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

Senior Manager, Credit & Banking
Financial Services and Wealth Group
Australian Securities and Investments Commission
Level 7, 120 Collins Street
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Dear Senior Manager

Response to consultation paper 355: Product intervention orders in credit

Thank you for the opportunity to respond to the Australian Securities and Investments Commission's (ASIC) Consultation Paper 355 - Product intervention orders: Short term credit and continuing credit contracts (CP 355).

Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**), the Indigenous Consumer Assistance Network Ltd (**ICAN**), the Victorian Aboriginal Legal Service and WEstjustice strongly support the interventions proposed in CP 355. Since at least 2018, our organisations have assisted many consumers that have suffered significant detriment caused by credit arrangements using the two multi-contract models described in CP 355. We have provided evidence of that detriment to ASIC over this period - in particular, we provided detailed responses to prior ASIC consultations papers CP 316 and CP 330.

We continued to see both models described in CP 355 used to issue many loans in 2021.¹ There remains significant demand for assistance from both financial counsellors and community lawyers to deal with these types of loans 'arranged' by Cigno Pty Ltd (**Cigno**). The detriment they cause is the same as that identified in prior consultations.

Both proposed product intervention orders (the **Draft PIOs**) must be made to have any hope of stopping the harm caused by these models. The models have been used interchangeably by Cigno, Cigno Australia Pty Ltd (**Cigno Australia**) and their related lending companies. Loan arrangements involving Cigno are all generally accessed by customers in the exact same manner and operate identically to one another in practical terms, such that customers are generally unaware of any difference between the lending models.

We urge ASIC to proceed to make the Draft PIOs as quickly as possible. That said, ASIC should also pay close attention to ensuring that the exclusions to the Draft PIO at Attachment 2 of CP 355 (particularly for buy now, pay later) do not unnecessarily provide an obvious format for another similarly harmful, avoidant loan arrangement. We reiterate similar concerns we have previously raised in response to the Addendum to CP 330 in this regard.

A summary of recommendations is available at **Appendix A**.

¹ Short term credit facilities began appearing again after ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917 expired)

About Consumer Action

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.

About Financial Rights

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 is an operator of the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters.

About ICAN

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

Aboriginal and Torres Strait Islander peoples living in regional and remote communities often experience heightened consumer disadvantage. Structural barriers and an uncompetitive marketplace create conditions in which consumer and financial exploitation occur. In its ten years of service delivery, ICAN has assisted people through a range of consumer and financial issues including: dealing with unscrupulous used car dealers, finance companies, payday lenders, telemarketers and door-to-door salesmen. In line with its vision to empower Indigenous consumers, ICAN provides Indigenous consumers with assistance to alleviate consumer detriment, education to make informed consumer choices and consumer advocacy services to highlight and tackle consumer disadvantage experienced by Indigenous peoples.

About Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as an Aboriginal Community Controlled Co-operative Society in 1973. VALS is the only dedicated, multidisciplinary legal and support service for Aboriginal and Torres Strait Islander peoples in the State of Victoria. VALS plays a vital role in supporting Aboriginal people in custody and providing referrals, advice/information, duty work and case work assistance across criminal, family, civil and strategic litigation matters.

About WEstjustice

WEstjustice provides free legal advice and financial counselling to people who live, work or study in the cities of Wyndham, Maribyrnong and Hobsons Bay, in Melbourne's western suburbs. We have offices in Werribee and Footscray as well as a 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, law reform, and advocacy.

The impact of loans involving Cigno on our casework

Providing advice and assistance to people in relation to consumer credit in Australia is a substantial part of the work of each of our organisations, particularly for people who are experiencing vulnerability or disadvantage. Over the last four years, the rate at which credit products 'arranged' by Cigno using the two models discussed in CP 355 have appeared in our casework has been substantial. The excessive fees that are charged by Cigno for their alleged services associated with these loans makes them one of the most harmful individual credit products on the market. The harm these fees cause 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;²
- people we assist regarding loans arranged by Cigno routinely report being completely unaware of the extent of the fees charged by Cigno (both standard fees and default fees);³
- the absence of any proper affordability or suitability assessment, meaning many people are provided loans without any realistic hope of paying off the principal and excessive fees charged;⁴
- terrible customer service, most obviously displayed by the fact it is very difficult to get anyone from Cigno on the phone to discuss an account;
- the absence of any reasonable or transparent hardship application and approval process;⁵
- the fact that Cigno and their lenders cannot be taken to any external dispute resolution (EDR) service;⁶
- Cigno's repeated use of opportunistic unsolicited offers (such as via text message) to past customers, even in instances where the customer has not engaged with them in years, and has asked them to stop; and
- aggressive debt collection tactics by both Cigno and the debt collectors to which they sell debts.

We elaborate on the significant detriment caused by these arrangements in response to Question D1Q1 of CP 355 below, and provide several case studies demonstrating the harm caused at **Appendix B**.

Statistics on Cigno from our 2021 casework

Loan arrangements involving Cigno and using the two models described in CP 355 take up a disproportionate amount of time of financial counsellors and community lawyers both within our organisations and in the wider community.⁷

One of the most telling statistics on the impact these loans have on people experiencing vulnerability and disadvantage comes from ICAN in North Queensland. From 1 January to 31 December 2021, Cigno was the **most common private creditor** that came up in ICAN's casework (where this data was recorded)—a trend that was consistent throughout the year. Approximately 7.6% of ICAN's casework for the year involved Cigno.⁸ This is a huge rate for a single creditor to appear, particularly considering around 218 different creditors came up in ICAN's casework. For an unregulated fringe loan scheme to appear more often in casework than any major bank or payday lender is a telling indicator of the harm that these loans are causing in the community. Three case studies are provided from ICAN in **Appendix B**, that demonstrate the harm that these loans are causing First Nations people

² See for example, Financial Rights case studies 1, 3, 5, 6.

³ See for example, Financial Rights case studies 4, 5, 6.

⁴ See for example, Financial Rights case studies 1, 3, 5; Consumer Action case study 5.

