

24 November 2020

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

Addendum to ASIC Consultation Paper 330 – Using the product intervention power: Continuing credit contracts

Thank you for the opportunity to comment on the Addendum to Australian Securities and Investments Commission's (ASIC) Consultation Paper 330, *Using the product intervention power: Continuing credit contracts* (CP330), and the proposed updated product intervention order at Attachment 2 (**New Draft PIO**).

Consumer Action Law Centre (**Consumer Action**), WEstjustice and the Financial Rights Legal Centre (**Financial Rights**) made a joint submission to the original consultation on CP330 (**Original Submission**). All our comments in the Original Submission maintain their relevance to the New Draft PIO. We continue to strongly support ASIC taking steps to stop the lending model described in paragraphs 16-22 of CP330.

While we appreciate that an intervention order should not have unintended consequences, we hold concerns about the proposed changes detailed in the Addendum to CP330 (**Addendum**). In relation to the buy now pay later (**BNPL**) exemption, a blanket exclusion should not be provided at all, considering the BNPL industry predominantly market the product's low fees and no interest. The fees and charges that can be imposed under a continuing credit contract should suffice. At most, exclusions should be limited to genuinely necessary larger fees.

There is a risk that as drafted, both of the exceptions provided for BNPL and non-cash payment facilities (**NCP Facilities**) in the New Draft PIO could be gamed by unscrupulous lenders, resulting in similar harm that CP330 aims to stop. We accordingly recommend further changes to the amendments that provide the BNPL exception, and recommend removing the NCP Facilities exemption altogether, unless it can re-drafted to more concisely and specifically address the particular conduct ASIC is looking to exempt.

We encourage ASIC to make the product intervention order as quickly as possible. Cigno Pty Ltd (**Cigno**) and BHF Solutions Pty Ltd (**BHF Solutions**) still appear to be issuing loans, despite ASIC recently commencing legal proceedings against them for unlicensed lending. The product intervention power is intended to allow for quick and effective interventions to stop significant consumer detriment.¹ The sooner the future use of this lending model is banned in future, the better.

¹ ASIC, *Regulatory Guide 272: Product Intervention Power*, June 2020, at paras 8-9.

Question 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.

Buy now pay later

We understand that ASIC does not intend for CP330 to impact the operation of BNPL providers that use continuing credit contracts. While we have significant concerns over the lack of regulatory oversight of BNPL in general, we appreciate that the case for intervention in the market is a separate issue to that considered by CP330.

Use of intervention powers on BNPL in future

We note, however, that some of the data in ASIC's Report 672 *Buy now pay later: An industry update* is particularly concerning, and does suggest that BNPL may be causing significant detriment to retail clients. One particularly telling statistic is that 20% of the consumers ASIC surveyed reported that they cut back or went without essentials to make their BNPL payments on time.² What amplifies this concern is that an industry seemingly left to self-regulation considers the prevalence of consumers in hardship to be less than 1%,³ even when 21% of BNPL users surveyed by ASIC reported that they missed a payment in the last 12 months.⁴ This suggests the BNPL industry are unable or unwilling to identify financial hardship among their customers, or the harms being caused by their products. We consider there to be strong indicators that there is likely significant detriment to retail clients of BNPL occurring due to the current lack of safeguards.

The product intervention power was provided to ASIC by the government because, as the financial services conduct regulator, it is best placed to obtain information to help identify where significant detriment is occurring in the market. It relies on ASIC's role of proactively monitoring market conduct, and relying on its expertise to promptly intervene. As an independent regulator, ASIC has an important role to play in stopping misconduct that harms consumers. We strongly encourage ASIC to consider, separately to CP330, intervening in the BNPL sector to reduce the detriment evidenced in ASIC's recent report.

New Draft PIO: Excluding some fees justified, but industry wide exclusion risks regulatory arbitrage

If a BNPL provider's service involves a continuing credit contract between them and the consumer, then it appears that any purchase agreement between a consumer and merchant made with that BNPL service would be a collateral contract under the New Draft PIO.

