CONSULTATION PAPER 371

Product intervention orders: Short term credit facilities and continuing credit contracts

August 2023

About this paper

This consultation paper sets out ASIC’s proposals to extend the product intervention orders relating to short term credit facilities and continuing credit contracts, which were made under Pt 7.9A of the *Corporations Act 2001* (Corporations Act), so that they remain in force until they are revoked or sunset.

The proposals are subject to consultation and Ministerial approval.

We are seeking the views of interested stakeholders, including industry and consumers, on our proposals.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 10 August 2023 and is based on the legislation as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

Contents

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy. When providing feedback, please specify which proposal you are addressing.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We want to fully understand and assess the financial and other impacts of our proposals and any alternative approaches you suggest. Therefore, we also ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on exercising the product intervention power.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by **31 August 2023** to:

Senior Manager, Credit & Banking
Enforcement Inquiries & Compliance
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne VIC 3000
email: product.regulation@asic.gov.au

What will happen next?

Stage 1	10 August 2023	ASIC consultation paper released
Stage 2	31 August 2023	Comments due on the consultation paper
Stage 3	August to October 2023	ASIC will review and consider all relevant submissions. We will then prepare a report to the Minister on whether the product intervention orders should be extended. After considering the report, the Minister may give approval in writing for ASIC to extend the product intervention orders. If we decide to extend the product intervention orders, we will publish a notice on our website about the decision with a link to the product intervention orders.

A Background to our proposals

Key points

This consultation paper seeks feedback on ASIC's proposals to extend two product intervention orders made under Pt 7.9A of the Corporations Act, which impose conditions on the issuing of short term credit facilities and continuing credit contracts.

Short term credit facilities and continuing credit contracts

1 On 13 July 2022, ASIC made two product intervention orders by way of legislative instrument under s1023D of the Corporations Act:

(a) *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647* (2022 short term credit order); and

(b) *ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648* (2022 continuing credit contracts order).

2 The product intervention orders came into force on 15 July 2022 and respectively prohibit the provision of short term credit facilities and continuing credit contracts that involve unreasonably high fees and charges for retail clients through a collateral contract, in excess of the cost caps in the relevant exemption in s6(1) and 6(5) of the National Credit Code at Sch 1 of the *National Consumer Credit Protection Act 2009* (National Credit Act).

Note: For more information on the orders, see the Short term credit product intervention order notice (PDF 390 KB) and the Continuing credit contracts product intervention order notice (PDF 512 KB).

3 The product intervention orders were made after we were satisfied that the relevant classes of financial products were, or were likely to be, available to retail clients, and had resulted in, and were likely to result in, significant detriment to retail clients.

4 We have been monitoring the impact of the product intervention orders and changes in the market. Based on our analysis, the orders have been effective in preventing and reducing the risk of significant detriment to retail clients.

5 Unless revoked or extended, both orders will expire on 15 January 2024. We can extend each order for a specified period of time or until they are revoked, by declaration in a legislative instrument with the approval of the Minister: see s1023H of the Corporations Act.

Proposed extension of the product intervention orders

6 Subject to this consultation, and obtaining the Minister's written approval, we propose to extend both product intervention orders before they expire on 15 January 2024 so that they will remain in force until they are revoked or they sunset on 1 October 2032.

Note: If they are not revoked earlier, each product intervention order will sunset on 1 October 2032 as a result of s50 of the *Legislation Act 2003* (Legislation Act).

7 We consider that the product intervention orders are necessary to stop the likely impact of significant detriment to retail clients caused by both the short term credit and continuing credit contracts markets.

8 Given our view that the product intervention orders are operating effectively in preventing and reducing the risk of significant detriment to retail clients, we consider that, subject to consultation, extending the orders so they remain in force until they are revoked or sunset, is preferable to a shorter extension period, such as three or five years.

9 We are seeking stakeholder feedback on whether the product intervention orders should remain in force until revoked to reduce the risk that retail clients may suffer significant detriment if the orders were allowed to expire.

10 We will consider all submissions received in response to this consultation paper, which will inform our report to the Minister on whether the orders should be extended.

ASIC's power to extend product intervention orders

11 Under s1023H(1) of the Corporations Act, ASIC may, in accordance with a written approval from the Minister, by legislative instrument, declare that a product intervention order that is in force:

(a) remains in force until it is revoked; or

(b) remains in force for a specified period, unless it is revoked earlier.

12 Under s1023H(2), ASIC may make more than one declaration under s1023H(1) in relation to a product intervention order that is in force.

13 To obtain the approval of the Minister, under s1023H(3), ASIC may at any time before the order ceases to be in force, give the Minister a report on whether the declaration should be made.

14 After considering the report, the Minister may give an approval in writing for the purposes of s1023H(1).

15 We note that since making the product intervention orders, anti-avoidance provisions have been enacted in Div 1A of Pt 7-1 of the National Credit Act. This includes provisions prohibiting persons from entering, beginning or carrying out a scheme if it would be reasonable to conclude that the purpose, or one of the purposes, of the person engaging in that conduct was an avoidance purpose.