⁵ See for example, Financial Rights case studies 3, 4.

⁶ See for example, Financial Rights case study 4, 6.

⁷ While Cigno is not the actual 'lender' of loans under these models, we refer to 'loans involving Cigno' here because consumers who take out loans under these models deal only with Cigno, and many are unaware that there is a separate lender entity involved in the transaction at all.

⁸ 81 out of the 1055 clients ICAN provided services to from 1 January – 31 December 2021 had loans involving Cigno. 63 of these clients identified as Aboriginal and/or Torres Strait Islanders.

in north Queensland. Most of the clients ICAN hear from who have taken out Cigno loans are using them to pay for essentials, specifically food and fuel.

Consumer Action's 2021 statistics tell a similar story. Consumer Action receives the majority of calls to the National Debt Helpline (NDH) that come from Victoria. In 2021, Cigno was the 5th most common creditor or trader listed on calls to the NDH (where this data was recorded). The only organisations that came up more often were all major ASX listed companies.

Similarly, Cigno was the equal 3rd most common creditor or trader listed on matters dealt with by Consumer Action's legal advice lines in 2021 (where this data was recorded), with only two major banks coming up more (and one major bank being recorded as a creditor for the same number of calls).⁹ These figures indicate that in 2021 Cigno loans appeared in our casework at a comparable frequency to the largest market players in financial services.

These statistics cannot be broken down by the relevant lending model used because in many cases we do not see the loan documents, and for the most part consumers are unaware of the lending model used. However, in cases where we can identify the lending model, both models contemplated by each of the proposed orders in CP 355 have featured regularly in 2021. This is discussed further in response to the relevant questions in CP 355 below.

Consumer Action also developed an 'action pack' toolkit designed to help community workers and the general public deal with loans arranged by Cigno which are unsuitable or unaffordable.¹⁰ The reality is that anyone assisting people with consumer credit in the community is likely to come across Cigno regularly in their casework.

The impact of these loans also has a flow on effect, in that the demand for assistance with these loans causes a drain on the available resources of our organisations, financial counsellors and other community workers. Disputing or seeking relief from loans involving Cigno is often quite difficult and time consuming because of Cigno's poor hardship responses and unwillingness to negotiate or act reasonably.

Loans issued in the manner described in CP 355 are having an extremely detrimental and disproportionately harmful impact upon the community. Cigno and their lenders have been permitted to skirt around the edge of the law for too long, and need to be conclusively prevented from lending using either current lending model, and any future similar model.

Short term credit product intervention order

Question D1Q1 – Do short term credit facilities issued in the way described in paragraph 23 result in significant detriment to retail clients?

Yes. Since the ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917 (First PIO) expired on 13 March 2021, we have again seen short term credit facilities issued alongside collateral contracts involving an associate of the lender (Cigno) in the manner described at paragraph 23 of CP 355 (Short Term Credit Model, or STCM). We have seen many examples of these loans in the last nine months, and virtually every consumer we have seen that has taken out such a loan out has suffered significant detriment as a result.

How the STCM causes significant consumer detriment

STCM arrangements are causing these consumers detriment in the same manner and for the same reasons described in paragraphs 27-29 of CP 355. The points set out in CP 355 that justified ASIC's decision to make the First PIO all apply just the same to the use of these credit arrangements today. Our 2019 submission to ASIC consultation CP 316¹¹ detailed how the significant detriment was being caused by these loans – these comments

⁹ Consumer Action runs two separate legal advice lines – one open to Victorian consumers and one to Victorian community workers. This data is based on the combined statistics from the two services.

¹⁰ Available at: <https://consumeraction.org.au/resources-and-toolkits/cigno-loans-action-pack/>.

¹¹ Available at: https://financialrights.org.au/wp-content/uploads/2019/07/190730_ASICCP316CShortTermCredit_FINAL.pdf.

remain relevant. Elaborating further on the points listed on page 3 of this submission in relation to the detrimental effect of STCM arrangements:

- The fees that are being charged via the STCM are excessive and likely unconscionable. The establishment fees, account keeping fees, default fees and administration fees charged under every arrangement we have seen amount to far more than ever would be allowable under any form of credit captured by the *National Consumer Credit Protection Act 2009 (NCCPA)*, or under a single contract that falls within the s 6(1) *National Credit Code (NCC)* exemption. In some cases, the fees imposed are numerous times what would be allowable with any form of regulated credit, and many times the principal of the loan.
- Lenders (and their associates) using the STCM target people in financial hardship or with low levels of financial literacy. The excessive fees charged under the arrangements are so unappealing that the loans would not offer any benefit to anyone that understands the terms or without a desperate need for funds. In our experience, customers who take out these loans are already dealing with many other debts before they take out the loan.
- The impact of the fees associated with credit provided by the STCM often impacts the ability of borrowers to meet other financial commitments, or pay for essentials like food, which obviously causes significant stress. The high fees mean that these loans push people further into financial hardship faster than other comparable forms of regulated credit, such as small amount credit contracts (**SACCs**) captured by the NCCPA.
- The issuers of STCM loans (and their associates) are not members of the Australian Financial Complaints Ombudsman (**AFCA**), and do not comply with the obligations to provide hardship relief under the NCCPA. This leaves borrowers with fewer means to seek hardship relief or dispute costs associated with the loans.
- Despite the excessive fees charged by Cigno for 'administering' STCM loans, they are notoriously difficult to contact and their hardship responses are routinely abysmal.

The product intervention power (**PIP**) was intended to be a proactive tool to ban or regulate financial products which cause significant consumer detriment, which is occurring here.¹² The STCM contractual arrangements are a legal fiction made unnecessarily complex thereby avoiding capture by the NCCPA and NCC, and the associated consumer protections built into that legislation. By avoiding its operation, the STCM is being used to permit lenders (and their associates) to charge consumers more than they would be able to in relation to regulated loans, and to treat consumers worse.

