



ASIC
Australian Securities &
Investments Commission

Attachment 1 to Media Release (20-274MR) Addendum to Consultation Paper 330 *Using the product intervention power: Continuing credit contracts*

Background

On 9 July 2020, ASIC issued [Consultation Paper 330 *Using the product intervention power: Continuing credit contracts*](#) (CP 330), which sets out our proposal to use our product intervention power under Pt 7.9A of the *Corporations Act 2001* (Corporations Act) to address the significant detriment that has resulted from, or will or is likely to result from, a class of financial products, namely continuing credit contracts, being made available to retail clients.

As outlined in CP 330, ASIC is concerned that continuing credit contracts, when issued to retail clients in the way described in paragraphs 16–22 of CP 330, have resulted in, or will or are likely to result in, significant detriment to retail clients.

In response to CP 330, ASIC received over 900 submissions. Several submissions we received stated that the proposed product intervention order would capture certain sub-classes of continuing credit contracts that were not being issued to retail clients in the way described in CP 330.

Exclusions for specific sub-classes of continuing credit contracts

To address these potential unintended consequences, ASIC has made some changes to the draft intervention order issued with CP 330 to provide for certain exclusions in relation to some sub-classes of continuing credit contracts. These exclusions are for:

- (a) buy now pay later arrangements; and
- (b) non-cash payment facilities.

We propose to insert these exclusions on the basis that the significant detriment described in CP 330, does not, on the evidence currently available, arise from these products. Further details are provided under headings below.

Buy now pay later arrangements

A buy now pay later arrangement, where the credit facility is a continuing credit contract, generally comprises a series of arrangements between the following parties:

- (a) a merchant and a retail client, where the merchant supplies goods or services to the retail client;
- (b) the merchant and a buy now pay later provider, where the merchant agrees to offer the retail client access to a payment method provided by the provider; and
- (c) the retail client and the buy now pay later provider, where the provider issues a continuing credit contract to the retail client, and either:

- (i) the provider pays the merchant for the supply of goods and services to the retail client under the continuing credit contract; or
- (ii) the provider provides the retail client with a single use identifier to enable the retail client to pay the merchant for the supply of goods and services (in this circumstance there may be no agreement between the merchant and the provider as set out in paragraph (b)).

In ASIC's view, this exclusion is appropriate as the significant detriment described in CP 330, does not, on the evidence currently available, arise from buy now pay later arrangements.

Non-cash payment facilities

A non-cash payment facility is a facility through which, or through the acquisition of which, a person makes a non-cash payment. A person makes a non-cash payment if they make a payment, or cause a payment to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins: see s763D of the Corporations Act.

ASIC is proposing to exclude fees and charges imposed for the provision of a non-cash payment facility for the purposes of the product intervention order, in circumstances where the facility is used by the retail client to make repayments towards a continuing credit contract, if the issuer of the non-cash payment facility holds an Australian financial services (AFS) licence.

In ASIC's view, this exclusion is appropriate as consumers are afforded consumer protections under the Corporations Act, including access to external dispute resolution, if the issuer of the facility holds an AFS licence.

Changes to the draft product intervention order

Table 1 sets out the proposed changes to the draft product intervention order. For the revised draft instrument, see Attachment 2 to Media Release (20-274MR) *ASIC seeks further feedback on the proposed intervention order for continuing credit contracts*, issued on 10 November 2020.

Table 1: Summary of proposed changes to the draft product intervention order

Section	Relevant change	Purpose of change
Section 4	Addition of definition of ' <i>buy now pay later arrangement</i> '	To define <i>buy now pay later arrangement</i> for the purposes of subsection 6(3)
Section 4	Addition of definition of ' <i>collateral non-cash payment facility</i> '	To define <i>collateral non-cash payment facility</i> for the purposes of subparagraph 5(5)(b)(i)
Section 4	Addition of definition of ' <i>non-cash payment facility</i> '	To define <i>non-cash payment facility</i> which is referred to in the definition of <i>collateral non-cash payment facility</i>
Section 4	Addition of definition of ' <i>makes non-cash payments</i> '	To define <i>non-cash payment</i> which is referred to in the definition of <i>non-cash payment facility</i>

Section	Relevant change	Purpose of change
Section 5	Addition of <i>'other than a collateral non-cash payment facility'</i> to the condition	To exclude the fees and charges imposed under a <i>collateral non-cash payment facility</i> from counting towards the condition in paragraph 5(5)(b)
Section 6	Addition of subsection 6(2): <i>'For the avoidance of doubt, where a continuing credit provider is not purporting to rely on subsection 6(5) of the National Credit Code in relation to a continuing credit contract, subsections 5(1) to (4) of this instrument do not apply in relation to the contract.'</i>	To clarify that this instrument does not apply to continuing credit contracts where the continuing credit provider is not purporting to rely on the exemption in s6(5) of the National Credit Code (Sch 1 of the <i>National Consumer Credit Protection Act 2009</i>)
Section 6	Addition of subsection 6(3): <i>'This instrument does not apply in relation to a continuing credit contract that forms a part of a buy now pay later arrangement.'</i>	To exempt <i>buy now pay later arrangements</i> , as defined in section 4

Specific questions for feedback

We seek your views on the proposed changes and your responses to the following questions. Please describe, and provide reasons for, any alternative approaches you think would achieve our objectives.

1. Do you agree with the proposed changes to the draft product intervention order as summarised in Table 1? Please explain the reasons for your view.
2. Do you consider there is a significant risk of avoidance as a result of these changes? If so, what additional measures could be introduced by ASIC to address that risk?

Making a submission

Comments should be sent by 5 pm on **Tuesday 24 November 2020** to:

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

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 if we need to.

Please note that 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.

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