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Consumer Credit Law Centre SA

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Submission to Australian Securities Investment Commission
CONSULTATION PAPER 330
Using the product intervention power: continuing credit contracts

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

This submission is in response to Consultation Paper 330 (CP 330) seeking feedback on the use of ASIC's product intervention power with respect to continuing credit contracts. The submission is based on the Consumer Credit Law Centre SA's (CCLCSA) experience advising consumers who entered into continuing credit contracts with BHF Solutions Pty Ltd (BHFS) and service agreements with Cigno Pty Ltd (Cigno), which has resulted in them suffering significant detriment.

Consumer Credit Law Centre SA

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

Uniting Communities

Uniting Communities works with South Australian citizens across metropolitan, regional and remote South Australia through more than 90 community service programs. Our purpose is to build compassionate communities and great lives. People are at the heart of all we do. We will work alongside South Australians as they strive for a bright future and great lives, supporting them to overcome adversity and disadvantage. We will do this in a way that is non-judgemental, generous and supportive; that embraces diversity; and that values and promotes fairness, justice and the benefits of strong communities.

We are made up of a team of more than 1500 staff and volunteers who support and engage with more than 20,000 South Australians each year. Recognising that people of all ages and backgrounds will come across challenges in their life, we offer professional and non-judgemental support for individuals and families.

Uniting Communities, through the CCLCSA, is particularly interested in ASIC's proposal to use its product intervention power to address significant detriment caused by BHFS/Cigno due to our extensive involvement in the provision of financial counselling and ongoing advocacy on a raft of measures associated with financial matters, financial stress, and financial hardship for low and modest income households. Our particular focus is providing support to low income and disadvantaged households.

The CCLCSA fully supports ASIC making a product intervention order to prohibit credit providers and their associates from issuing continuing credit contracts, except in accordance with strict limits on total fees that can be charged.

Through our work assisting clients with disputes against financial firms such as BHFS and Cigno the CCLCSA has seen significant harm caused by:

- The issuing of loans using a model that avoids compliance with responsible lending laws and other consumer protections;
- Excessively high fees (including establishment, default and ongoing account maintenance fees);
- Loans arranged that appear wholly unsuitable for the borrowers, and require unrealistic repayments to be made;
- Difficulty our clients have reported having when trying to contact Cigno to discuss issues with their loans;
- Cigno and BHFS not being members of the Australian Financial Complaints Authority (AFCA), leaving borrowers with limited access to justice; and
- Aggressive debt collection tactics.

2. Feedback on list of proposals and questions

The CCLCSA provides the following feedback on selected questions outlined on page 15 of CP 330.

D1 Q1 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 to retail clients? If so, please provide any relevant evidence which supports your views.

Yes. The CCLCSA provides specialist legal advice and we have received a sharp increase in the number of clients who have suffered significant detriment as a result of entering into continuing credit contracts with BHFS/Cigno. Clients contact us because they are alarmed at the amounts Cigno are requiring them to pay under their contracts due to the exorbitant fees charged. Due to intimidating debt collection activity by Cigno, clients frequently report to the CCLCSA that they are forced to prioritise unaffordable Cigno repayments over day-to-day living expenses in order to avoid Cigno's excessive default and rescheduling fees. We have noticed a particular increase in clients being contacted with respect to debt collection activity since the commencement of additional Centrelink supplements linked to the COVID-19 pandemic.

We have attached a number case studies in support of our views above. Please see **Attachment A.**

D1 Q2 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.

In the past, the majority of the clients that we assisted in relation to Cigno loans relied on Centrelink as their primary source of income. However, since the 2019/2020 bushfires and the COVID-19 pandemic, we have been contacted by clients who were employed prior to these events and had not experienced financial hardship. For an increasing number of clients, these events have led to them losing their employment and being in need of cash to meet immediate living expenses.

The CCLCSA anticipates that a direct result of the COVID-19 pandemic will be an increased number of Australians who previously did not rely on Centrelink benefits, finding themselves in financial crisis for the first time. Without any intervention by ASIC as proposed in CP 330, there is a significant risk that Cigno's target market will greatly expand to a new cohort of Australians who are experiencing significant financial distress.