Consumers do not benefit in any way by obtaining credit via the STCM, compared with similar forms of regulated credit, or under a single contract that falls in the section 6(1) NCC exemption. Previous arguments raised by Cigno suggesting that these loans promote financial inclusion should be disregarded. Offering credit to consumers who cannot reasonably afford to repay it does not amount to financial inclusion – quite the opposite. These loans are pushing people into rapid and more harmful debt spirals.

Allowing this model to operate incentivises regulatory arbitrage

As set out in our submission responding to ASIC CP 316,¹³ use of the STCM undermines the effectiveness of the consumer credit laws contained in the NCCPA and NCC. The loans we have seen issued using the STCM are similar to SACCs. However, by avoiding the consumer protections and limits on fees that can be charged for SACCs under the NCCPA, lenders using the STCM can charge consumers more, and do not incur compliance costs such as providing legitimate hardship assistance and responding to disputes in AFCA.

¹² Explanatory Memorandum to *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2019*, para 2.5.

¹³ Page 3-4.

If the use of the STCM is permitted to continue, there would be little reason for other SACC lenders to keep providing regulated credit. SACC lenders would adopt the STCM as well, and charge fees beyond that which are permitted under the NCC, while doing away with important consumer protections. Inaction will only lead to an increase in the consumer detriment being caused by use of the STCM in future.

Extent of the use of the STCM

The statistics provided above detailing the extent to which credit and collateral contract arrangements involving Cigno appeared in 2021 for ICAN and Consumer Action gives some indication about the extent to which this lending model is causing harm in the community. As noted above, we cannot confirm the exact portion of those cases specifically involved the STCM. However, for those arrangements where we have been able to determine which lending model has been used, a reasonable portion of them (entered into post 13 March 2021) have involved the STCM. The case studies provided in **Appendix B** below are also split up by the relevant lending model used in those cases, where possible.

Question D1Q2 – Should ASIC make the order in Attachment 1 to CP 355? Has there been any significant changes in relevant matters since 14 September 2019?

Yes. As detailed above, all the same reasons for making the First PIO in 2019 became relevant again following its expiration. ASIC should seek Ministerial approval and make the Draft PIO at Attachment 1 of CP 355 as quickly as possible. Any relevant changes in the market environment since 14 September 2019 give further justification to the case for making the product intervention order.

The impact of the COVID-19 pandemic

The COVID-19 pandemic has created increased economic uncertainty, and wreaked havoc with the finances of many people. Workers in some industries have been out of work for months, businesses have been shut or forced to downsize their workforce, and some people have suffered significant health problems. While it is hard to identify and measure the exact financial impact of the pandemic, it is highly likely that people are (and will continue to) face drastic and unexpected financial changes in their circumstances. In some situations, this will make people more desperate, and many may be facing financial hardship for the first time in their life.

The last thing that people need in desperate financial circumstances is a complex loan arrangement with excessively high fees charged. This is only going to worsen their situation. Properly assessing whether someone can afford to repay a loan—as is required to provide credit that is captured by the NCCPA or NCC—is more important than ever when income streams are uncertain. The increased uncertainty in the economic situation we are facing provides greater reason to ensure that the forms of credit available to people have proper consumer safeguards in place.

The use of the similar continuing credit contract lending model

The onset of use of the continuing credit contract lending model described in paragraph 48 of CP 355 is another change in the market that has arisen since 14 September 2019. This model has been used by Cigno and their associated lenders since the First PIO came into effect. As discussed below, it appears that it is still being used alongside the STCM by Cigno and their associates since the First PIO expired.

This development also only provides further support to the case for making the Draft PIO contained at Attachment 1 of CP 355. The use of two lending models by effectively the same parties in a manner that is for all practical purposes the same further indicates that these models are being used to specifically avoid the operation of the NCCPA and NCC.

RECOMMENDATION 1. ASIC should make the Draft PIO contained at Attachment 1 as soon as possible.

Question D1Q3 – Are you aware of entities issuing loans in the way described in paragraph 23?

Yes. All of the loans issued using the two-contract STCM issued since 14 September 2019 we have seen have involved Cigno or Cigno Australia as the provider of the 'collateral services'. We are not aware of any entities issuing loans in this manner that do not involve Cigno.

Generally, the actual short term credit facilities we have identified that sit alongside the collateral contract with Cigno involve BSF Solutions Pty Ltd. However, we did identify one case where BHF Solutions Pty Ltd was the lender using a STCM.

We have provided some of these contracts to ASIC in the past, but can provide copies again upon request.

Question D1Q4 – Are there alternative approaches to preventing significant detriment caused by loans issued in this manner?

No. Just like when ASIC consulted on CP 316, there are no other alternative approaches available to ASIC that will prevent the significant detriment being caused by loans currently issued using the STCM.

A public education campaign (as was contemplated in CP 316) or mandating increased disclosure obligations on high-cost loans are not viable options. There are significant limits on what disclosure can be expected to achieve in financial services, as was documented in ASIC's Report 632.¹⁴ Even where financial products are captured by regulation and comply with existing consumer protection laws, disclosure alone does not guarantee good consumer outcomes. It should not be considered a viable option to address a complex and harmful loan scheme designed to avoid consumer protection laws.

Additionally, the STCM is currently being used to target people who are in financial hardship and consider themselves in desperate need of funds. A public education campaign on financial literacy in the high-cost credit space is unlikely to connect with the current users of Cigno STCM loans.

It is possible that the anti-avoidance provisions contained in Schedule 4 of the *National Consumer Credit Protection (Supporting Economic Recovery) Bill 2020* currently before the Senate, if passed, could also conclusively confirm that the STCM is unlawful. However, due to the other detrimental reform contained in that Bill (removing essential responsible lending obligations for most forms of credit) it appears unlikely that this Bill will pass, or even proceed to a vote in the Senate. Furthermore, the PIP is intended to be a faster solution than legislative reform.

ASIC's unlicensed lending case against Cigno and BHF Solutions

There is still a matter before the Full Federal Court concerning the use of the continuing credit contract model discussed in part C of CP 355, and whether this constitutes unlicensed lending.¹⁵ For the reasons discussed in our response to D2Q5 below, this should not prevent ASIC from making either Draft PIO.

