

25 January 2022

██████████  
Senior Manager, Financial Services Group  
Australian Securities and Investments Commission  
Level 7, 120 Collins Street  
MELBOURNE VIC 3000  
email: [product.regulation@asic.gov.au](mailto:product.regulation@asic.gov.au)

Dear ██████████

## CP 355 PRODUCT INTERVENTION ORDERS: SHORT TERM CREDIT AND CONTINUING CREDIT CONTRACTS

The Australian Finance Industry Association (AFIA) appreciates the opportunity to provide a submission.

AFIA is a leading advocate for the Australian financial services industry. We support<sup>1</sup> our members to finance Australia's future. We believe that our industry can best support Australia's economy by promoting choice in and access to consumer and business finance, driving competition and innovation in financial services, and supporting greater financial, and therefore social, participation across our community.

AFIA represents over 100 providers of consumer, commercial and wholesale finance across Australia. These banks, finance companies, fleet and car rental providers, and fintechs provide traditional and more specialised finance to help businesses mobilise working capital, cashflow and investment. They are also at the forefront of financial innovation in consumer finance.

### BACKGROUND

The activities of the various credit providers and associates outlined by ASIC<sup>2</sup>, was an example of very poor conduct and behaviour. AFIA agrees that, given this market failure, it was appropriate for ASIC to make the product intervention order in 2019.

---

<sup>1</sup> [Australian Finance Industry Association \(afia.asn.au\)](http://www.afia.asn.au)

<sup>2</sup> Finance & Loans Direct Pty Ltd, Gold-Silver Standard Finance Pty Ltd, and BHF Solutions Pty Ltd as short-term credit providers and Teleloans Pty Ltd, Cigno and MyFi Australia Pty Ltd (now known as Fi-Fit Services Pty Ltd) as associates targeted financially stressed retail clients with short term credit facilities with no adequate affordability assessment, high fees charged through a collateral contract (including upfront, ongoing and default fees) and a high default rate.

AFIA notes that ASIC remains concerned about ensuring continuing credit contracts do not result in or will likely result in significant detriment to retail customers. Similar to ASIC, AFIA members are also concerned about ensuring their credit contracts do not result in or will likely result in significant detriment to retail customers.

Many of AFIA's BNPL members originate continuing credit contracts. In March 2021, as ASIC would be aware, AFIA published the Buy Now Pay Later Code of Practice (BNPL Code)<sup>3</sup>. The BNPL providers accredited to this Code represent approximately 95 percent of the BNPL market in Australia, including Afterpay, Brighte, Humm Group, Klarna, Latitude, Openpay, Payright and Zip Co.

The BNPL Code is a world-leading initiative in the BNPL sector and has been designed as a dynamic framework to enable industry participants to take a proactive approach to increasing consumer protections and go beyond current legal and regulatory obligations for BNPL products or services.

The BNPL Code contains strong consumer protections to prevent detriment such as:

- upfront assessments on customers, prior to providing a product or service, to assess if the product will be suitable for them as a customer
- existing customer re-assessments if the customer applies for a higher limit
- robust internal dispute resolution processes
- ensuring customer have recourse to the Australian Financial Complaints Authority for any external dispute resolution obligations
- capping fees, and conducting 'in life' checks to ensure the product or service remains suitable for customers
- providing proactive hardship assistance for customers in financial difficulty.

The BNPL Code is overseen by an independent Code Compliance Committee who also collect data from Code Compliant Members (CCM).

Consistent with many of the CCMs public announcements (as part of continuous disclosure obligations), it is pleasing to see the positive trend in terms of low complaints and requests for hardship assistance relative to total volume of transactions. This highlights the continued value that these products and services provide to customers and to many retail businesses who have been assisted through the COVID-19 crisis.

Furthermore, it also demonstrates that the BNPL sector recognises the importance of establishing best practices and setting high standards, to ensure the appropriate balance between consumer outcomes and preserving customer choice to make purchases and payments in a way that suits their needs.