Furthermore, the CCLCSA anticipates that when JobSeeker, JobKeeper and mortgage deferrals are phased out there will be a sharp increase in demand for unregulated, immediate credit to cover expenses such as mortgage repayments. Although a Cigno loan may assist an individual in the very short term, the CCLCSA's experience is that Cigno loans exacerbate existing financial stress due to the high cost of maintaining Cigno's extortionate fees.

D1 Q3 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?

No.

D1 Q4 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.

Yes, we agree.

D1 Q5 What alternative approaches could ASIC take that would achieve our objectives of preventing the detriment to retail clients identified in this paper?

The CCLCSA believes that this should only be a short term measure and that legislation needs to be amended in order to address the significant detriment caused to retail clients by the Cigno loan continuing credit contract model in the longer term.

The CCLCSA is of the view that all financial services providers should be required by law to be registered and be a member of the independent dispute resolution scheme, AFCA.

The CCLCSA also calls on ASIC to implore the Australian Parliament to urgently pass the *National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019 (No. 2)* and bring into effect broad anti-avoidance protections to prevent credit providers from circumventing the rules and protections contained in the *National Consumer Credit Protection Act 2009* (Cth).

Thank you for your consideration.

The Consumer Credit Law Centre SA

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Attachment A – CCLCSA Case Studies

<u>Case Study 1 - Monica</u>

Monica is a carer and supports a child living with disability. Monica had been affected by the Adelaide Hills bushfires. Monica works minimal part-time hours and was unable to work after the bushfires. Monica needed cash to meet her living expenses. Monica applied for a $175.00 loan online through Cigno. Monica paid $54.00 each week for a total of ten weeks totaling a sum of $540.00. Around the time that the COVID-19 pandemic started, Monica then became suspicious that she had not paid off the 'loan'. Monica called her bank and told them to cease the direct debits so that she could review her agreement. When Monica called her bank, they were familiar with Cigno and issues with clients experiencing hardship and direct debits paid to Cigno. Monica tried to access Cigno's members' portal but it did not work. Monica tried calling Cigno but there was a voice message advising that nobody was in the office due to the COVID-19 pandemic. Monica tried calling a multitude of times over many weeks, however she was unable to speak to Cigno and kept hearing the same voice message. Monica then tried emailing Cigno and did not receive any response. Throughout this time Monica kept receiving marketing messages from Cigno encouraging her to pay off her account and to borrow more money during COVID-19. Monica tried using Facebook Messenger and SMS to contact Cigno. Monica used every contact source listed on Cigno's website, to no avail. Monica then began receiving weekly dishonor letters from Cigno. In some weeks, Monica received the same letter twice but with different repayment amounts. Monica was confused and again tried to contact Cigno and was still unable to get through to them. She then received a letter from Cigno stating that she owed a further amount of around $500.00. This would mean she would pay back over $800.00 in fees alone, excluding the principal sum borrowed. Each week, further default charges of $79.00 had been charged despite Monica not being able to access the members' portal to change scheduled payment dates or view her agreement. The default letters implied that if she did not resume the direct debit payments or enter into another loan with the lender, that she would get into trouble with the police or AUSTRAC; that the debt was being referred to a debt collector; and that Cigno would garnish her income or bank account.

After the third week of missed payments, a default letter emailed to Monica threatened investigation action:

> *"If you do not make contact with us, we have no alternative but to commence an investigation to determine whether the information you provided, including your financial situation, was correct and accurate at the time of taking the loan. Our decision was based on that information and misrepresentation will be regarded as extremely serious.*
>
> *If you do make contact and your situation is such that you are experiencing hardship, we are happy to accommodate you and make an arrangement that is suitable.*

If you have multiple little debts and a consolidation loan would help you, then through our finance associate company BHF Solutions Pty Ltd or another lender we can apply for a consolidation loan of up to $5000.00 to cover all your debts. This will however be reliant on your conduct and ability to settle your debts…This is your last opportunity to remedy the default and prevent further action against you. You need to comply with your contract, and contact us within 14 days to confirm the above payment or to make an arrangement that is suitable to you. Failure to do so will lead to:

- *an internal investigation and verification of all the information provided when you entered into the recorded contract*
- *discrepancies will be evaluated and if considered fraudulent, will be reported to the police and possibly also to AUSTRAC if deemed necessary.*
- *the possibility of you being sued for the total amount outstanding under your contract.*
- *seeking of a judgement against you in the Courts and pursuing you for the amount of judgement either by way of an examination of your means in Court or a garnishee of income or bank account."*

One week later, Monica received a Notification of Referral to External Collections:

"Despite our collection efforts regarding your small loan, we have not been able to settle the matter. Your account is to be forwarded through to an external collections agency Milton Graham within three business days. Milton Graham can be contacted on 13 23 33 or via email clientservices@dnb.com.au to accommodate a new affordable arrangement that is suitable.