However, should ASIC be successful in that case, it should also consider commencing proceedings against Cigno and associated lenders using the STCM for unlicensed credit activity, as it appears likely the same conclusion would likely apply to this model.

Continuing credit contract product intervention order

Question D2Q1 – Is significant detriment caused by relevant continuing credit contracts?

Yes. Continuing credit contracts and associated collateral contracts used in the arrangements described in paragraph 48 of CP 355 (**Continuing Credit Contract Model**, or **CCCM**) are causing significant detriment to retail clients who sign up to these loans, in the same way as described above on page 3 (regarding Cigno), and in response

¹⁴ ASIC and the Dutch Authority for the Financial Markets, *Disclosure: Why it shouldn't be the default*, October 2019, <https://download.asic.gov.au/media/5303322/rep632-published-14-october-2019.pdf>.

¹⁵ *Australian Securities & Investments Commission v BHF Solutions Pty Ltd & Cigno Pty Ltd*, Federal Court of Australia No NSD716/2021.

to question D1Q1 above. We started seeing arrangements using the CCCM in our casework soon after the First PIO was made, and they continued to appear through all of 2020 and 2021.

We provided details of the significant consumer detriment the CCCM was causing in our submission to CP 330, regarding loans issued between 14 September 2019 and mid-2020.¹⁶ The issues raised in that submission apply equally to each of the more recent cases we have seen involving Cigno.

Based on the cases for which we have seen the contracts, it appears that the CCCM is still being used in a significant portion of the loans 'arranged' by Cigno.

We have generally observed that the arrangements using CCCM operate in identical fashion to arrangements using the STCM. However, we are aware of one instance where a customer of Cigno reported that after they paid off a loan, they started getting charged for another draw down on the loan that they never requested. We also understand that Cigno and their lenders may more readily approve subsequent repeat drawdown requests under the continuing credit contract model.

Question D2Q2 – Are you aware of entities issuing loans in the way described in paragraph 48?

Yes. All of the loans we saw documents for in 2021 involving the CCCM have involved Cigno (or Cigno Australia) as the collateral service provider, and BHF Solutions Pty Ltd as the lender.

Question D2Q3 – Are you aware of any differences in the continuing credit contracts market since CP 330?

No. Based on our casework, it appears Cigno and BHF Solutions are issuing credit contracts in substantially the same way as they were in the months prior to when ASIC consulted on CP 330.

As noted in our original submission to CP 330, we continue to hold concerns that loans using the CCCM (and the STCM) can exacerbate the economic hardship some people are suffering as a result of the COVID-19 pandemic. For the same reasons as expressed in response to question D1Q2 above, the ongoing uncertainty and hardship caused by the pandemic only provides greater justification to prevent exploitative and harmful loans of this nature being sold to consumers.

The concurrent use of the STCM and CCCM by Cigno and their lending associates also provides further weight to the case for intervening to stop both products. The two lending models are being used interchangeably, which further suggests their use is simply to avoid being captured by the NCCPA and NCC.

Question D2Q4 – Do you agree with the proposal to make the product intervention order in Attachment 2 to CP 355?

Yes, subject to our remarks below.

RECOMMENDATION 2. ASIC should make the Draft PIO contained at Attachment 2 as soon as possible.

We provided a response to ASIC's Addendum to CP 330, in which ASIC first proposed to provide exclusions for buy now, pay later (**BNPL**) and non-cash payment (**NCP**) facilities in a Draft PIO.¹⁷ The concerns we raised in that submission remain.

Our primary concern about these exclusions is that they may provide a clear avenue for unscrupulous companies like Cigno to develop a new avoidant lending strategy to keep trading in a similar fashion.

However, we also encourage ASIC to question the need for any blanket exclusion of this nature more closely.

¹⁶ Available at <https://consumeraction.org.au/using-the-product-intervention-power-continuing-credit-contracts/>.

¹⁷ Our submission is available at: <https://consumeraction.org.au/product-intervention-power-for-continuing-credit-contracts-some-further-considerations/>.

BNPL exclusion is unreasonably and unnecessarily broad

As set out in our submission responding to the Addendum to CP 330,¹⁸ the evidence of significant consumer detriment and the case for intervening in the BNPL market remain as relevant as ever.

Furthermore, it would be an absolute disaster if the Draft PIOs were made and an exclusion within them was used by Cigno to continue trading as if nothing had happened, just as it did via the CCCM after the First PIO was made. A further loophole to sell similar loans to similar demographics would continue to place more consumers into debt spirals without appropriate remedies, and potentially seriously affect the legitimacy of the product intervention power.

If ASIC's reasoning for proposing an exemption of this extent is based only on no such problematic model existing at present, this is insufficient. Paragraph 59 of CP355 acknowledges this risk of new models designed to circumvent the operation of the order. Cigno have made use of legal loopholes for four years now, charging people in financial hardship exploitative fees on loans that never should have been allowed. A far better approach would be to:

- amend the Draft PIO to apply to BNPL, but exempt the specific fees that the BNPL industry can reasonably demonstrate are required (eg delivery, installation, etc); and/or
- at a minimum, impose some cap on the total fees that may be charged under a collateral contract that is part of a BNPL arrangement. This figure could be set at an amount equivalent to fees permissible under regulated credit products. This would at least minimise the consumer harm if Cigno or another company developed a harmful lending model using this exemption.

RECOMMENDATION 3. Reduce the scope of the exemption provided to BNPL arrangements in the continuing credit contract Draft PIO at Attachment 2 of CP 355, so that:

- only specific fees that the BNPL industry can demonstrate are reasonably necessary for their lending models are exempt; and
- any exemption from the PIO still imposes reasonable caps on the permissible fees charged.

