

Attachment 2 to CP 355: Draft legislative instrument



ASIC
Australian Securities &
Investments Commission

ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/XX

I, <insert name>, delegate of the Australian Securities and Investments Commission, make the following legislative instrument.

Date 2022

[DRAFT ONLY – NOT FOR SIGNATURE]

<signature>

<insert name>

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Part 1—Preliminary

1 Name of legislative instrument

This is the *ASIC Corporations (Product Intervention Order—Continuing Credit Contracts) Instrument 2022/XX*.

2 Commencement

This instrument commences on a day that is the [XX] day after the instrument is registered on the Federal Register of Legislation.

Note: The register may be accessed at www.legislation.gov.au.

3 Authority

This instrument is made under subsection 1023D(3) of the *Corporations Act 2001*.

4 Definitions

In this instrument:

Act means the *Corporations Act 2001*.

associate, in relation to a primary person that is a continuing credit provider, has the meaning given by sections 11 and 15 of the Act.

buy now pay later arrangement means an arrangement or series of arrangements comprising:

- (a) an arrangement between a person (the *merchant*) and another person (the *retail client*) in relation to the supply of goods or services by the merchant to the retail client; and
- (b) either:
 - (i) an arrangement between the merchant and a person (the *BNPL provider*) in relation to which the BNPL provider pays the merchant for the supply of those goods or services to the retail client (less any merchant fees); or
 - (ii) an arrangement between the retail client and a person (the *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 by using an identifier provided or made available to the retail client for such a purpose; and

Note: For example, the identifier may be a credit card or debit card number that the retail client provides to the merchant's payment system.

- (c) 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.

collateral contract, in relation to a continuing credit contract, means a separate contract between a retail client and a continuing credit provider or an associate in relation to the continuing credit contract, including (without limitation) a contract or arrangement for the continuing credit provider or an associate to provide services to the retail client in relation to the continuing credit contract.

collateral non-cash payment facility, in relation to a continuing credit contract, means a non-cash payment facility operating in relation to a continuing credit contract where the issuer of the non-cash payment facility is the holder of an Australian financial services licence covering the provision of financial services in relation to the non-cash payment facility.

continuing credit contract means a contract, arrangement or understanding covered by paragraph 12BAA(7)(k) of the ASIC Act 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.

continuing credit provider means a person who is purporting to rely on subsection 6(5) of the National Credit Code in relation to a continuing credit contract.

contract includes a series or combination of contracts, or contracts, arrangements and understandings.

makes non-cash payments has the meaning given by section 763D of the Act.

National Credit Code has the same meaning as in subsection 5(1) of the *National Consumer Credit Protection Act 2009*.

non-cash payment facility means a facility through which, or through the acquisition of which, a person makes non-cash payments.

Part 2—Order

5 Continuing credit contracts

- (1) A continuing credit provider must not provide credit to a retail client under a continuing credit contract except in accordance with the condition in subsection (5).
- (2) A director of a continuing credit provider must not cause or authorise the provider to provide credit to a retail client under a continuing credit contract except in accordance with the condition in subsection (5).
- (3) A continuing credit provider or an associate must not impose or provide for fees and charges under a collateral contract in relation to a continuing credit contract except in accordance with the condition in subsection (5).
- (4) A director of a continuing credit provider or of an associate must not cause or authorise the provider or associate to impose or provide for fees and charges under a collateral contract in relation to a continuing credit contract except in accordance with the condition in subsection (5).

Condition

- (5) The total of:
 - (a) the amount of fees and charges that may be imposed or provided for under the continuing credit contract; and
 - (b) the amount of fees and charges that:
 - (i) may be imposed or provided for under:
 - (A) a collateral contract (other than a collateral non-cash payment facility); or
 - (B) a contract, arrangement or understanding that belongs to a series or combination that constitutes the continuing credit contract (except for a fee or charge already counted under paragraph (a)); and
 - (ii) are paid or payable by a retail client;

must not exceed the maximum charge permitted under subsection 6(5) of the National Credit Code or regulations made for the purposes of that subsection.

6 Application

- (1) This instrument applies in relation to a continuing credit contract entered into on or after the commencement of this instrument.

- (2) 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.
- (3) This instrument does not apply in relation to a continuing credit contract that forms a part of a buy now pay later arrangement.

Note 1: The application of the orders in section 5 is subject to the limitations in section 1023C of the Act.

Note 2: Subject to the Court making an order staying or otherwise affecting the operation of the orders in section 5, the orders will remain in force for 18 months from the day this instrument commences: see subsection 1023G(2) of the Act.