16 The product intervention order power and the anti-avoidance provisions complement one another. They establish a regulatory framework that significantly increases the legal risks and reduces the incentives for persons to engage in credit activities that are harmful to consumers by providing ASIC with a range of options for responding to any such conduct.

B The short term credit product intervention order

Key points

This section describes the product intervention order relating to short term credit facilities and ASIC's rationale for making the order. It also describes the impact of the order and why we propose to extend it.

A class of financial products: Short term credit facilities

17 Short term credit facilities are financial products within the meaning of Div 2 of Pt 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and are also covered by s6(1) of the National Credit Code. They are financial products for the purposes of the product intervention order provisions in Pt 7.9A of the Corporations Act.

18 Under the short term credit exemption in s6(1) of the National Credit Code, the National Credit Code and the National Credit Act do not apply to credit if:

(a) under the contract, the provision of credit is limited to a total period that does not exceed 62 days; and

(b) the maximum amount of credit fees and charges that may be imposed or provided for does not exceed 5% of the amount of credit; and

(c) the maximum amount of interest charges that may be imposed or provided for does not exceed an amount (calculated as if the National Credit Code applied to the contract) equal to the amount payable if the annual percentage rate were 24% per annum.

Note: The meaning of 'short term credit' in s6(1) of the National Credit Code is different to the meaning of 'short-term credit contract' in s5 of the National Credit Act, which refers to credit under $2,000 on a term of 15 days or less and which is prohibited under s133CA of the National Credit Act.

19 We are aware of a class of financial products—namely, short term credit facilities—that were being provided to retail clients in the following manner:

(a) A short term credit facility is provided by the short term credit provider, who charges fees consistent with limits prescribed in the exemption in s6(1) of the National Credit Code (short term credit exemption).

(b) An associate of the provider provides collateral services (e.g. application, distribution, management and collection services) in relation to the facility and charges significant fees or other charges under a separate collateral contract.

20 ASIC is aware of short term credit facilities that have been issued to retail clients since 2014 in the manner described in paragraph 19 at various stages by:

(a) Finance & Loans Direct Pty Ltd (as the short term credit provider) and Teleloans Pty Ltd (as the associate);

(b) Gold-Silver Standard Finance Pty Ltd (GSSF) (as the short term credit provider) and Cigno Pty Ltd (Cigno) (as the associate);

(c) BHF Solutions Pty Ltd (BHFS) (as the short term credit provider) and MyFi Australia Pty Ltd (now known as Fi-Fit Services Pty Ltd) (as the associate); and

(d) BSF Solutions (BSFS) (as the short term credit provider) and Cigno Australia Pty Ltd (Cigno Australia) (as the associate).

21 Short term credit facilities, when issued to retail clients in the manner described in paragraph 19, expose retail clients to the risk of being charged significant fees.

Example 1: Short term credit facility issued in July 2021

A retail client was issued a short term credit facility of $175 with a term of 48 days by BSFS in July 2021, which was arranged by Cigno Australia.

The retail client was issued a collateral contract by Cigno Australia alongside the short term credit facility—within three months the retail client owed over $715 to Cigno Australia under the collateral contract (i.e. 410% of the value originally extended).

Fees charged by Cigno Australia during the statement period included:

- a $144.25 financial supply fee;
- four $79 default fees ($316 in total);
- two $22 change of payment schedule fees ($44 in total);
- ten $5.95 weekly account keeping fees ($59.50 in total); and
- an $8.75 lender fee.

22 ASIC was concerned that the issuance of short term credit facilities to retail clients in the manner described in paragraph 19 and illustrated in Example 1, was resulting in significant detriment to retail clients due to the excessive overall costs of the products.

The 2019 short term credit order

CP 316

23 In July 2019, ASIC publicly consulted on a proposal to make a product intervention order relating to short term credit facilities: see Consultation Paper 316 *Using the product intervention power: Short term credit* (CP 316).

24 Interested and affected stakeholders including retail clients, industry bodies and participants, a complaints authority, consumer organisations and community legal centres provided submissions to ASIC about the proposal.

25 On 12 September 2019, a product intervention order was made by legislative instrument under Pt 7.9A of the Corporations Act: see *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917* (2019 short term credit order). This order was made after ASIC was satisfied that a class of financial products—namely, short term credit facilities, when provided in conjunction with collateral contracts—was resulting in, or would or was likely to result in, significant detriment to retail clients.

Note: For more information on the 2019 short term credit order, see pp 2–10 of the accompanying product intervention order notice (PDF 285 KB).

26 The 2019 short term credit order came into force on 14 September 2019 and related to short term credit facilities provided by short term credit providers who purported to rely on the short term credit exemption in s6(1) of the National Credit Code.