The NCP facility exclusion

We remain disappointed and concerned with the limited information ASIC has offered to explain the blanket exclusion for collateral contracts that are NCP facilities. There was limited explanation about this exclusion proposed by the addendum to CP330, and this remains in CP355. We routinely see entities that hold an Australian financial services licence (AFSL) engage in conduct that causes significant detriment to consumers. Some licensees have product lines that altogether offer demonstrably poor value and are seemingly designed to mislead consumers. While it does guarantee some ASIC oversight and membership of an EDR service, the AFSL requirement is no silver bullet to guarantee this exemption will not be misused.

As with the BNPL exemption, the NCP facility exemption should be made more specific, or at the very least include some reasonable cap that ensures it cannot be misused in future.

RECOMMENDATION 4. Amend the exemption provided to NCP facility arrangements in the Draft PIO at Attachment 2 of CP 355, by specifying the kinds of fees which may be charged under a collateral contract of this nature or by imposing a reasonable cap on the amount that may be charged.

¹⁸ Ibid.

Question D2Q5 – Are there alternative approaches to preventing significant detriment caused by credit issued in this manner?

No. For the same reasons provided in response to question D1Q4, the product intervention power is the most appropriate mechanism to address the significant consumer detriment being caused by the current use of the CCCM.

Considering the Federal Court’s decision in *Australian Securities & Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684 that use of the CCCM model by Cigno and BHF Solutions did not constitute unlicensed credit activity under the NCCPA,¹⁹ it is clearly necessary for ASIC to make this intervention to prevent significant detriment to retail clients.

Should the Full Federal Court find in favour of ASIC in the appeal of that case,²⁰ it may mean that using the CCCM is already unlawful, separate to any PIO. However, this conduct has been permitted to go on for a long time already, and the PIP is intended to be a tool used to proactively intervene in markets to stop significant consumer detriment from occurring. Even if ASIC is successful in its appeal, at worst the PIO would be deemed redundant and could be cancelled at that point. Using the PIP in the interim does not have any impact upon that case, and solves this problem in the short term.

Further information

Please contact Policy Officer **Tom Abourizk** at **Consumer Action Law Centre** on 03 9670 5088 or at tom.a@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,



Gerard Brody | CEO
CONSUMER ACTION LAW CENTRE



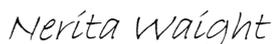
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Nerita Waight | CEO
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¹⁹ *Australian Securities & Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684.

²⁰ *Australian Securities & Investments Commission v BHF Solutions Pty Ltd & Cigno Pty Ltd*, Federal Court of Australia No NSD716/2021.

APPENDIX A - SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. ASIC should make the Draft PIO contained at Attachment 1 as soon as possible.

RECOMMENDATION 2. ASIC should make the Draft PIO contained at Attachment 2 as soon as possible.

RECOMMENDATION 3. Reduce the scope of the exemption provided to BNPL arrangements in the continuing credit contract Draft PIO at Attachment 2 of CP 355, so that:

- only specific fees that the BNPL industry can demonstrate are reasonably necessary for their lending models are exempt; and
- any exemption from the PIO still imposes reasonable caps on the permissible fees charged.

RECOMMENDATION 4. Amend the exemption provided to NCP facility arrangements in the Draft PIO at Attachment 2 of CP 355, by specifying the kinds of fees which may be charged under a collateral contract of this nature or by imposing a reasonable cap on the amount that may be charged.

APPENDIX B – CASE STUDIES

Short-term credit facility case studies

Financial Rights Case Study 1 – Hamish’s story – S269600

At this time of dealing with Cigno, Hamish was a single parent of a 5 year old daughter living in rural NSW in his early 30's. He was unemployed and reliant on the Centrelink Parenting Payment as his sole source of income.

In July 2021 he received a text message from Cigno inviting him to apply for a loan (he had previously borrowed with Cigno in 2019). His mother had recently passed away and he needed money to pay for her funeral. He logged onto his account on the Cigno website and applied for a loan. The application form was pre-filled with his personal details. He provided his bank account details to Cigno but did not provide any other financial information.

In July 2021, Hamish entered into a short term credit facility as described in paragraph 23 of CP355, comprising the following:

- A loan agreement with BSF Solutions for \$250. Credit fees of \$12.50 were payable to BSF. The loan had a term of 53 days, and required four fortnightly payments.
- A services agreement with Cigno, requiring the payment of a Financial Supply Fee of \$200.50 and a weekly accounting fee of \$5.95. These fees were to be paid in four fortnightly instalments. The services agreement also provided for the imposition of a default fee of \$79 and a change of payment schedule fee of \$22.

In total, Hamish was required to make four fortnightly payments of \$127 under the loan and services agreement, a total of \$508 (assuming no defaults), in return for the \$250 received in hand. He made one payment of \$127 but couldn't afford the rest of the payments. When Hamish contacted our service, Cigno had already commenced applying default fees and were demanding a further \$438.80 to pay out the account.

Financial Rights Case Study 2 – Vicki’s story – C223879

In September 2021, Vicki entered into a short term credit facility as described in paragraph 23 of CP355, comprising the following:

- A loan agreement with BSF Solutions for \$250. Credit fees of \$12.50 were payable to BSF. The loan had a term of 26 days, and required two fortnightly payments.
- A services agreement with Cigno, requiring the payment of a Financial Supply Fee of \$163 and a weekly accounting fee of \$5.95. These fees were to be paid in two fortnightly instalments. The services agreement also provided for the imposition of a default fee of \$79 and a change of payment schedule fee of \$22.

In total, Vicki was required pay a total of \$441.35 under the loan and services agreement (assuming no defaults), in return for the \$250 received in hand.

Financial Rights Case Study 3 – Yolanda’s story – C220061

Yolanda is a 20 year old sole parent of a 9 month old. She lives in regional NSW and is Aboriginal. As background, we set out Yolanda’s history of Cigno loans pre-dating March 2021.

Yolanda obtained her first Cigno account in 2019 when she 17 years old, Cigno recorded her date of birth significantly differently for the first loan, and was subsequently corrected for the following 2 loans.

