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Senior Manager, Credit & Banking
Enforcement Inquiries & Compliance
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne VIC 3000

Dear Senior Manager

Response to consultation paper 371 - Product intervention orders in credit

Thank you for the opportunity to respond to the Australian Securities and Investments Commission's (**ASIC**) *Consultation paper 371 - Product intervention orders: Short term credit facilities and continuing credit contracts* (**CP 371**). This is a joint submission made on behalf of Consumer Action Law Centre, Financial Rights Legal Centre, Financial Counselling Australia, Indigenous Consumer Assistance Network, WEstjustice, The Salvation Army, Consumer Credit Legal Service WA, Victorian Aboriginal Legal Service and Redfern Legal Centre.

Our organisations support and agree with ASIC's findings and recommendations in CP 371, including the proposal to extend the following product intervention orders (**PIOs**) made by ASIC under the *Corporations Act 2001* (**Corporations Act**) in relation to credit facilities, so that they remain in force until they are revoked or sunset on 1 October 2032:

- <u>*Short term credit order*</u> - *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2022/647* that applies to short term credit facilities and associated collateral contracts used in the arrangements described in paragraph 19 of CP 371 (**Short Term Credit Model,** or **STCM**); and
- <u>*Continuing credit contracts order*</u> - *ASIC Corporations (Product Intervention Order – Continuing Credit Contracts) Instrument 2022/648* that applies to continuing credit contracts and associated collateral contracts used in the arrangements described in paragraph 60 of CP 371 (**Continuing Credit Contract Model**, or **CCCM**).

There has been a total of three PIOs created by ASIC prohibiting these credit models. The first PIO[1] (**2019 STCM PIO)** applied to the STCM. It commenced on 14 September 2019 and expired on 14 March 2021.

Extending the operation of the 2022 PIOs, listed above, is the best way that ASIC can ensure the harmful effects of these credit models remain prohibited and will disincentivise the risk of similar harmful models re-emerging in the future.

A significant risk of consumer harm if the 2022 product intervention orders are not extended

The use of the STCM and CCCM by Cigno Pty Ltd (**Cigno**), a pseudo credit broker, has caused and continues to cause significant harm to countless numbers of people on low incomes, experiencing vulnerability. Prior submissions our organisations have provided to ASIC in relation to the various PIOs, including the response to ASIC for consultation paper C 355[2], have provided detailed evidence of the significant consumer detriment caused by these models. The two existing PIOs were created to primarily address the two most harmful lending models used by Cigno and their lending associates.

Cigno offers to arrange loans for consumers through associated credit providers. However, the conditions of Cigno's service agreements and loans impose excessive fees for short term, low value loans that are similar in substance to small amount credit contracts (although far more expensive), but which are designed to avoid the definition of credit under the *National Credit Code* (**NCC**) of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**). This means Cigno and its associates are able to avoid the obligation to hold a credit licence and associated vital consumer protections such as limits on fees, hardship obligations and the need to be a member of the Australian Financial Complaints Authority.

A standard credit facility arranged by Cigno will generally involve a small loan (under $1000), repayable within a few weeks, but with fees that amount to roughly the same as the principal borrowed. Cigno also charges administrative fees, late fees and other fees that do not reasonably correlate to the cost of lending the principal amount. We regularly hear from clients where Cigno has claimed they owe the business multiple times the amount borrowed within months of the loan being taken out. Loans arranged by Cigno have been one of the most harmful individual forms of credit on the market today, and are designed to prey on financially vulnerable people.

To assist consumers to understand their rights under each model, Consumer Action Law Centre (**CALC**) has updated it's 'action pack' toolkit designed to help community workers and the general public deal with the outstanding loans arranged by Cigno which have been unsuitable or unaffordable.[3]

<u>B1Q1 - Do you agree with our proposal to extend the 2022 short term credit order? Please explain the reasons for your views.</u>

Yes, we agree with ASIC's proposal and rationale in paragraphs 53-54 of CP 371, which states there is a real risk of arrangements under the STCM resuming if the PIO were not extended, as it did when the in 2019 STCM PIO expired on 14 March 2021.

Cigno has demonstrated a willingness to adapt its models and use any opportunity to offer and advertise its loans to consumers. The serious harm caused to hundreds of thousands of consumers[4] by this and other Cigno models

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[1] *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917.*

[2] For examples of the harm caused by these loans, see our submissions to ASIC's consultation papers proposing to make PIOs addressing these models: https://consumeraction.org.au/product-intervention-orders-in-credit-a-joint-submission/; https://consumeraction.org.au/using-the-product-intervention-power-continuing-credit-contracts/; https://consumeraction.org.au/asic-cp-316-pip-short-term-credit/

[3] Available at: https://consumeraction.org.au/resources-and-toolkits/cigno-loans-action-pack/.