27 The order prohibited:

(a) the provision of short term credit facilities and the charging of collateral fees and charges by short term credit providers and/or their associates, in circumstances where the credit fees and charges under the credit contract and the collateral fees and charges under a collateral contract, together, exceed the limits in the short term credit exemption; and

(b) directors of short term credit providers and/or their associates from causing or authorising that prohibited conduct.

28 The order did not prohibit persons from providing short term credit facilities in reliance on the short term credit exemption. Short term credit providers and their associates could continue to issue and provide services in relation to short term credit facilities in reliance on this exemption, provided that they complied with the condition in the order.

Significant detriment resulting from short term credit facilities

29 In determining whether the issue of short term credit facilities had resulted in, or would or was likely to result in, significant detriment to retail clients, ASIC reviewed reports of misconduct, gathered data and evidence, and undertook a public consultation processes: see CP 316.

30 After considering all the relevant material, we were satisfied that the short term credit facilities issued in the manner described in paragraph 19 had resulted in, or would or were likely to result in, significant detriment to retail clients.

31 To conclude that there was significant detriment, we considered the following factors:

(a) The target market included vulnerable retail clients who were in financial difficulty and required short term loans generally to cover basic living expenses, many of whom had been declined for regulated credit.

(b) The short term nature of the short term credit facilities provided retail clients with limited time to raise funds to make the required repayments.

(c) The overall fees and charges for the short term credit facilities were significantly higher than was permitted under the short term credit exemption.

(d) The product class had an overall high default rate, which resulted in large amounts of default-related fees being charged to retail clients.

(e) Many retail clients could not afford to repay the short term credit facilities or to repay them without suffering substantial hardship.

32 We also identified the following financial losses resulting from the short term credit facilities issued in the manner described in paragraph 19:

(a) Retail clients were being charged significant upfront, ongoing and default fees in total for the short term credit facilities, greater than what is permitted under the short term credit exemption.

(b) Additional fees from third parties were often incurred, including bank charges for dishonoured direct debits and overdrawn fees.

(c) Due to the significant fees and charges and subsequent increase in debt, retail clients were often unable to meet other financial commitments.

(d) Because the short term credit facilities were not regulated, retail clients did not have the following statutory protections under the National Credit Act and National Credit Code that would otherwise apply to regulated 'small amount credit contracts':

  (i) a cap on fees (i.e. an establishment fee of up to 20% of the credit amount, and a monthly fee of up to 4% of the credit amount);

(ii) a prohibition on charging an establishment fee to refinance the loan; or

(iii) a cap on default fees and charges, limited to double the amount borrowed.

Note: See paragraph 5 of CP 316 for case studies that show the significant detriment suffered by retail clients due to issues involving short term credit facilities. See also paragraphs 52–57 of CP 316 for the fees charged by Cigno for short term credit facilities.

33 From a review of fees and additional confidential data received for the period May 2016 to April 2019, ASIC understands the following about the short term credit facilities and collateral contracts issued by GSSF and Cigno in the manner described in paragraph 19:

(a) The lender fee—equalling 5% of the loan amount—was the only fee charged by the short term credit provider under the short term credit facility, which amounted to approximately 2% of the overall fees charged in relation to the facility.

(b) The fees charged by the associate under a collateral contract—comprising 98% of the overall fees charged in relation to the credit facilities—exceeded the fees that could be charged under the short term credit exemption.

(c) The short term credit facilities had a high default rate, which was almost double the default rate of similar regulated credit products, such as small amount credit contracts.

(d) We estimate that before 14 September 2019 at least 270,000 retail clients had obtained credit from GSSF and through Cigno.

Note: For the default rate for payday loans, see the report by Digital Finance Analytics and Monash University Centre for Commercial Law and Regulatory Studies, *The stressed finance landscape: Data analysis*, October 2015.

Judicial review proceedings

34 Cigno filed a judicial review application on 20 September 2019 in the Federal Court, seeking to quash the 2019 short term credit order. In April 2020, the court dismissed that application with costs awarded to ASIC.

35 In May 2020, Cigno filed an appeal in the Federal Court. A hearing was held on 19 November 2020 before the Full Federal Court. The court dismissed Cigno's appeal on 29 June 2021, with costs awarded to ASIC.

Note: See Media Release (21-151MR) *Full Federal Court upholds first ASIC product intervention order* (29 June 2021).

Expiry of the 2019 short term credit order

36 When the 2019 short term credit order expired in March 2021, ASIC did not act to extend the order because of an ambiguity in the product intervention provisions in the Corporations Act and the National Credit Act in relation to ASIC's ability to intervene in the cost of financial and credit products.

37 On 24 June 2021, the Treasury Laws Amendment (2021 Measures No. 4) Bill 2021—which removed the ambiguity and ensured ASIC's ability to intervene in respect of the cost of financial and credit products—was passed. The *Treasury Laws Amendment (2021 Measures No. 4) Act 2021* (Amendment Act) received royal assent on 30 June 2021.