In May 2019, Yolanda entered a Short Term Credit Contract with Cigno and Gold-Silver Standard Finance Pty Ltd (GSSF) with the following terms:

- a loan agreement with GSSF for \$120. Credit fee of \$6 payable to GSSF. The Loan term 60 days and loan payments of \$31.50.
- a services agreement with Cigno, requiring a financial supply fee of \$90, Account keeping fees of \$47.60 and same day deposit fee of \$16 to a total of \$153.60. Repayments were \$70 per fortnight for 3 fortnights and a final payment of \$69.90.

In total Yolanda was required to pay \$279.90 (assuming no defaults) for \$120 in hand.

Account statements show, Yolanda made no payments until August 2019, by which time the debt was \$1,042. Yolanda resolved the account by agreement in December 2019 with reduced fees of the contract \$279.90.

In May 2020 Yolanda entered a continuing credit contract facility with Cigno and BHF Solutions with the following terms:

- a loan agreement with BHF Solutions for \$160. Lender fee of \$15,
- the service agreement included a Financial Supply fee of \$85, and weekly account keeping fees of \$5.95.

The contract required a one off payment of \$265.95 for the \$160 obtained in hand due 6 days after the loan was granted. A change of payment schedule fee was charged of \$22 the day prior.

Yolanda did not pay, and by July 2020 the amount outstanding was \$806.65 inclusive of change of payment fees, weekly account fees and default fees..

Yolanda paid regular amounts of \$50 per fortnight so by August 2021 \$763.30 was paid.

The contract and Yolanda’s bank account statement show a drawdown of \$250 was paid to Yolanda in April 2021 on the continuing credit contract.

- The lender required payments to BHF of \$67 per fortnight for 3 fortnights and a final payment of \$64.
- A services agreement summary \$5.95 weekly account keeping fees totalling \$41.65 and a Financial Supply Fee of \$200.50 to be paid by 4 repayments of \$127 and a final payment of \$126.15.

Assuming there were no defaults, Yolanda was required, to pay \$507.15 for \$250 received in hand for the drawdown. The account statements for the continuing credit contract do not reflect the drawdown or the new repayments.

In July 2021, Yolanda entered into a short term credit facility as described in paragraph 23 of CP355, comprising the following:

- A loan agreement with BSF Solutions for \$250. Credit fees of \$12.50 were payable to BSF. The loan had a term of 58 days, and required four fortnightly payments
- A services agreement with Cigno, requiring the payment of a Financial Supply Fee of \$200.50 and a weekly accounting fee of \$5.95. These fees were to be paid in four fortnightly instalments. The services agreement also provided for the imposition of a default fee of \$79 and a change of payment schedule fee of \$22.

Yolanda provided 3 months of bank account statements prior to the loan being granted, which showed the existence of buy now pay later debts, small amount credit contracts, and wage advance repayments. In total, Yolanda was required pay a total of \$510.60 under the loan and services agreement (assuming no defaults), in return for the \$250 received in hand.

Consumer Action case study 1 – Carla’s story

A financial counsellor contacted Consumer Action when assisting her client Carla (name changed), a woman in her mid-70s who is living in aged care in regional Victoria. The financial counsellor told us that two of Carla’s family members hold joint power of attorneys for Carla’s financial matters. The financial counsellor told us that earlier this year one of these family members got a loan for themselves through Cigno, but provided Carla’s bank details for repayments. The financial counsellor told us that this was not permitted under the power of attorney – rather, it was a form of financial abuse.

The financial counsellor told us she identified the Cigno loan via the amounts direct debited from Carla’s bank account, and confirmed with that she was not aware of the loan. The financial counsellor told us that Cigno confirmed that Carla’s account had been provided as the bank account for repayments on a loan provided to Carla’s family member.

The financial counsellor told us that initially Cigno refused to refund the charges, insisting that the bank account did belong to the family member who had taken out the loan. Only after ongoing advocacy by the financial counsellor and providing proof the bank account was Carla’s did Cigno agree to refund the amounts taken from Carla’s account.

Consumer Action case study 2 – Jay’s story

Jay (name changed) obtained a loan from BSF Solutions through Cigno in mid- 2021, for \$250. The BSF Solutions contract described the arrangement as a ‘short-term loan agreement’, with a loan term of 57 days and charging credit fees of \$12.50. Cigno charged nearly the same amount as the principal for their services, meaning that Jay would pay more than double the amount borrowed if he made all the repayments on time.

A financial counsellor assisting Jay told us that at the time he took out the loan, Jay was homeless and his only source of income was the disability support pension. The financial counsellor reported that it was also clear from the account statement provided to Cigno for the loan that most of his recent income had been spent on gambling.

Despite this, the financial counsellor told us that Cigno refused a request to waive the loan because Jay had taken out **more than 10** loans with them previously.

WEstjustice case study 1 S105513 – Bradford’s story

Bradford is a refugee from Liberia who arrived in Australia in his teens. At the time he took a loan out from Cigno/GSSF he was the sole carer for a disabled sibling and was in desperate need to meet short-term costs. His one-off loan of \$350.00 incurred fees and charges for lenders and administration fees well in excess of twice the principal. At no time did Bradford understand the relationship between Cigno and Gold-Silver Standard Finance as credit ‘facilitator’ and credit provider respectively and the legal position this created in terms of charges which would ordinarily be unlawful.

Although WEstjustice was successful in having the non-principal amounts waived, this was after much back-and-forth emphasising the client’s extreme hardship and judgment-proof circumstances at a time when he was on the cusp of eviction. We believe Bradford’s experience is common to many clients using these arrangements. For all intents and purposes, they are led to believe it is a standard form of short term credit and they have a single contract with a lender. We imagine that future tactics to avoid the legislation or an ASIC intervention order (if the order inadvertently creates loopholes) will confuse consumer in a similar way.

Continuing credit contract case studies

Financial Rights Case Study 4 – Gillian’s story – S263718

At the time of dealing with Cigno, Gillian was an Aboriginal woman in her mid-20s residing in regional NSW, working but suffering from a gambling addiction and other problems with her mental health. She had recently borrowed \$2000 from a pay day lender and was reliant on borrowed funds from family and friends. Upon receiving an email from lastminute.com, saying she would make a good candidate for a Cigno loan, she went online and obtained one.