[4] It is unknown exactly how many people borrow from Cigno, but Federal Court documents show that in around six months Cigno arranged 166,045 loans for $46 million that incurred fees of around $61 million (*Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2022] FCAFC 108 at [15]); Also see: https://www.choice.com.au/money/credit-cards-and-loans/personal-loans/articles/cigno-loan-declared-illegal.

each time they were permitted to operate has had a devastating effect on people's lives, and cannot be permitted to occur again.

Cigno continues to strongly assert its right to collect payment in relation to STCM contracts and to refer accounts to debt collectors. As a result, financial counsellors, community lawyers and community organisations continue to redirect much of their resources to assist customers with the financial hardship caused by this model for loans they took out before the existing PIO came into force.

<u>C1Q1 - Do you agree with our proposal to extend the 2022 continuing credit contracts order? Please explain the reasons for your views.</u>

Yes, we agree with ASIC's proposal and rationale in paragraphs 82-83 of CP 371, which states there is a real risk of arrangements under the CCCM resuming if the PIO were not extended.

As noted in paragraph 83 of CP 371, although ASIC was successful in Federal Court proceedings[5] to prohibit the operation of the CCCM operated by Cigno and an associate, extending the CCCM PIO is necessary due to its broader application and usefulness. It applies across industry and covers conduct in relation to all fees and charges that will or are likely to result in significant detriment to consumers. It is a more comprehensive and effective way of addressing consumer harm from such models.

The continued application of the PIO would also serve as a significant deterrent to other organisations looking to exploit this model in the future as businesses have consistently found ways to develop lending models in the past to evaded enforcement action.[6]

<u>B1Q2 - Do you agree with our proposal that the 2022 short term credit order, if extended, should be extended so that it remains in force until it is revoked or sunsets? Please explain the reasons for your views.</u>

Yes, we agree with ASIC's proposal to extend the PIO applying to the STCM to the sunset of 1 October 2032. Existing STCM arrangements and the continued enforcement of debts are causing consumers harm for the same reasons described in paragraphs 29–33 and 40 of CP 371, which will remain highly relevant for the foreseeable future.

Ideally, it would be preferable for Government to consider reviewing the definition of 'credit' that exists in the NCC so that there are no loopholes left for companies like Cigno to exploit. As these models have repeatedly appeared over the years, ASIC has been left to play a game of whack-a-mole to stop them. The best long-term solution would be to fix the legislative definition altogether. However, until suitable reforms are implemented to comprehensively protect consumers, the long-term need for the PIOs remain.

<u>C1Q2 - Do you agree with our proposal that the 2022 continuing credit contracts order, if extended, should be extended so that it remains in force until it is revoked or sunsets? Please explain the reasons for your views.</u>

Yes, we agree with ASIC's proposal to extend the PIO applying to the CCCM to the sunset of 1 October 2032. The risk of consumer harm from this model described in paragraphs 74-75 of CP 371 will remain highly relevant for the foreseeable future. The ongoing uncertainty and hardship caused by the current cost of living crisis only provides greater justification to prevent exploitative and harmful products of this nature being sold to consumers.

We saw Cigno swiftly use this model to take advantage of vulnerable consumers immediately after the 2019 STCM PIO expired. The profitability of this model was also enough to give Cigno the incentive to challenge ASIC through the court system. Cigno's conduct has not only caused significant harm to consumers experiencing vulnerability

[5] See: *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684; (2021) 153 ACSR 469, *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2022] FCAFC 108 and *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* (No 2) [2023] FCA 787.
[6] *Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648

for years, attempts to stop them have also cost significant resources for ASIC, government and the community sector.

<u>B1Q3 - Alternatively, do you consider that, if extended, the 2022 short term credit order should only be extended for a set period, such as three or five years? Please explain the reasons for your views.</u>

For the reasons mentioned above, we are of the view that it is necessary to extend the PIO applying to the STCM to the sunset of 1 October 2032, or as close to this date as possible, and extending it by a shorter period should be avoided.

<u>C1Q3 - Alternatively, do you consider that, if extended, the 2022 continuing credit contracts order should only be extended for a set period, such as three or five years? Please explain the reasons for your views.</u>

For the reasons mentioned above, we are of the view that it is necessary to extend the PIO applying to the CCCM to the sunset of 1 October 2032, or as close to this date as possible, and extending it by a shorter period should be avoided.