On our reading, the principal amounts agreed to be paid (or owed) by consumers for goods or services purchased would not be a 'fee or charge' under a collateral contract captured by the operation of the both Draft PIOs. Rather than a fee or charge, they are simply the purchase price. However, we recognise some additional fees or charges that may be imposed with goods or services may be captured, such as delivery or installation fees. In some circumstances these may be larger the relevant maximum charges imposed by section 6(5) of the *National Credit Code* (which are prescribed in reg 51 of the *National Consumer Credit Protection Regulations 2010* (**NCCP Regulations**)) that would apply across the BNPL contract and collateral contract, under the New Draft PIO.

However, we consider it is more appropriate for ASIC to exempt particular fees, than to exempt BNPL from the operation of the New Draft PIO altogether. The New Draft PIO goes well beyond exempting any particular fees—it gives a free pass altogether to the credit model. We are particularly concerned that this would leave a very obvious loophole open to unscrupulous lenders to begin (or continue) charging excessive fees through BNPL

² ASIC, *Buy now pay later: An industry update*, Report 672, November 2020, p 15.

³ Australian Financial Review, *ASIC to call out buy now, pay later 'harms that we continue to see*, 13 November 2020, <https://www.afr.com/companies/financial-services/asic-to-call-out-buy-now-pay-later-harms-that-we-continue-to-see-20201112-p56eox>.

⁴ ASIC, *Buy now pay later: An industry update*, Report 672, November 2020, p 5.

arrangements. The BNPL industry has consistently put significant effort into distinguishing itself from other credit products through marketing campaigns flagging BNPL's comparatively lower fees and charges. Outside of merchant fees for physical services like delivery or installation, this is arguably the last industry that should be exempt from any limits on fees and charges. These concerns are further detailed in our response to question 2.

Non-cash payment facilities

We similarly hold concerns about the amendments directed at excluding NCP Facilities, even if they are issued by Australian financial services licence (AFSL) holders. Non-cash payments come in a range of forms. While we understand that there could be some specific situations involving legitimate business models that ASIC is seeking to exclude, this is not clear from the Addendum or New Draft PIO and we are concerned the exclusion is too broad.

Rather than explaining the model the exemption aims to address, the Addendum appears to largely suggest that any risk to excluding these fees is sufficiently mitigated by limiting the exception to situations where the issuer of the NCP Facility holds an AFSL. We do not think that this alone provides sufficient protection to consumers. As with the BNPL exemption, we are concerned that this exemption is leaving a big loophole open to unscrupulous credit providers to exploit (explained further in our response to question 2).

We therefore do not support including exceptions for NCP Facilities. If there is an existing specific type of conduct worth excluding, the exemption needs to be far more clearly and directly articulated, so as to ensure it does not leave open a loophole for harmful conduct similar to that which CP330 aims to stop.

Question 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?

Buy now pay later

Yes, we consider the amendments exempting BNPL altogether from the New Draft PIO to pose a significant risk of avoidance. To fix this we suggest the below amendments to make the exemption more appropriately targeted.

Restrict the types of fees and charges that are excluded from the order

The Original Draft PIO would have applied a maximum cost to sometimes legitimate fees charged by merchants with purchases made with BNPL continuing credit contracts. However, we can only imagine a couple of these kinds of fees that relate to either genuine costs of the merchant, or that deliver a benefit to consumers, such as delivery and installation fees. These fees and charges should also only be charged with the express consent, at the option of consumers, and only by the merchant. This is particularly the case considering the fees could still be charged if they fell within the \$125 (or \$200) cap specified under reg 51 of the NCCP Regulations (along with those charged under the continuing credit contract).

Any other fees or charges related to a BNPL arrangement at all should not be excluded from the operation of the instrument. As noted above, BNPL is supposed to be a low fee credit product. If ASIC thinks an exception is necessary to avoid unreasonably impacting BNPL arrangements involving continuing credit contracts, it should be drafted so as to restrict the exclusion to genuine and reasonable fees and charges as far as is possible.

Accordingly, we recommend that ASIC amends section 6(3) of the New Draft PIO, to specify that the instrument only does not apply to an exhaustive list of fees that could be reasonably charged in relation to a BNPL arrangement. While there may be a few more than just delivery and installation fees, we anticipate the list would not be particularly long, and could be sufficiently clear to make the risk of any misuse of a fee category low.