On in January 2020, Gillian entered into a continuing credit contract as described in paragraph 48 of CP 355, comprising the following:

- A loan agreement contemplating multiple advances of credit up to \$350 with BHFS, with a “\$0” fee per advance (although we note BHFS actually charged its standard \$15 per advance drawdown fee) up to a maximum of \$120 in any 12 month period; and
- A services agreement with Cigno, requiring payment of a Financial Supply Fee of \$258, a weekly accounting fee of \$5.95 and a drawdown fee of an unspecified amount, to be advised prior to processing the drawdown.

Gillian made the first payment when scheduled, but then lost her job. She was unable to request a financial hardship arrangement as Cigno was uncontactable and unresponsive to her calls and emails. Eventually, in March 2020, Cigno offered by email to finalise her debt – then at \$950.55 (including imposed four \$79 default fees, totalling \$316; two \$22 change of payment schedule fees, totalling \$44; and seven \$5.95 weekly account keeping fees, totalling \$41.65) – for a lump sum payment of \$665.46. Given Gillian was still not working, this was plainly not a fair or reasonable proposal.

Financial Rights case study 5 – Karolina’s story – S267215

At the time of dealing with Cigno, Karolina was a single parent of three young children in her mid-20s. She was unemployed and reliant on the Centrelink Parenting Payment as her sole source of income. Karolina had debts including with a debt collector, two payday lenders, and two buy now pay later providers.

In March 2021 Karolina applied for a loan on the Cigno website to buy household items for her children. She had been rejected by a few different credit providers before she found the Cigno website. Karolina can't remember providing any financial information to Cigno before obtaining the credit described below.

In March 2021, we understand Karolina entered into a continuing credit contract as described in paragraph 48 of CP 355, comprising the following:

- A loan agreement contemplating multiple advances of credit with BHFS up to a set credit limit; and
- A services agreement with Cigno.

On the same day as the contract, BHFS advanced Karolina \$100 pursuant to the loan agreement, and Karolina was issued with:

- A drawdown summary from BHFS, which required repayment of the \$100 plus a \$15 fee to BHFS, in four fortnightly instalments; and
- A drawdown request summary from Cigno, which imposed an additional \$88 financial supply fee payable to Cigno, along with \$5.95 weekly account keeping fees until the loan amount was repaid (a total of \$47.60 in account keeping fees, assuming no defaults).

In total, Karolina contracted to pay a \$250.60 under the loan and services agreement (assuming no defaults or changes in payment schedule), in return for the \$100 received in hand.

Karolina in fact paid \$208.95 to pay out the \$100 loan ahead of schedule in March 2021 (the \$100 loan amount, plus \$15 to BHFS, plus the \$88 financial supply fee to Cigno together with a \$5.95 accounting fee), overdrawing her account in the process and incurring a \$15 overdrawn fee from her bank.

Shortly thereafter, in April 2021, she sought further funds from Cigno to pay for her car registration, and BHFS advanced Karolina \$200 pursuant to the existing loan agreement. Karolina was issued with:

- A drawdown summary from BHFS, which required repayment of the \$200 plus a \$15 fee to BHFS, in four fortnightly instalments; and
- A drawdown request summary from Cigno, which imposed an additional \$163 financial supply fee payable to Cigno, along with \$5.95 weekly account keeping fees until the loan amount was repaid (a total of \$35.70 in account keeping fees, assuming no defaults).

In total, Karolina was required to pay a total of \$413.70 under the loan and services agreement (assuming no defaults), in return for the \$200 received in hand.

Karolina was unable to make the first repayment, scheduled for April 2021, or, indeed, any of the subsequent payments as scheduled. She made one late payment of \$104 in June 2021. By July 2021, Karolina had racked up six \$79 default fees (totalling \$474) and four \$22 change of payment schedule fees (totalling \$88) (on top of the existing financial supply fee and account-keeping fees). Cigno now wanted \$913.35 (in addition to the \$104 paid in June) to pay out the \$200 loan.

Financial Rights case study 6 – Cherie’s story – S271382

Cherie is a Disability Support Pensioner and has an intellectual disability. She met someone on a dating app, trusted this person and gave him some personal information. Her instructions are this person used her identity to create a Cigno account in her name. When Cherie’s siblings became aware of the direct debits to Cigno, they attempted to resolve the matter in their capacity as Cherie’s attorneys, but had difficulty contacting Cigno.

After Financial Rights became involved, Cigno supplied documents which purported to show that, in February 2021, Cherie entered into a continuing credit contract as described in paragraph 48 of CP 355, comprising the following:

- A loan agreement contemplating multiple advances of credit up to \$150 with BHF Solutions, with a \$15 fee per advance up to a maximum of \$120 in any 12 month period; and
- A services agreement with Cigno, requiring payment of a Financial Supply Fee of \$125.50, a weekly accounting fee of \$5.95 and a drawdown fee of an unspecified amount, to be advised prior to processing the drawdown.

BHFS claims to have advanced Cherie \$150 pursuant to the loan agreement. No drawdown summaries appear to have been issued. In total, Cigno claims Cherie contracted to pay a total of \$332.15 under the loan and services agreements (assuming no defaults), in return for the \$150 paid out.

Cherie’s instructions are that she never applied for a loan or other services with Cigno or BHFS, and never received the benefit of any funds. She believes that the scammer applied for the loan with Cigno in her name and using her identity, and took the \$150.

Sporadic direct debits, unbeknownst to her, came out of Cherie’s account to Cigno when funds were available, totalling \$786 by 14 October 2021. In the meantime, Cigno had imposed six \$79 default fees and one \$35.05 default fee (totalling \$509.05), three \$22 change of payment schedule fees (totalling \$66) and thirty-one \$5.95 weekly account keeping fees (totalling \$184.45). Cigno now wants \$264 (in addition to the \$786 already paid) to pay out the \$150 loan.