<u>B1Q4 - In your view, has the 2022 short term credit order been effective to date in reducing the risk of significant detriment to retail clients in the short term credit market? Please provide evidence and data to support your view.</u>

Yes. The PIO in relation to the STCM has been highly effective and is in line with ASIC's comments in paragraph 48 of CP 371.

Although our services continue to assist consumers placed into significant financial hardship by this model and by continued debt collection practices by Cigno, we have seen a significant reduction in enquiries and complaints about Cigno after the 2022 PIOs came into force on 15 July 2022.

Following the expiry of the initial 2019 STCM PIO on 14 March 2021, CALC's services were receiving dozens of complaints per month from Cigno customers in financial distress. From 2023 to date this number significantly reduced.[7]

<u>C1Q4 - In your view, has the 2022 continuing credit contracts order been effective to date in reducing the risk of significant detriment to retail clients in the continuing credit contracts market? Please provide evidence and data to support of your view.</u>

Yes. For the same reasons provided in B1Q4, the PIO in relation to the CCCM has been highly effective and is in line with ASIC's comments in paragraph 80 of CP 371.

<u>B1Q5 - What effects (if any) do you consider the 2022 short term credit order has had on competition in the financial system? What effects are likely if the order is extended?</u>

There is no downside in extending the PIO in relation to the STCM for consumers.

We agree with ASIC's comments in paragraph 54 of CP 371 and have not observed any negative or unintended consequences of the PIO for customers or the market broadly. The order does not prohibit the use of credit facilities relying on the short-term credit exemption in s6(1) of the NCC, provided the credit provider complies with the PIO.

The extension of the PIOs would not inhibit the payday lending and consumer lease industry's ongoing operation. People who need to turn to these products as a temporary measure will continue to be able to access them. The *Financial Sector Reform Act 2022* (Cth) contains provisions that are working to prevent the consumer harms as

[7] CALC recorded approximately 466 services in relation to Cigno accounts between March 2021 to August 2023, with approximately 56 of those services occurring in 2023; Financial Rights Legal Centre recorded 250 services in relation to Cigno accounts between March 2021 to August 2023, with approximately 46 of those services occurring in 2023 (noting that we cannot always identify which lending model is in use from an advice phone call).

identified in the final report of Treasury's 2016 independent review of Small Amount Credit Contracts.[8] The only major difference is the harms that we have outlined throughout this and prior submissions from the STCM and CCCM have been and will continue to be greatly reduced.

C1Q5 - What effects (if any) do you consider the 2022 continuing credit contracts order has had on competition in the financial system? What effects are likely if the order is extended?

For the same reasons mentioned above, there is no downside in extending the PIO in relation to the CCCM.

We agree with ASIC's comments in paragraph 83 of CP 371 and have not observed any negative or unintended consequences of the PIO on customers or the market broadly. The order does not prohibit the use of credit facilities relying on the continuing credit exemption in s6(5) of the NCC, provided the credit provider complies with the PIO.

As discussed above, the benefit to consumers and society by extending both PIOs to prevent future harm would far outweigh any cost.

B1Q6 - What alternative approaches (if any) could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

At this point in time, we are of the view that there are no better alternatives available to ASIC that would be as effective as the proposed extension of the PIO, to prevent the significant consumer detriment caused by the STCM.

We welcome the new anti-avoidance provisions introduced by the *Financial Sector Reform Act 2022* (Cth) to prohibit conduct intended to avoid the operation of PIOs. The fact that Cigno has managed to lend for years demonstrates the need for anti-avoidance provisions to support ASIC's PIOs.

The anti-avoidance provisions should provide a clearer, faster path to regulatory action for ASIC for this type of harm or similar conduct in future. However, the anti-avoidance provisions remain largely untested to determine the effectiveness of their reach in preventing consumer harms, including from the two lending models prohibited by the 2022 PIOs.

C1Q6 - What alternative approaches (if any) could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

We are similarly of the view, that there are no better alternatives available to ASIC that would be as effective as the proposed extension of the PIO, to prevent the significant consumer detriment caused by the CCCM.

Extending both PIOs to the sunset date would not only have a continuing benefit for consumers, it would prevent the need for ASIC to consult with consumer representatives on the same issues in only a few years time. This would allow ASIC to more efficiently direct its resources to address other urgent and emerging areas of consumer harms caused by financial products and business operating in the gaps between the regulated and unregulated markets.

RECOMMENDATION 1. Extend the *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2022/647* so that it remains in force until revoked or it sunsets on 1 October 2032.