As at the date of this letter, your total outstanding balance is [approximate amount of $500.00]

Please find attached a copy of your up to date Account Statement for your own personal records"

Monica contacted the CCLCSA and sent a dispute to Cigno. Cigno offered to waive the outstanding balance that Cigno were claiming. At no time was Monica able to speak to anyone from Cigno (even though Cigno asked Monica to get in touch with them each time she received a letter). Monica was too fatigued and overwhelmed to pursue recovering the balance she felt she overpaid to Cigno through court action. Monica was unable to access AFCA to file a dispute about the service agreement as Cigno and BHFS are not members. Monica believes ASIC need to issue a product intervention order before the government's next budget speech because you cannot have predatory entities preying on the vulnerable in our nation, especially in the midst of the anticipated COVID-19 financial crisis.

Furthermore, while Monica was recently speaking to the CCLCSA and giving consent for her case study to be included in the CCLCSA's CP 330 submission to ASIC, she was contacted directly by Cigno requesting that she provide a submission to ASIC in relation to CP 330 *in support* of Cigno's business model.

<u>Case study 2 - Melissa</u>

Melissa is a person living with a disability and has a gambling addiction. Whilst she was at the Adelaide Casino at the end of May 2020, she applied online for a $230.00 Cigno loan. Earlier that same day, Melissa had made several withdrawals using her debit card and had exhausted all of her funds. At the time, Melissa already had two other payday loans and was receiving the Disability Support Pension.

Melissa had previously borrowed $300.00 from Cigno and believed that she had 'paid off' the loan. Melissa did not understand that she had entered into a continuing credit contract. Melissa entered into another drawdown through Cigno under the continuing credit exemption model but did not understand what this meant or that it was different to her other regulated small amount credit contracts. Melissa gambled and lost the $230.00.

The repayment schedule was to repay approximately $373.40 the following fortnight which was an amount that Melissa was never able to afford. Fees and charges were added to her account.

Melissa sought the assistance of the CCLCSA and reported that when she was trying to repay the $300.00 loan, she was going without food and seeking emergency relief in order to repay Cigno. Melissa had previously renegotiated her payments but that each time she did, she was charged a $22.00 fee. Melissa was worried that she would never be able to 'pay off' the drawdown or have enough money to buy food as Cigno were seeking repayments that she could not afford or would add further fees and charges. Melissa was also worried about how she would seek emergency food relief during COVID-19 pandemic. Cigno claimed approximately $700.00 and had referred the amount to a debt collector, Milton Graham.

Had Melissa sought to borrow money from a regulated small amount credit provider:

- The lender would have been required to have regard to the fact that she already had two other payday loans;
- The lender would have been required to obtain a copy of her bank statements for the preceding 90 days which would have shown she was at the Adelaide Casino and that she had withdrawn all of her funds; and
- The cost of credit would have been capped (i.e. the lender could only recover 200% of the adjusted credit amount in the event of default);
- If the lender advanced the loan, Melissa would have been able to raise a dispute that the loan was unsuitable and had recourse to AFCA.

<u>Case Study 3 - Nancy</u>

Nancy is a single mother who left a situation of family violence in March 2016. After she left, Nancy needed immediate cash and entered into a contract online that she believed was with an online payday loan company for the sum of $150.00. The proposed payments were to repay an initial amount $129.00 and then $127.30 one fortnight later, which Nancy was never able to afford. Nancy was unable to make the scheduled payments due to her family violence crisis. She was also unable to afford the further default and collection fees and charges Cigno had charged to her account. Within two months in May 2016, Nancy's account had rapidly grown to $861.50.