The 2022 short term credit order

CP 355

38 In December 2021 ASIC publicly consulted on a proposal to make a further product intervention order relating to short term credit facilities in substantially the same terms as the 2019 short term credit order: see Consultation Paper 355 *Product intervention orders: Short term credit and continuing credit contracts* (CP 355).

39 When CP 355 was published, we understood that two companies registered in March 2021—namely, BSFS and its associate, Cigno Australia—were issuing short term credit facilities and collateral contracts in the manner described in paragraph 19.

40 As outlined in CP 355, before making the 2022 short term credit order, we considered that short term credit facilities:

(a) were available, and were likely to be available, for acquisition by issue to retail clients in the manner described in paragraph 19; and

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

  (i) The target market included vulnerable retail clients who were in financial difficulty and required loans generally to cover basic living expenses, many of whom had been declined for regulated credit.

  (ii) The short term nature of the short term credit facilities provided retail clients with a maximum period of 62 days to make the required repayments, which increased the amount of the repayments and the consequent risk of default than if a longer period was provided.

  (iii) The fees and charges charged under both the short term credit facility and the collateral contract were significant, and in aggregate higher than what was permitted under the short term credit exemption.

(iv) Short term credit facilities, when issued in the manner described in paragraph 19, had a high default rate, which resulted in large amounts of default-related fees being charged to retail clients.

(v) Many retail clients could not afford to repay the short term credit facilities or to repay them without suffering substantial hardship.

41 Interested and affected stakeholders including consumer advocates and community legal centres, financial counselling organisations and industry participants provided feedback to ASIC about the proposal. The submissions generally supported our view of significant detriment resulting from short term credit facilities issued in the manner described in paragraph 23 of CP 355, and either supported or did not oppose the making of the order.

42 On 4 July 2022 the Minster, the Hon Stephen Jones MP, provided ASIC with written approval under s1023M(b) of the Corporations Act to allow us to consider making a new product intervention order relating to short term credit facilities, in substantially the same terms as the 2019 short term credit order.

43 On 13 July 2022, the 2022 short term credit order was made by legislative instrument under Pt 7.9A of the Corporations Act: see *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647*. This order was made after ASIC was satisfied that a class of financial products—namely, short term credit facilities, when provided in conjunction with collateral contracts—was resulting in, or would or was likely to result in, significant detriment to retail clients.

Note: For more information on ASIC's rationale for making the 2022 short term credit order, see the product intervention order notice (PDF 390 KB) published with the order on 13 July 2020.

How the 2022 short term credit order operates

44 The 2022 short term credit order came into force on 15 July 2022, and will expire on 15 January 2024, unless revoked or extended.

45 The order prohibits the provision of short term credit where the short term credit provider or associate of the provider imposes or provides for certain fees, interest and charges paid or payable by a retail client in relation to a class of financial products (as set out in paragraph 19) that ASIC was satisfied:

(a) was, and was likely to be, available for acquisition by issue to persons as retail clients; and

(b) had resulted in, and was likely to result in, significant detriment to retail clients.

46 The purpose of the order is to reduce the risk of significant detriment to retail clients resulting from a class of financial products that consists of short term credit facilities where the short term credit facility is provided:

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

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

47 The order does not prohibit persons from providing short term credit facilities relying on the short term credit exemption. Short term credit providers and their associates could continue to issue and provide services in relation to short term credit facilities in reliance on this exemption, provided that they comply with the condition in the order.

The impact of the 2022 short term credit order

48 Since the 2022 short term credit order came into force on 15 July 2022, ASIC has observed the following from information and data collected:

(a) Short term credit facilities issued in the manner described in paragraph 19 ceased to be issued to retail clients after 15 July 2022.

(b) ASIC continued to receive reports of misconduct regarding short term credit facilities issued before 15 July 2022.

49 Cigno Australia and BSFS, entities that previously issued short term credit facilities to retail clients in the manner described in paragraph 19, started issuing a new financial product to retail clients after 15 July 2022 until 21 December 2022.

50 The new product appeared to be issued to retail clients in a similar manner to the short term credit facilities described in paragraph 19 but did not appear to rely on an exemption in s6 of the National Credit Code.

51 Our understanding as of 22 December 2022 is that Cigno Australia and BSFS have voluntarily ceased offering any type of credit facility to retail clients.

52 ASIC is concerned that there is a risk that entities may resume or start issuing short term credit facilities in the manner described in paragraph 19 in the future, if the 2022 short term credit order is not extended.

Proposal to extend the 2022 short term credit order

Proposal

B1 Subject to consultation and the Minister's written approval, we propose to extend the industry-wide product intervention order relating to short term credit facilities by legislative instrument under s1023H of the Corporations Act (i.e. the 2022 short term credit order).

Your feedback

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

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

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

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

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

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

Rationale

53 Subject to consultation and the Minister's approval, ASIC considers it is appropriate to make a declaration under s1023H(1)(a) of the Corporations Act to extend the 2022 short term credit order so that it remains in force until it is revoked or sunsets.