Consumer Action Case Study 3 – Ashley’s story

Ashley (name changed) took out a \$230 loan from BHF Solutions through Cigno in mid-2021. The agreement with BHF Solutions claimed the loan was a continuing credit contract arrangement, and charged a \$15 fee on top of the loan. The Cigno services agreement imposed nearly double the loan amount in fees relating to ‘financial supply’ and ‘account keeping’. Ashley made three payments on the loan totaling over \$350. Cigno also charged Ashley an additional \$79 default fee for missing one payment.

A community worker helping Ashley with the loan sought a waiver and refund of amounts paid over the original loan. Ashley’s only source of income was the disability support pension, and because he has a developmental disability and would not have understood the terms of the agreement.

Despite Ashley having paying at least \$60 more than would be permitted under an equivalent regulated small amount credit contract, Cigno refused the request for a refund, and still required Ashley pay over \$100 more to satisfy the debt.

Consumer Action Case Study 4 – Mia’s story

Loans arranged by Cigno exacerbate client’s financial hardship over long period

Mia (name changed) lives in Melbourne and her only source of income is from Centrelink. Between January 2019 and August 2021, Mia took out four loans via Cigno to cover medical bills, car issues and theft of her property, borrowing a total of \$835. In this time, Mia has experienced significant mental health issues, homelessness and family violence. The first of these loans was for \$150, and was from Gold-Silver Standard Finance, and appeared to be a short-term contract. At least one other was made under an alleged continuing credit contract with BHF Solutions. Mia told us she was never informed she could seek any of these loans direct from the lender, separate to Cigno.

Mia repaid the first two loans on time, though she was still charged more than double the maximum fees that would have been allowable if she obtained the loans under credit contracts subject to the National Credit Code. The third loan Mia took out was for \$310 and significantly exacerbated her financial hardship, taking her six months to pay off and resulted in her paying \$655 - more than double the amount borrowed due to Cigno’s high fees. Cigno initially attempted to charge her far more, but waived some fees.

Mia’s most recent loan was for \$200 and was taken out in August 2021, and is currently under dispute. Within under 3 months Cigno was claiming that she owed over \$600 in fees alone - more than triple the original loan amount. Mia has received letters from Cigno threatening to report her to the police and threatening legal action, which has caused her significant distress.

Mia’s financial records indicate she has paid over \$1400 to Cigno in total for these loans - over 160% of the amount she borrowed. These loans have contributed to Mia’s financial hardship over a long period. Mia is seeking a refund for the amounts she has paid over the principal advanced on all four loans, but at present Cigno are still seeking further payments from her.

General Cigno case studies

ICAN case study 1 – Leroy

Leroy is a 30 year old Indigenous man from an Aboriginal community near Cairns. Leroy and his partner are both unemployed and have two small children. After Leroy began having problems with his partner and they began to spend more time apart, he took out a loan of \$250 with Cigno because his income was not enough to pay for essentials, which he used to buy food for himself and his children. Leroy could not afford to maintain repayments to the loan, and it ballooned to over \$800 before a financial counsellor became involved. Leroy has advised that the weight of the debt plus other factors (difficulties with his partner, death of his uncle) had led him to contemplate suicide.

ICAN case study 2 – Felicity

Felicity is an Indigenous woman from an Aboriginal community in Far North Queensland. In 2018, she separated from her partner after he became violent. As she had 3 children in her care, she was forced to cease her part-time job at a local school and go onto government benefits. As a result, she was unable to afford to repay her debts and pay for essential cost of living expenses (housing, food, healthcare), so she took out a loan with Cigno to buy food. She borrowed \$250, and although she tried to make repayments (paying \$225 in total) less than six months later the debt had grown to over \$800 and she was unable to repay it.

ICAN case study 3 - Chris

Felicity is an Indigenous woman from an Aboriginal community in Far North Queensland. In 2018, she separated from her partner after he became violent. As she had 3 children in her care, she was forced to cease her part-time job at a local school and go onto government benefits. As a result, she was unable to afford to repay her debts and pay for essential cost of living expenses (housing, food, healthcare), so she took out a loan with Cigno to buy food. She borrowed \$250, and although she tried to make repayments (paying \$225 in total) less than six months later the debt had grown to over \$800 and she was unable to repay it.

WEstjustice case study 2 S101170 - Kim's story

Kim was referred to our office from a family violence agency. While trying to flee family violence she had endured criminal behaviour from her ex so severe that he was ultimately sentenced to jail. The economic abuse she had experienced during the relationship saw her incur a number of loans and debts, including a loan of \$150.00 through Cigno that had immediately incurred 'financial supply' and 'lenders' fees' of \$120.00.

In the space of only two months the fees had ballooned to over 500% of her initial small borrowing fee. Kim was trying to pay this off in instalments while working as a contractor on very low hours. Although WEstjustice was able to waive the remaining balance, it had to ultimately do so by sharing Kim's family violence experiences and their effects in detail. Cigno offered a 'compassionate waiver' but did not acknowledge the application of the NCCPA to the fees and charges. We maintain Kim paid hundreds of dollars to Cigno she should not have incurred and could not afford.

Consumer Action case study 5 - Kelly's story

Kelly (name changed) is being assisted by a financial counsellor in regional Victoria, having recently escaped from an extremely abusive partner. The financial counsellor told us that over a 12-month period, Kelly had experienced shocking abuse, with the perpetrator exercising complete control over Kelly. This included taking out numerous forms of credit in her name, for his own benefit.

The financial counsellor told us that one of these loans was with Cigno, for which she was going to seek a waiver. The financial counsellor did not know exactly how much the Cigno loan was for but reported that documents from a recent informal debt agreement indicated \$1017 had allegedly been owed to Cigno (at that time). The financial counsellor noted that Kelly's credit history suggested Cigno did not credit check before making the loan, which meant Cigno were likely unaware of the many other recent loans taken out in Kelly's name.

Undertaking a proper affordability assessment or even a credit check may have allowed Cigno or the lender to identify that further credit was inappropriate for Kelly and prevented the loan from exacerbating the abuse Kelly experienced.