## OUR SUBMISSION

AFIA's submission supports recommendations made on 11 August 2020, as part of its response to Consultation Paper 330 and the Addendum to CP 330: Using the Product Intervention Power: Continuing Credit Contracts.

---

<sup>3</sup> [AFIA Buy Now Pay Later Code of Practice - New](#)

AFIA notes that ASIC now proposes to make an industry-wide product intervention order by legislative instrument under s1023D(3) of the *Corporations Act* to prohibit credit providers and their associates (including directors of such entities) from issuing continuing credit contracts, in circumstances where total fees exceed the maximum permitted under the continuing credit contracts exemption in s6(5) of the National Credit Code and Regulation 51 of the National Consumer Credit Protection Regulations 2010.

The proposed order will have:

- specific exclusions for buy now pay later arrangements and non-cash payment facilities as outlined in the Addendum to CP 330, and
- some changes as outlined in paragraph 55.

As requested, our submission focuses on the appropriate application of ASIC's proposed use of its product intervention power, outlined under Proposal Two.

Proposal Two aims to address significant detriment that has resulted from, or will or is likely to result from, these continuing credit contracts<sup>4</sup>. It is also the most relevant to AFIA members who originate BNPL products under the National Consumer Credit Protection Act 2009 (NCCP) or under the ASIC Act 2001 (ASIC Act).

#### **KEY RECOMMENDATION 1 – ENSURE THE PRODUCT INTERVENTION ORDER SPECIFICALLY EXCLUDES:**

- **BNPL PRODUCTS ORIGINATED UNDER THE NCCP OR THE ASIC ACT AND**
- **MERCHANTS AND RETAILERS WHO DISTRIBUTE BNPL PRODUCTS OR SERVICES FROM THE DEFINITION OF COLLATERAL SERVICE**

The BNPL market is dynamic. Many new entrants are using the word 'BNPL' as part of product / marketing collateral. This is confusing to customers as well as to providers who originate products under the NCCP or ASIC Act.

While the proposed order will exclude BNPL arrangements, specifically adding the words 'originated either under the NCCP or the ASIC Act' will remove ambiguity and assist manage potential future product evolution. It also ensures that continued competition and innovation is driven through market forces and customer demand, supported by evidence-based policy.

AFIA believes that regulation should only be used in the advent of a market failure or when interventions are required to achieve optimal outcomes for customers, businesses, the financial system, and the broader economy, and where those interventions are deemed economically necessary and beneficial.

The definition of 'associate' under the Corporations Law (s11 and 15) law is very broad. This means that the reference to 'collateral contract' or 'collateral services' includes 'distribution' in relation to continuing credit contracts.

---

<sup>4</sup> [Consultation Paper CP 355 Product intervention orders: Short term credit and continuing credit contracts \(asic.gov.au\)](https://asic.gov.au/consultation/papers/CP355-Product-intervention-orders-Short-term-credit-and-continuing-credit-contracts/)

While ASIC proposes to exclude BNPL products (as amended above), under the Design and Distribution Obligation Regime<sup>5</sup>, some merchants are considered 'distributors.' If applicable, this means that (absent the BNPL product exemption) the Merchant Service Fee (MSF) (if passed on to consumers - which is currently not permitted but being considered by RBA and Treasury) would be included in this proposed product intervention order as part of caps on fees.

Explicitly excluding merchants and retailers who distribute BNPL products for BNPL providers from the definition of collateral service clarifies the legal position. It also means that competition within the payments and credit industry is not unduly restricted and BNPL providers can continue to support the ongoing response and economic recovery phase of the COVID-19 crisis in a customer centric manner.