54 We consider the proposed extension is appropriate for the following reasons:

(a) It is likely that persons will or may resume issuing short term credit facilities in the manner described in paragraph 19 if the order does not remain in force.

(b) When the 2019 short term credit order expired, Cigno Australia and BSFS did in fact start to issue short term credit facilities in the manner described in paragraph 19, which ASIC found resulted in significant detriment to retail clients.

(c) If the order does not remain in force and short term credit facilities are once again available for issue to retail clients in the manner described in paragraph 19, the significant detriment that was prevented by the order will, or is likely to, re-occur.

(d) The significant detriment to retail clients that will, or is likely to, re-occur if the order does not remain in force, will likely be the same or similar to the significant detriment described in paragraphs 30–33 and 40 of this paper.

(e) A shorter extension, such as three or five years, would necessitate a further consultation process to consider whether it should be extended again and would come at an additional cost and effort to ASIC and other stakeholders.

(f) Since the order came into force on 15 July 2022, ASIC has not observed any negative or unintended consequences of the order on retail clients or the market broadly.

C The continuing credit contracts product intervention order

Key points

This section describes the product intervention order relating to continuing credit contracts and ASIC's rationale for making the order. It also describes the impact of the order and why we propose to extend it.

A class of financial products: Continuing credit contracts

55 A continuing credit contract, including a contract that purports to rely on the continuing credit exemption, is a financial product under s12BAA(7)(k) of the ASIC Act, as a 'credit facility' within the meaning of reg 2B of the *Australian Securities and Investments Commission Regulations 2001*.

56 Under s204 of the National Credit Code, 'continuing credit contract' means a credit contract under which:

(a) multiple advances of credit are contemplated; and

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

57 Under s6(5) of the National Credit Code, the National Credit Code and the National Credit Act do not apply to the provision of credit under a continuing credit contract, if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided.

58 However, the National Credit Code applies if the charge:

(a) is of a nature prescribed by the regulations for the purposes of this subsection; or

(b) exceeds the maximum charge (if any) so prescribed.

Note: In this paper, we refer to s6(5) of the National Credit Code as the 'continuing credit exemption'.

59 Regulation 51 of the *National Consumer Credit Protection Regulations 2010* (National Credit Regulations) specifies the prescribed maximum charges in relation to a continuing credit contract, for the purposes of the continuing credit exemption: see Table 1.

Table 1: Maximum account charges permitted under the continuing credit exemption

Item	If…	The prescribed maximum charge is…
1	the debtor is not already a party to a continuing credit contract with the credit provider, or an associate of the credit provider, when the continuing credit contract is entered into	(a) for the period of 12 months commencing when the debtor enters into the continuing credit contract—$200; and (b) for any subsequent period of 12 months during which the continuing credit contract is in effect—$125.
2	both of the following apply when the continuing credit contract (the *new contract*) is entered into: (a) the debtor is already a party to a continuing credit contract with the credit provider, or an associate of the credit provider, or was such a party within the previous 12 months; (b) neither the credit provider nor the associate of the credit provider is an [authorised deposit-taking institution]	(a) for the period of 12 months commencing when the debtor enters into the new contract—nil; and (b) for any subsequent period of 12 months during which the new credit contract is in effect—nil.

Note: See reg 51 of the National Credit Regulations.

60 ASIC is aware that continuing credit contracts have been issued to retail clients in the following circumstances:

(a) A continuing credit contract is provided by the credit provider, who charges fees consistent with limits prescribed in the exemption in s6(5) of the National Credit Code (continuing credit exemption).

(b) An associate of the credit provider provides collateral services (e.g. application, distribution, management and collection services) in relation to the continuing credit contract and charges significant fees or other charges under a separate collateral contract.

61 This manner of issuing continuing credit contracts is almost identical to the way in which short term credit facilities were issued to retail clients, as described in paragraph 19.

62 We are aware that Cigno and BHFS provided continuing credit contracts in the manner described in paragraph 60 from September 2019 to May 2021.

Example 2: Continuing credit contract issued in September 2019

The following example from a continuing credit contract issued in September 2019 illustrates how continuing credit contracts were made available by BHFS and Cigno.

A retail client was issued a continuing credit contract of $350 by BHFS in September 2019, which was arranged by Cigno.

The retail client was issued a collateral contract by Cigno alongside the continuing credit contract.

> Over the subsequent three months the client was only able to make $150 in repayments and in that period the client was charged almost $1,100 in fees which included:
>
> - $300 in upfront fees (BHFS lender fee and Cigno financial supply fee);
> - $80 in total for weekly Cigno account keeping fees; and
> - $720 in Cigno default fees (including change of payment fees).
>
> By December 2019, the client owed Cigno and BHFS over $1,200. The total amount, including fees owed were approximately 410% of the original loan amount.