RECOMMENDATION 2. Extend the *ASIC Corporations (Product Intervention Order – Continuing Credit Contracts) Instrument 2022/648* so that it remains in force until revoked or it sunsets on 1 October 2032.

[8] The Australian Government the Treasury, *Review of the small amount credit contract laws – Final report*, March 2016, available at: https://treasury.gov.au/consultation/review-of-small-amount-credit-contracts-final-report.

Further information

Please contact Senior Policy Officer [redacted] at **Consumer Action Law Centre** on [redacted] or at [redacted] if you have any questions about this submission.

Yours Sincerely,

CONSUMER ACTION LAW CENTRE

FINANCIAL RIGHTS LEGAL CENTRE

INDIGENOUS CONSUMER ASSISTANCE NETWORK

FINANCIAL COUNSELLING AUSTRALIA

WESTJUSTICE

THE SALVATION ARMY

CONSUMER CREDIT LEGAL SERVICE WA

REDFERN LEGAL CENTRE

VICTORIAN ABORIGINAL LEGAL SERVICE

ABOUT OUR ORGANISATIONS

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. We are the voice for the financial counselling profession and provide support to financial counsellors including by sharing information and providing training and resources. We also advocate on behalf of the clients of financial counsellors for a fairer marketplace.

Financial Rights Legal Centre

Financial Rights is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Finally we operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies.

Indigenous Consumer Assistance Network

The Indigenous Consumer Assistance Network Ltd (ICAN) provides consumer education, advocacy, and financial counselling services to First Nations peoples across north and far north Queensland, with a vision of "Empowering Indigenous Consumers".

The people we work with are strong, resilient and knowledgeable about their lives and their communities. However, structural barriers and an uncompetitive marketplace in remote and regional communities create conditions in which consumer and financial exploitation occur. As a result, First Nations peoples often experience heightened consumer disadvantage. ICAN provides people with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle systemic consumer disadvantage experienced by First Nations peoples.

WEstjustice

WEstjustice provides free legal services and financial counselling to people who live, work, or studying in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray, as well as youth legal branch in Sunshine, and outreach across the west. Our services include: legal information, advice and casework, duty lawyer services, community legal education, community projects, and law reform and advocacy.

The Salvation Army

The Salvation Army is an international Christian movement with a presence in 130 countries. Operating in Australia since 1880, The Salvation Army is one of the largest providers of social services and programs for people experiencing hardship, injustice and social exclusion.

The Salvation Army Australia provides more than 1,000 social programs and activities through networks of social support services, community centres and churches across the country. Programs include: Financial inclusion, including emergency relief; Homelessness services; Youth services; Family and domestic violence services; Alcohol, drugs and other addictions; Chaplaincy; Emergency and disaster response; Aged care; and Employment services.

Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973. We provide referrals, advice/information, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Our solicitors specialise in one of three areas of law: Criminal Law, Family Law and Civil Law.

Consumer Credit Legal Service WA

CCLS champions the financial rights of Western Australians on credit, debt and consumer law issues.

- We ensure people in Western Australia are treated fairly in the financial marketplace by providing free, confidential legal advice through our Telephone Advice Line.
- We provide legal representation to people experiencing vulnerability and disadvantage so that they can access justice.
- Our community legal education programs empower West Australians experiencing vulnerability and disadvantage to understand their rights and avoid financial pitfalls.
- We help other service providers, including financial counsellors and community support workers, to understand and support their clients' financial rights.
- We are a voice for change so that financial systems and consumer laws are improved for all.

Redfern Legal Centre

Redfern Legal Centre (RLC) is a non-profit community legal centre that provides access to justice. Established in 1977, RLC was the first community legal centre in NSW and the second in Australia. We provide free legal advice, legal services and education to people experiencing disadvantage in our local area and statewide. We work to create positive change through policy and law reform work to address inequalities in the legal system, policies and social practices that cause disadvantage.

We provide effective and integrated free legal services that are client-focused, collaborative, non-discriminatory and responsive to changing community needs – to our local community as well as state-wide. Our specialist legal services focus on tenancy, credit, debt and consumer law, financial abuse, employment law, international students, First Nations justice, and police accountability, and we provide outreach services including through our health justice partnership.

Redfern Legal Centre's Financial Abuse Service is the first of its kind in Australia. We run a statewide legal service providing trauma-informed expertise in credit, debt and consumer law issues as well as family law. We engage in policy, law reform and capacity building by working with government and industry to improve responses to financial abuse, including through coordination of the national Economic Abuse Reference Group.