### **KEY RECOMMENDATION 2 – INCLUDE IN THE DEFINITION OF BNPL THE ABILITY TO PAY CUSTOMER BILLS AND EXPAND THE DEFINITION OF COLLATERAL NON-CASH PAYMENT FACILITY**

Customer choice and needs are evolving. To meet these needs, some BNPL providers are providing a service where they pay eligible bills on the customer's behalf, such as utilities, council rates, body corporate fees, or annual memberships (i.e. sporting clubs), etc and the customer repays the BNPL provider over time under a payment plan or continuing credit contract. There is no Merchant Service Fee payable in respect of these sorts of BNPL transactions, but at present, this type of arrangement would not currently be captured under the definition of BNPL in Proposal Two.

Under the draft product intervention order, fees and charges related to collateral non-cash payment facilities (NCPFs) are excluded from the fee cap. The proposed definition of 'collateral non-cash payment facility' only includes NCPFs issued by a person that holds an Australian financial services (AFS) licence. However, there are a number of NCPFs that are exempt from requiring a person to hold an AFS licence. It is not clear why all NCPFs that are exempt from licensing are not included in the exclusion, particularly as NCPFs that are exempt from AFS licensing are low risk from a consumer perspective. Therefore, expanding the definition to include all NCPFs would be reasonable, balancing consumer protections, competition, and innovation.

### **KEY RECOMMENDATION 3 – ENSURE THE PRODUCT INTERVENTION ORDER EXPLICITLY EXCLUDES FROM THE DEFINITION OF COLLATERAL SERVICES ANY ARRANGEMENT MADE BY A BNPL PROVIDER TO ENTER INTO A RELATIONSHIP WITH A THIRD PARTY FOR DEBT COLLECTION**

When AFIA members met to discuss the proposed product intervention order, there was confusion and ambiguity in interpretation about whether debt collection services were collateral services. This ambiguity arises due to the process of debt collection where the debt is assigned and any late fees charged, under the continuing credit contract, are effectively made by the assignee. It would be appreciated if ASIC could clarify that debt collection services are not part of the collateral services definition.

---

<sup>5</sup> [Update on the Design and Distribution Obligations \(DDO\) regime | Treasury.gov.au](https://www.treasury.gov.au/updates/2020/08/20200814-update-on-the-design-and-distribution-obligations-ddo-regime)

## KEY RECOMMENDATION 4 – CLARIFY WHAT CONTRACTS WITH THE CONTINUING CREDIT PROVIDER ARE CAPTURED UNDER THE DEFINITION OF COLLATERAL CONTRACT

When AFIA members met to discuss the proposed product intervention order, there was confusion and ambiguity about the definition of ‘collateral contract’.

Specifically, it is unclear what other contracts with the continuing credit provider could be captured for the purposes of the fee cap. It would be appreciated if ASIC could clarify if the other contract has to be ‘in relation to the continuing credit contract’ or is it any other contract with the continuing credit provider’.

The current draft suggests that the words ‘in relation to the continuing credit contract’ only applies to the associate of the continuing credit provider. If this interpretation were to apply, it could have the effect of capturing, within the fee cap, any fees or charges paid or payable under any other contract irrespective of whether the other contract related to the original continuing contract or a separate product or service that is genuinely not related to the continuing credit contract.

AFIA recommends that only those contracts with the continuing credit provider that are ‘in relation to the continuing credit contract should be included in the fee cap’. Therefore, the definition of collateral contract should be amended to clarify that ‘in relation to the continuing credit contract’ applies to both contracts with the continuing credit provider and the associate.

## CLOSING REMARKS

AFIA appreciates the strong and collaborative engagement we have had with ASIC on many issues relating to the BNPL sector.

AFIA recognises there are significant changes taking place around the world with the increasing digitisation of financial services. In this operating environment, it is critical to put customer expectations at the centre, so there continues to be simple, transparent, low-cost, and integrated options for finance. This will make it easy for customers and deliver benefits to the economy, while maintaining consumer safeguards and promoting competition and innovation.

Should you wish to discuss our submission or require additional information, please contact me or [REDACTED], Executive Director, Policy & Risk Management at [REDACTED] or [REDACTED].

Yours sincerely

[REDACTED]

[REDACTED]  
**Chief Executive Officer**