63 ASIC was concerned that continuing credit contracts, when issued in the manner described in paragraph 60 and illustrated in the above example, were resulting in significant detriment to retail clients due to the overall cost of the products.

The 2022 continuing credit contracts order

CP 330

64 In July 2020, ASIC publicly consulted on a proposal to make an industry-wide product intervention order by way of legislative instrument for continuing credit contracts: see Consultation Paper 330 *Using the product intervention power: Continuing credit contracts* (CP 330).

65 In response to CP 330, we received a total of 910 submissions which included 6 submissions from financial counselling services and community legal centres, 10 from industry bodies, participants and a public policy consultancy, 5 from individuals and 889 from Cigno clients (through a survey conducted on Cigno's website).

66 Several of the submissions to CP 330 we received stated that the proposed product intervention order relating to continuing credit contracts would capture certain sub-classes of continuing credit contracts that were not being issued to retail clients in the way described in CP 330.

67 To address any potential unintended consequences, we changed the draft product intervention order to provide certain exclusions for:

(a) buy now pay later arrangements; and

(b) collateral non-cash payment facilities.

68 We sought feedback on these proposed changes by publishing an addendum to CP 330 in November 2020: see Addendum to CP 330.

> Note: The draft product intervention order was also updated: see *Updated draft ASIC Corporations (Product Intervention—Continuing Credit Contracts) Instrument 2020/XX* (PDF 96 KB).

69 Following this further consultation, ASIC did not make the proposed product intervention order as we were awaiting:

(a) the Full Federal Court decision on the judicial review of the 2019 short term credit order (see paragraphs 34–35); and

(b) amendments to the product intervention power made by the Amendment Act that clarified and confirmed ASIC's ability to make product intervention orders in certain circumstances (see paragraphs 36–37).

CP 355

70 In December 2021, ASIC publicly consulted again on a proposal to make a product intervention order relating to continuing credit contracts: see CP 355.

71 Interested and affected stakeholders including consumer advocates and community legal centres, financial counselling organisations and industry participants provided feedback to ASIC about the proposal. The submissions generally supported our view that retail clients were experiencing significant detriment from continuing credit contracts issued in the manner described in paragraph 48 of CP 355, and the making of the order.

72 On 13 July 2022, a product intervention order was made by legislative instrument under Pt 7.9A of the Corporations Act: see *ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648*.

73 This order was made after ASIC was satisfied that a class of financial products—namely, continuing credit contracts, when provided in conjunction with collateral contracts—had resulted in, and was likely to result in, significant detriment to retail clients. The order has a carve out for buy now pay later arrangements.

Significant detriment resulting from continuing credit contracts

74 In determining whether the issue of continuing credit contracts had resulted in, or would or was likely to result in, significant detriment to retail clients, ASIC reviewed reports of misconduct, gathered data and evidence, and undertook public consultation processes: see CP 330, the Addendum to CP 330 and CP 355.

75 After considering all the relevant material, ASIC was satisfied that the continuing credit contracts issued in the manner described in paragraph 60:

(a) were likely to be available for acquisition by issue to retail clients in the manner described in paragraph 60; and

(b) had resulted in, and were likely to result in, significant detriment to retail clients because of a combination of:

  (i) the overall high cost of both the continuing credit contract and the collateral contract, relative to the loan amount, which many retail clients could not afford;

  (ii) the significant number of retail clients who had been issued this product; and

  (iii) the particular target group of retail clients the product was issued to, many of whom were vulnerable and suffering from financial instability and hardship.

Note: For further details on ASIC's analysis of the significant detriment, see pp 41–78 of the Continuing credit contracts product intervention order notice (PDF 512 KB) published with the order on 13 July 2022.

How the 2022 continuing credit contracts order operates

76 The 2022 continuing credit contracts order came into force on 15 July 2022, and will expire on 15 January 2024, unless revoked or extended.

77 The order prohibits the provision of continuing credit contracts where the continuing credit provider or associate of the provider imposes or provides for certain fees and charges paid or payable by a retail client, for a class of financial products (as set out in paragraph 60) that ASIC was satisfied:

(a) was likely to be available for acquisition by issue to persons as retail clients; and

(b) had resulted in, and was likely to result in, significant detriment to retail clients.

78 The purpose of this order is to reduce the risk of significant detriment to retail clients resulting from a class of financial products that consists of continuing credit contracts where the continuing credit contract is provided:

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

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

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

79 The order does not prohibit persons from providing continuing credit contracts relying on the exemption in s6(5) of the National Credit Code. Rather, it limits the total fees and charges that can be charged under the continuing credit contract and collateral contract to the limits prescribed in s6(5) of the National Credit Code or regulations made for the purposes of that subsection.

Impact of the 2022 continuing credit contracts order

80 Since the 2022 continuing credit contracts order came into force on 15 July 2022, ASIC has observed the following from information and data collected in relation to the order:

(a) Continuing credit contracts issued in the manner described in paragraph 60 have not been offered or made available to retail clients since Cigno and BHFS ceased offering this product around May 2021.