Nancy had not heard from Cigno for four years. Then after the government announced income support packages due to the COVID-19 pandemic in March 2020, Nancy received debt collection emails from Cigno stating that she owed them $861.50.

Nancy sent a message to Cigno seeking copies of her contract. The copies of the contracts forwarded by Cigno for the BHFS 'loan' stated that it was a 'continuing credit contract'.

Nancy contacted the CCLCSA and advised that she would have to use all of the COVID-19 supplement and increased amounts from JobSeeker to repay Cigno the outstanding amount claimed.

Case Study 4 - Kym

Kym suffered chronic health issues and had been injured in a workplace accident in February 2019. Kym had joint custody of raising his child with his ex-wife. Towards the end of March 2019, Kym had exhausted his savings and was struggling to meet his basic living expenses. Kym borrowed $350.00 through Cigno Loans believing that it would operate like any other regulated payday lender. By the first week of May 2019, Cigno were claiming that he owed them $1171.70. No responsible lending assessment was undertaken by Cigno and Kym was never in a position to be able to afford to repay the loan. The loan was granted using the short term credit exemption model which notably had lower dishonour fees of $49.00.

Kym attempted to resolve the dispute with Cigno but reported that it seemed that "one arm of the business was not communicating with the other arm". When Kym raised a dispute with Cigno, he was sent inconsistent letters by them and it seemed there was no effective internal dispute resolution system with effective oversight. In the end Kym gave up dealing with Cigno.

On the 22 March 2020, Scott Morrison announced JobSeeker and the COVID-19 supplement payment to support Australians receiving Centrelink benefits during the pandemic. Kym was relieved to learn that he would be able to pay his basic living expenses and keep himself and his child safe throughout the pandemic.

Three days later on 25 March 2020, Kym received the following message from Cigno:

> ***Subject: FINAL NOTICE - Referral to Milton Graham***
>
> *Dear [Kym]*
>
> *IMPORTANT: YOUR LAST PAYMENT HAS FAILED*
> *Due to failure to repay your loan, your file is at risk of being forwarded through to*

> *our external collections agency, Milton Graham, in 3 business days time.*
>
> *To resolve your debt to Cigno internally, please make payment today via Member Portal or to details below:*
>
> *https://members.cignoloans.com.au/*
> *Username: [redacted]*

That same day, Kym received an SMS text message from Milton Graham, debt collectors acting for Cigno. Kym sought assistance from the CCLCSA. Kym believed that the messages were intentionally timed to be sent after the Centrelink income support measures were announced by the federal government and targeted at Centrelink recipients who might agree to use the COVID-19 supplements and Jobseeker payments to pay amounts claimed by Cigno.

That same day, Kym received an email in his junk email box suggesting that he needed a reserve of emergency cash for the pandemic, as well as the following:

> *As a result, many lenders may adjust credit assessment policies and as a result will be more reluctant to lend to those in need. This will happen as they see a bigger risk in terms of being repaid.*
>
> *We offer a service whereby we focus on the emergency needs of clients that often cannot get credit elsewhere. Please be assured that Cigno will stand by you, our clients, and do our very best to assist in the same manner as we always have.*
>
> *What we ask of you now is that you review your file and start a new affordable repayment plan to settle your account with us. So that if a time comes when you are in need of assistance, we can be here for you. In fact, if possible, settle your account in full and put money aside for an emergency - that way you have two emergency options.*

After reading this email Kym called the Cigno phone number but there was a voicemail message and he was unable to speak to anyone from Cigno. Six days later, Kym received the following:

> *Hi [Kym]!*
>
> *Need a Cash Boost? Great news! You're already APPROVED!*
>
> *Simply verify your bank details for deposit to receive funds TODAY!*
>
> *Visit: https://cignoloans.com.au/[redacted]*
>
> *Once received, your contracts will be sent to you in MINUTES! Too Easy right?*
>
> *Get started today!*

Two weeks later, Kym received emails marketing the services of Debt Management Plans through Cigno.

Whilst Kym's case study did not relate to a continuing credit exemption contract with BHFS and Cigno, the CCLCSA is concerned that consumers were contacted immediately after the COVID-19 supplements were announced and they were unable to speak with anyone from Cigno.