RECOMMENDATION 1. Amend subsection 6(3) to specify that the instrument only does not apply to particular reasonable fees charged by merchants under collateral contracts that are part of a buy now pay later arrangement, and which are optional to the retail client, such as delivery and installation fees.

Delete or fix paragraph (b)(ii) of 'buy now pay later arrangement' definition

Whether or not the above recommendation is adopted, we hold significant concern that the definition of BNPL arrangement still leaves a real risk that additional costs could be imposed through a similar business model to that used by Cigno.

The Addendum suggests that one of the constituent elements of a BNPL arrangement is an "arrangement between ... 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".⁵ However, this feature of does not appear to be one of the necessary elements of the definition of BNPL arrangement in the New Draft PIO as drafted. Rather, paragraph (b)(ii) of the definition in the New Draft PIO alternatively allows for a situation where there is no relationship between the BNPL provider and the merchant, and the transaction is simply arranged through the provision of a 'single-use identifier'.

The term 'single-use identifier' is not defined in the instrument and does not appear to be defined in any other Commonwealth legislation. There is no reason, on the face of the PIO as drafted, that this could not encompass an additional entity – such as Cigno (or another entity seeking to replicate its business model), providing a code to its customer to enable the release of funds, which the customer could then use to pay the merchant (either directly or by way of inputting the merchant-payee details into Cigno's payment system). There does not appear to be any need for there to be any arrangement or direct contact between the BNPL provider and the merchant.

The definition of BNPL arrangement in section 4 of the New Draft PIO needs to be amended to ensure it only captures arrangements where the BNPL provider has a direct arrangement with the merchant. The best way to achieve this would be to delete paragraph (b)(ii) and make paragraph (b)(i) a compulsory aspect of meeting the BNPL arrangement definition.

If there are existing BNPL arrangements that do not involve a direct relationship between the merchant and retail client that ASIC thinks essential to include, then section 4 could alternatively be re-drafted to explicitly clarify that a BNPL arrangement must not include any additional entities beyond the merchant, the BNPL provider and the retail client.

RECOMMENDATION 2. Delete paragraph (b)(ii) from the definition of 'buy now pay later arrangement' in section 4.

Paragraph (c) of the 'buy now pay later arrangement' definition

Paragraph (c) of the definition of BNPL arrangement also uses particularly loose language to describe the relationship between the BNPL provider and the retail client, that risks opening up the exemption to further avoidant conduct. To meet the requirements of paragraph (c) of the definition of BNPL arrangement, the arrangement must just *include* a continuing credit contract between the BNPL provider and retail client. This appears to allow for the possibility that the arrangement may also include an additional, separate contact between the parties, that does not necessarily need to be a continuing credit contract.

We strongly recommend that paragraph (c) be amended to clarify that the BNPL arrangement can **only** involve a single continuing credit contract between the BNPL provider and retail client, so that it must meet the requirements of section 6(5) of the NCC. Allowing additional contracts to fall within this definition could allow the BNPL provider to impose additional unjustified charges separately.

⁵ Page 1.

RECOMMENDATION 3. Amend paragraph (c) of the definition of 'buy now pay later arrangement' in section 4 to clarify that it only covers a continuing credit contract between the BNPL provider and retail client.

Exclude any collateral contracts relating to credit

We also recommend amending the final paragraph of the definition of 'BNPL arrangements' (beginning with 'but only where the principal business...') in section 4 of the New Draft PIO to exclude any situations where the collateral contract between the merchant and retail client concerns good or services that involve, or relate, to the provision of credit (as defined in section 3 of the *National Credit Code*).

While we appreciate that the final paragraph (that is, the clause starting 'but only...') of the definition of BNPL arrangement in the New Draft PIO aims to stop BNPL being used to pay for services similar to that charged for by Cigno in relation to continuing credit contracts issued by BHF Solutions, we think this limit does not go far enough, and could be avoided. For example, we are concerned about a situation where a condition of making a purchase under a BNPL continuing credit contract is that it triggers another purchase of a credit 'assessment' or 'review' or 'approval', by a third party merchant under another collateral contract that results in the retail client incurring a range of fees or charges. Doing so may change the principal business of the merchant.