(b) ASIC continued to receive reports of misconduct regarding continuing credit contracts issued before May 2021.

81 ASIC is concerned that there is a risk that entities may resume or start issuing continuing credit contracts issued in the manner described in paragraph 60 in the future, if the 2022 continuing credit contracts order is not extended.

Proposal to extend the 2022 continuing credit contracts order

Proposal

C1 Subject to consultation and the Minister's written approval, we propose to extend the industry-wide product intervention order relating to continuing credit contracts by legislative instrument under s1023H of the Corporations Act (i.e. the 2022 continuing credit contracts order).

Your feedback

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

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

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

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

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

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

Rationale

82 Subject to consultation and the Minister's approval, ASIC considers it is appropriate to make a declaration under s1023H(1)(a) of the Corporations Act to extend the 2022 continuing credit contracts order so that it remains in force until it is revoked or sunsets.

83 We consider the proposed extension is appropriate for the following reasons:

(a) It is likely that persons will or may resume issuing continuing credit contracts in the manner described in paragraph 60 if the order does not remain in force.

(b) If the order does not remain in force and the issuing of continuing credit contracts resumes in the manner described in paragraph 60, the significant detriment that was prevented by the order will or is likely to re-occur.

(c) The significant detriment to retail clients that will, or is likely to, re-occur if the order does not remain in force, will likely be the same or similar to the significant detriment described in paragraphs 74–75 of this paper.

(d) A shorter extension, such as three or five years, would necessitate a further consultation process to consider whether it should be extended again and would come at an additional cost and effort to ASIC and other stakeholders.

(e) ASIC was successful in the Federal Court and Full Federal Court against Cigno and BHFS, who provided continuing credit contracts in the manner described in paragraph 60. However the 2022 continuing credit contracts order has a broader application than this case—it applies across industry and covers conduct in relation to all fees and charges that ASIC considers results in, or will or is likely to result in, significant detriment to retail clients. It is therefore a more comprehensive and effective way of addressing the significant detriment ASIC has identified.

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

(f) Since the order came into force on 15 July 2022, ASIC has not observed any negative or unintended consequences of the order on retail clients or the market broadly.

D Regulatory and financial impact

84 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

(a) reducing the likelihood of significant detriment to retail clients resulting from short term credit facilities and continuing credit contracts to retail clients; and

(b) the financial and other impacts of the proposed orders on the issuers or prospective issuers of short term credit facilities and continuing credit contracts.

85 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis requirements by:

(a) considering all feasible options, including examining the likely impacts of the range of alternative options that could meet our policy objectives;

(b) if regulatory options are under consideration, notifying the Office of Impact Analysis (OIA); and

(c) if our proposed option has more than a minor or machinery impact on business or on the not-for-profit sector, preparing an Impact Analysis (IA) or an IA equivalent (Independent Review).

86 All IAs are submitted to the OIA for approval before we make any final decision, or if an IA equivalent—to the OIA for agreement. Without an approved IA or agreed IA equivalent, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

87 To ensure that we are in a position to properly complete any required IA or IA equivalent, please give us as much information as you can about our proposals or any alternative approaches, including:

(a) the likely compliance costs;

(b) the likely effect on competition; and

(c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
2019 short term credit order	The product intervention order relating to short term credit facilities made on 12 September 2019 by *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2019/917*
2022 continuing credit contracts order	The product intervention order relating to continuing credit contracts made on 13 July 2022 by *ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/648*
2022 short term credit order	The product intervention order relating to short term credit facilities made on 13 July 2022 by *ASIC Corporations (Product Intervention Order—Short Term Credit) Instrument 2022/647*
Amendment Act	*Treasury Laws Amendment (2021 Measures No. 4) Act 2021*
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
BHFS	BHF Solutions Pty Ltd
BSFS	BSF Solutions Pty Ltd
buy now pay later arrangement	Means an arrangement or series of arrangements comprising: • an arrangement between a person (merchant) and another person (retail client) in relation to the supply of goods or services by the merchant to the retail client; and • any of the following: – an arrangement between the merchant and a person (BNPL provider) in relation to which the BNPL provider pays the merchant some or all of the price for the supply of those goods or services to the retail client; – an arrangement between the retail client and a person (BNPL provider) in relation to which, when the retail client is required to pay the merchant for the supply of those goods or services, the retail client pays the merchant some or all of the price by using a credit card or debit card identifier provided or made available by the BNPL provider to the retail client for such a purpose; – an arrangement between the retail client and a person (the BNPL provider) in relation to which the BNPL provider pays, through a bill payment system specified by the merchant, some or all of a bill issued by the merchant to the retail client for the supply of those goods or services to the retail client; and Note: for example, the bill payment system may be the BPAY bill payment system. – an arrangement between the BNPL provider and the retail client which includes a continuing credit contract in relation to which the retail client pays the BNPL provider over time in relation to the supply of those goods or services; but only where the principal business of the merchant is not the supply of administration, brokerage, management, collection, recovery or other services in relation to the provision of credit under continuing credit contracts

