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By email: creditreforms@treasury.gov.au

Director, Consumer Credit Unit
Financial System Division
Treasury
Langton Cres
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Dear Mr McAuliffe

Anti-avoidance provisions for credit product intervention orders

Thank you for the opportunity to comment on the *Treasury Laws Amendment (Measures for Consultation) Bill 2023: Anti-avoidance rule for product intervention orders (Draft Bill)* and the accompanying Explanatory Memorandum to the Draft Bill (**Draft EM**). This is a joint submission made on behalf of:

- Consumer Action Law Centre
- Financial Rights Legal Centre
- Indigenous Consumer Assistance Network
- Financial Counselling Australia
- WEstjustice

Our organisations support the Draft Bill and EM, and the proposal to introduce anti-avoidance provisions to prohibit conduct intended to avoid the operation of a product intervention order (**PIO**) made under the *Corporations Act 2001 (Corporations Act)*, in relation to a credit facility.¹ This would introduce added powers in relation to credit facility PIOs in line with the new anti-avoidance provisions available for PIOs issued under the *National Consumer Credit Protection Act 2009 (Cth) (NCCP Act)*, introduced by the *Financial Sector Reform Act 2022 (Cth)*.

We outline below why the Draft Bill needs to be prioritised by demonstrating the legal limitations ASIC and the courts have been dealing with in relation to Cigno Pty Ltd. The fact that Cigno have managed to lend for years demonstrates the need for anti-avoidance provisions to support ASIC's PIOs. Cigno's conduct has not only caused

¹ As defined in the *Australian Securities and Investments Commission Act 2001 (Cth)*

significant harm to consumers experiencing vulnerability for years, attempts to stop them have also cost significant resources of ASIC and Government.

RECOMMENDATION 1. The Government should finalise and present the Draft Bill, in its current form, to Parliament as a matter of priority.

A pressing need for this reform

As Treasury is well aware, there has been a lending model in use for over four years, by Cigno Pty Ltd, a pseudo credit broker, that is causing significant harm to people on low incomes experiencing vulnerability. The model has been adapted multiple times to avoid existing PIOs made by ASIC under the Corporations Act in relation to credit facilities. The two PIOs, *ASIC Corporations (Product Intervention Order – Short Term Credit) Instrument 2022/647* and *ASIC Corporations (Product Intervention Order – Continuing Credit Contracts) Instrument 2022/648* were made in 2022 to primarily address extremely harmful lending models used by Cigno and their lending associates.²

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 in the 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 charge 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 claim they owe them multiple times the amount they borrowed within months of the loan being taken out. Loans arranged by Cigno are one of the most harmful individual forms of credit on the market today,³ and are designed to prey on financially vulnerable people.

In response to three PIOs being made by ASIC aiming to ban the models used by Cigno and their partners, Cigno have continued to offer loans on terms that have been advertised identically to Cigno customers, but with slight changes to the contracts underpinning their model. While recent successful court action taken by ASIC against Cigno and one lending partner suggests at least one of these lending models has been declared unlawful (and we doubt the legality of other models),⁴ businesses have used similar lending models in the past and evaded enforcement action.⁵

The fact that Cigno have managed to lend for years demonstrates the need for anti-avoidance provisions to support ASIC's PIOs. The proper process necessary for ASIC to gather evidence and ensure a solid legal basis for the development of a PIO can be time consuming and costly, particularly in relation to a business model that avoids many of their regulatory powers related to licensing. Cigno's conduct has not only caused significant harm to consumers experiencing vulnerability for years, attempts to stop them have also cost significant resources for ASIC, government and consumer groups.

An anti-avoidance provision should provide a clearer, faster path to regulatory action for ASIC for this, or similar conduct, in future.

² The *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917* was also made previously in relation to the same conduct, but lapsed

³ 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/>

⁴ *Australian Securities and Investments Commission v BHF Solutions Pty Ltd* [2021] FCA 684

⁵ *Australian Securities and Investments Commission v Teleloans Pty Ltd* [2015] FCA 648

Anti-avoidance should apply to all Corporations Act PIOs, not just those involving a credit facility

There is no downside we see to the introduction of anti-avoidance provisions. They are a fallback in an area of law where drafting complexity can (and has) left loopholes in the law available for exploitation by unethical businesses. The anti-avoidance provisions would only be used by ASIC, which means that they would only be relied upon in appropriate circumstances where the intent of the PIO is being avoided. As part of the pre-condition for ASIC to use its PIO power, it must address conduct causing significant detriment to retail clients.⁶ Accordingly, a model could only be considered avoidant if it also caused similar detriment (as is confirmed in the Draft EM).

In this regard, we question why Treasury proposes in the Draft Bill to limit the application of anti-avoidance provisions to avoidance of PIOs made under the Corporations Act relating to credit facilities only. While this would ensure consistency with the NCCP Act reforms, there is no good reason to stop the anti-avoidance provisions applying to other forms of financial products or services. If a scheme is designed to avoid a PIO and is causing significant consumer detriment, why should it matter what kind of financial product is involved? Many other aspects of financial services legislation are also complex and rife with exceptions. The same logic and consistent approach should apply.

RECOMMENDATION 2. Treasury should reconsider restricting the anti-avoidance provision in the Draft Bill to credit PIOs only, and instead introduce anti-avoidance provisions for conduct that avoids *any* PIO issued under the Corporations Act and causes significant detriment to retail clients.

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,

CONSUMER ACTION LAW CENTRE

FINANCIAL RIGHTS LEGAL CENTRE

INDIGENOUS CONSUMER ASSISTANCE NETWORK

FINANCIAL COUNSELLING AUSTRALIA

WESTJUSTICE

⁶ *Corporations Act 2001* (Cth), s 1023D

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.