Excluding any contract where the merchant-retail client contract relates to credit is also not likely to impact any legitimate BNPL provider's operations. BNPL—while not properly regulated as such—is already essentially a credit facility. It is used to purchase goods and services, but it would not make any sense for it to be used to finance additional credit purchases—be it a loan, advice, or otherwise. Accordingly, there would be little to no risk that excluding all merchant-retail client contracts involving credit would have any unintended harm on the BNPL industry.

RECOMMENDATION 4. Restrict the definition of 'buy now pay later arrangement' in section 4 to exclude any arrangements where the collateral contract between the merchant and retail client involves, or relates to, credit.

Non-cash payment facilities

We hold similar concerns that the exemption for NCP Facilities may result in avoidant conduct causing ongoing significant detriment to retail clients. Due to subsection 5(5)(b)(i), it appears that the New Draft PIO would have no impact whatsoever on fees or charges imposed through a collateral NCP Facility. We consider there to be a real risk that this is just signposting the next lending model for unscrupulous lenders to use. NCP Facilities already benefit from relief from numerous aspects of the *Corporations Act 2001*, as detailed in ASIC Regulatory Guide 185.⁶

While we recognise that the entity imposing fees through the NCP Facility would need to hold an AFSL, this alone should not give any arrangement a free pass altogether. This may mean that consumers have access to AFCA, but this is not as good a solution as simply stopping the conduct. In our experience, there are a number of AFSL holders that have engaged in conduct that has caused their retail clients significant harm.

Under this exemption, it appears that all it would take for two new (perhaps even well disguised phoenix) entities to replicate the Cigno and BHF Solutions model altogether would be for one to obtain an AFSL, and then adopt the exact same lending and fee structure, just setting up a NCP Facility for repayments. This seems entirely possible, and while ASIC may have grounds to refuse an AFSL licence application for Cigno or obvious associates, this may not be clear at the time of the application. ASIC may later consider such conduct to be grounds to revoke the licence, but this can be a lengthy process that can end up in tribunals or court. Considering the current legal proceedings against Cigno and BHF Solutions for unlicensed credit activity has not stopped them from continuing to operate, far more detriment could be caused while ASIC goes through the legal process to stop this conduct.

⁶ ASIC, *Regulatory Guide 185: Non-cash payment facilities*, issued 15 November 2005, <https://download.asic.gov.au/media/5702401/rg185-published-15-november-2005-20200727.pdf>.

We accordingly oppose the inclusions relating to the NCP Facility exemption altogether. We are not aware of any existing legitimate continuing credit contract models using NCP Facilities in this manner. If there are, the specific conduct necessary to exclude needs to be described with far more specificity, rather than leaving the whole order open to regulatory arbitrage.

RECOMMENDATION 5. Do not exclude fees and charges imposed under a collateral non-cash payment facility from the operation of the draft instrument.

Conclusion

Considering that this is the second lending model involving Cigno that ASIC has targeted using the product intervention power, it is essential that no obvious loopholes are available in any intervention order made. ASIC obviously needs to avoid any unintended consequences from making a product intervention order. However, we strongly encourage ASIC to consider the risks that both the BNPL and NCP Facility exemptions pose in terms of enabling further avoidant activity.

Those behind Cigno and BHF Solutions had demonstrated they are adept at discovering and exploiting loopholes. Similar loopholes have been found in the past (for example, Teleloans). There is a real risk that if not done properly, ASIC will be back consulting on another proposed intervention within a few months. Accordingly, we strongly recommend limiting any exceptions to the New Draft PIO as far as possible.

The lending model targeted by CP330 has done significant damage to vulnerable Australians. It is essential that an effective order is made as soon as possible.

In future, when ASIC proposes changes to a draft instrument or similar intervention, we also strongly suggest that it publishes the submissions it received to the original consultation. If the Addendum referred to the submissions that have prompted the changes, feedback could be provided with more direct reference to the issue ASIC is trying to address.

Please contact [REDACTED] at Consumer Action Law Centre on [REDACTED] or at [REDACTED] [org.au](https://www.consumeractionlawcentre.org.au) if you have any questions about this submission.

Yours Sincerely,

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APPENDIX – ABOUT THE CONTRIBUTORS

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.

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 operates 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.

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.