mental or physical illness, Centrelink recipients, retail clients with substance or addiction issues, Indigenous retail clients, including those with low levels of financial and English literacy, young and elderly retail clients; and

(b) retail clients in financial difficulty requiring credit to pay for basic living expenses including food, medical bills, car registration and household items for their children.

Impact on retail clients

71. The impact that the significant detriment has on these types of retail clients identified at paragraph 70, as described at paragraphs 24-27 of CP 330, includes:

(a) exacerbating existing financial stress;

(b) increasing their inability to meet basic living expenses on an ongoing and prolonged basis;

(c) increasing their inability to improve their financial position;

(d) disempowering retail clients and exacerbating financial exclusion;

(e) undermining retail clients' financial capability and resilience; and

(f) increasing the stress, anxiety and further negative physical and mental health outcomes caused by financial difficulty.

72. In AFCA's submission provided in response to CP 330 it referred to a Melbourne Law School research paper which concluded that small amount lending (whether structured as short term lending or continuing credit contracts) 'have been assessed as having a disproportionately 'corrosive and harmful' impact on the financial and general wellbeing of the most vulnerable borrowers.' AFCA concluded that '[i]t is therefore critical that all products of this kind are subject to appropriate and consistent regulation in order to prevent significant consumer detriment.'

73. Legal Aid NSW and Legal Aid QLD, in their submissions to CP 330, identified that continuing credit lenders lend to some of their communities' most vulnerable consumers, many of whom are already experiencing financial difficulty, including consumers with low levels of literacy, young people, Aboriginal and Torres Strait Islander people, people experiencing homelessness, people with disability and people whose only source of income is Centrelink payments.

74. The joint submission from the peak bodies in the financial counselling sector to CP 330 provided case studies showing the impacts of the harm/detriment as including depression, financial distress, exacerbating financial situation, pawning goods to pay Cigno debt, accessing emergency relief like food banks/vouchers, defaulting on payment of utility bills and rent and reducing food consumption.

75. The Consumer Credit Legal Service (WA), in their submission to CP 355, noted that in their experience these continuing credit contracts have similar issues and cause detriment in the same way as short-term credit by: targeting vulnerable consumers who are using the loans to

pay for basic living expenses, high overall fees and charges, high default rates and the inability of consumers to make repayments without substantial hardship. They also noted that of six clients who entered these types of contracts, and whom they have assisted, four were unemployed, on Centrelink income and in financial difficulty.

76. The joint Consumer Group submission to CP 355 stated that:

(a) the harm caused by the excessive fees charged by Cigno is made worse by 'a business model that specifically targets people in, or at risk of, financial hardship, or who have low levels of financial literacy and do not understand the terms of the loans'; and

(b) these types of loans also have a flow on effect as the demand for assistance with these loans causes a drain on the available resources of community legal centres, financial counsellors and other community workers.

77. The CCLCSA in its submission to CP 335 stated that:

(a) 'Vulnerable retail clients, who could never afford to make the contracted repayments, are pushed further into financial despair by [the continuing credit model].'

(b) 'The vulnerabilities and desperation that leads clients to apply for this type of short term finance also prevents them from being able to make informed decisions and fully comprehend the associated fees and costs of the money they are borrowing.'

78. ASIC considers that the impact that the significant detriment has on retail clients from these continuing credit contracts, is likely to be of the same nature and extent as described in paragraphs 69 to 77 above, if continuing credit contracts are provided in the same or similar manner as described in paragraph 6 in the future.

Why the order is an appropriate way of reducing the detriment

79. In determining why the order is an appropriate way of reducing the significant detriment resulting from the issue of these continuing credit contracts, ASIC has focused on:

(a) identifying the specific product features, conduct or other factors that have contributed to the significant detriment or likely significant detriment; and

(b) how we can best reduce future significant detriment or the likelihood of further significant detriment occurring.

80. We consider that this intervention is the most appropriate regulatory solution to reduce further significant detriment to retail clients because:

(a) the submissions received from consumer advocates, community legal centres and industry stakeholders in response to CP 330, the Addendum to CP 330 and CP 355 (the ***Consultation Papers***) confirm and broadly support ASIC's view of significant detriment and support ASIC's proposed action (noting that ASIC did also receive submissions which opposed the Proposed order from Cigno, BHFS, some Cigno customers, and Benchmark Analytics);

(b) the order will prevent the charging of fees and charges in excess of the limits permitted under the continuing credit exemption;

(c) it will likely discourage and prevent other credit providers from adopting these kinds of arrangements or similar conduct which will or is likely to result in significant detriment to retail clients;

(d) it will effectively force continuing credit providers and their associates issuing continuing credit contracts in the manner described in paragraph 6, who wish to continue to charge fees and charges which exceed those permitted by the continuing credit exemption in subsection 6(5) of the National Credit Code, to obtain an Australian credit licence and comply with the consumer protection provisions of the National Credit Act and the National Credit Code, including obtaining membership of an EDR scheme; and

(e) it is a more comprehensive and timely response than the other regulatory options available to ASIC.

81. ASIC has considered the following impacts of the intervention order:

(a) issuers of continuing credit contracts and their associates will not be able to charge self-determined high and unregulated costs of continuing credit and collateral contracts and may be forced to exit the industry if they consider that the price cap in the continuing credit exemption is ‘uncommercial’; and

(b) if these continuing credit providers and their associates exit the industry, it may result in reduced access to credit for some retail clients who require credit but are ineligible to obtain a small amount credit contract or other regulated credit products.

82. ASIC has considered these impacts and has determined that it is appropriate to proceed with the order for the following reasons:

(a) there will always be retail clients who are unable to access any form of credit, even of a short term nature, due to their inability to afford repayments without suffering financial hardship and who therefore will need to utilise existing Government and community services;

(b) limited access to continuing credit would lead to more awareness by retail clients of other or alternative sources. Retail clients would benefit financially and non-financially as they would be prompted to make both greater and earlier use of more beneficial alternative products or options. Alternative products and services include:

i. financial counselling and advice services, which assist retail clients to plan and negotiate their financial affairs free of charge;

ii. accessing regulated credit, which is less costly and provides legislative protections;

iii. Centrelink products (lump sum advances) and incentives;

iv. government and utility hardship programs or utility relief grants; and

v. non-commercial microfinance products (e.g., no interest and low interest schemes);

(c) the increased and regular use of alternatives would, over time, reinforce the availability of these alternatives, and encourage retail clients to make use of them as they come to realise the costs involved, and the impact on their financial situation;

(d) retail clients who decide to use one of the alternatives to a continuing credit contract are likely to experience:

 i) a reduction in the amount they will spend to access credit because of the lower charges associated with the alternative products; and

 ii) where they use financial counsellors, better management of their income, changes to their spending habits and, overall, less reliance on all credit products;

(e) it may increase the use of regulated credit by retail clients, where consumer protections are provided under the National Credit Act and National Credit Code;

(f) it will allow other credit providers to assist retail clients in a regulated and responsible manner;

(g) it will provide a competitive playing field for regulated credit providers and prevent credit providers who currently offer regulated credit products adjusting their business models to avoid the necessity to comply with consumer protection provisions; and

(h) the significant detriment and associated impact that have been caused, and are likely to be caused, by continuing credit contracts issued in the manner described in paragraph 6, as described in paragraphs 41-78 above, will be reduced.