Term	Meaning in this document
Cigno	Cigno Pty Ltd
Cigno Australia	Cigno Australia Pty Ltd, registered in March 2021
collateral contract	A collateral contract, in relation to a short term credit facility or a continuing credit contract, means a separate contract between a retail client and a credit provider or an associate in relation to the facility or continuing credit contract, including (without limitation) a contract or arrangement for the credit provider or an associate to provide services to the retail client in relation to the facility or continuing credit contract
collateral fees and charges	Fees, charges or other consideration paid or payable by a retail client imposed or provided for under a collateral contract
collateral services	A service provided to a retail client in relation to the provision of credit by a credit provider under a short term credit facility or a continuing credit contract
consumer	Means both a retail client for a financial product and a consumer for a credit product, unless otherwise specified
continuing credit contract	The relevant class of financial products to which the proposed continuing credit contracts product intervention order relates Note: For the definition of 'continuing credit contract', see s204 of the National Credit Code.
continuing credit exemption	Means the exemption in s6(5) of the National Credit Code
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
CP 316 (for example)	An ASIC consultation paper (in this example numbered 316)
credit fees and charges	Has the same meaning as in s6(1) of the National Credit Code (as affected by s6(2) and (3) of the National Credit Code).
credit product	Means a credit contract, mortgage, guarantee or consumer lease Note: See s301D(a) of the National Credit Act.
credit provider	Has the meaning given in s5 of the National Credit Act
financial product	Has the meaning given by s1023B of the Corporations Act. Note: The definition of financial product in s1023B includes financial products within the meaning of Division 2 of Part 2 of the ASIC Act subject to certain limited exceptions.
GSSF	Gold-Silver Standard Finance Pty Ltd
interest charges	Include, for the avoidance of doubt, default interest charges
National Credit Act	*National Consumer Credit Protection Act 2009*
National Credit Code	National Credit Code at Sch 1 to the National Credit Act

Term	Meaning in this document
Pt 7.9A (for example)	A part of the Corporations Act (in this example numbered 7.9A), unless otherwise specified
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the *Corporations Regulations 2001*
short term credit	Has the meaning given in s6(1) of the National Credit Code
short term credit exemption	The exemption in s6(1) of the National Credit Code
short term credit facility	A financial product covered by both: • s12BAA(7)(k) of the ASIC Act; and • s6(1) of the National Credit Code
short term credit provider	A provider of short term credit
small amount credit contract	Has the meaning given in s5 of the National Credit Act
s204 (for example)	A section of the National Credit Code (in this example numbered 204), unless otherwise specified

List of proposals and questions

Proposal	Your feedback
B1 Subject to consultation and the Minister's written approval, we propose to extend the industry-wide product intervention order relating to short term credit facilities by legislative instrument under s1023H of the Corporations Act (i.e. the 2022 short term credit order).	B1Q1 Do you agree with our proposal to extend the 2022 short term credit order? Please explain the reasons for your views. B1Q2 Do you agree with our proposal that the 2022 short term credit order, if extended, should be extended so that it remains in force until it is revoked or sunsets? Please explain the reasons for your views. B1Q3 Alternatively, do you consider that, if extended, the 2022 short term credit order should only be extended for a set period, such as three or five years? Please explain the reasons for your views. B1Q4 In your view, has the 2022 short term credit order been effective to date in reducing the risk of significant detriment to retail clients in the short term credit market? Please provide evidence and data to support your view. B1Q5 What effects (if any) do you consider the 2022 short term credit order has had on competition in the financial system? What effects are likely if the order is extended? B1Q6 What alternative approaches (if any) could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?

Proposal	Your feedback
C1 Subject to consultation and the Minister's written approval, we propose to extend the industry-wide product intervention order relating to continuing credit contracts by legislative instrument under s1023H of the Corporations Act (i.e. the 2022 continuing credit contracts order).	C1Q1 Do you agree with our proposal to extend the 2022 continuing credit contracts order? Please explain the reasons for your views. C1Q2 Do you agree with our proposal that the 2022 continuing credit contracts order, if extended, should be extended so that it remains in force until it is revoked or sunsets? Please explain the reasons for your views. C1Q3 Alternatively, do you consider that, if extended, the 2022 continuing credit contracts order should only be extended for a set period, such as three or five years? Please explain the reasons for your views. C1Q4 In your view, has the 2022 continuing credit contracts order been effective to date in reducing the risk of significant detriment to retail clients in the continuing credit contracts market? Please provide evidence and data to support of your view. C1Q5 What effects (if any) do you consider the 2022 continuing credit contracts order has had on competition in the financial system? What effects are likely if the order is extended? C1Q6 What alternative approaches (if any) could ASIC take that would achieve our objectives of preventing the significant detriment identified in this paper?