

Article Information

Author: Andrea Beatty

Service: Banking & Finance

Sector: Financial Services

ASIC reviews “buy now pay later” industry

This article is republished from LexisNexis Financial Services Newsletter 2019 - Vol 17 No 10.

This article is republished from [LexisNexis Financial Services Newsletter](#) 2019 - Vol 17 No 10.

Authored by Andrea Beatty, Partner and Chelsea Payne, Law Graduate.

“Buy now pay later” is a rapidly expanding industry. It is particularly attractive to young people - it is like ‘credit’, but it is not considered ‘credit’ under Australian credit laws. As a result, it is not regulated like consumer credit.

In November 2018, ASIC released the much anticipated Report 600: review of buy now pay later arrangements (**Report**), which provides insight into the relatively unregulated ‘buy now pay later’ industry (**industry**). The review, which examined six buy now pay later providers (**providers**),^[1] identified areas that ASIC intends to monitor and potentially extend its new product intervention power to.^[2]

Buy now pay later arrangements allow consumers to purchase goods and services and pay off the purchase price over a specified period of time. Although each provider offers different payment arrangements, the arrangement involves three contracts between the consumer, the merchant and the provider.^[3] The provider assumes the debt of the purchaser by paying the merchant for the transaction, minus merchant fees.^[4]

The industry is not regulated by the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) either because the provider does not charge the consumer for providing the credit, or they offer continuing credit contracts that fall within the exemption in s 6(5) of the *NCCP Act* as they only include charges for credit that amount to a fixed fee, which does not vary according to the amount of credit provided.^[5] However, because these arrangements are considered ‘credit facilities’ under the *ASIC Act 2001* (Cth), ASIC has some jurisdiction, including for misleading, deceptive or unconscionable conduct.^[6]

1. The industry

The Report found that the industry is rapidly growing, with the customer base increasing from 400,000 in the 2015-16 financial year to 2 million in the 2017-18 financial year, and the number of transactions per month growing from over 50,000 in April 2016 to 1.9 million in June 2018.^[7]

The total value of transactions per month rose from \$56 million in April 2016 to \$346 million in June 2018.^[8] The average transaction value fell from \$1,098 in April 2016 to \$178 by June 2018,^[9] likely due to the increase in low-value purchases available from retailers such as K-Mart and Target.

Total revenue for the industry increased from \$32 million in the June 2016 quarter, to \$78 million during the June 2018 quarter.^[10] The total balance of outstanding debt from these arrangements grew from \$476 million in April 2016 to \$903 million by June 2018.^[11]

The industry has seen growing revenue from missed payment fees, rising from 2% of total revenue in the quarter ending June 2016 to 12% in the quarter ending June 2018.^[12] This trend is attributable to the entry and growing popularity of providers that charge multiple missed payment fees, the increase in lower-value purchases and the recent entry of many first-time users.^[13]

1.1 Price inflation

ASIC's review found that some arrangements result in the price of goods being inflated for users, especially for high-value purchases, goods with less transparent and 'negotiable' prices, and services.[14] ASIC believes that this inflation may be misleading if not disclosed to users, as retailers are obscuring the actual cost of using the arrangement.[15] ASIC is currently reviewing the legal position of price inflation, and has taken action against providers for attempting to avoid the *NCCP Act* by establishing artificial business models.[16]

1.2 Application approvals

Declined applications vary substantially between providers, ranging from 6% to 43% of all applicants.[17] The Report stated that providers can decline applications for various reasons that may not be immediately apparent to consumers, including:

- (a) a poor credit score or credit report
- (b) making several applications in a short period of time
- (c) poor past repayment history with the provider, or
- (d) failed external identity verification.[18]

The review also found that previous exposure to certain credit products such as small amount credit contracts (**SACCs**) could negatively affect an application being approved.[19]

1.3 Merchant arrangements

ASIC's review found that most merchants are choosing to offer buy now pay later arrangements in response to apparent demand.[20] Merchants are charged a fee equal to a percentage of the amount of the purchase, however some providers charge a fixed fee.[21] The size of fees is dependent on factors such as the volume of transactions from the merchant, the merchant's risk profile and the types of goods or services offered.[22]

Agreements between merchants and providers require merchants to actively promote the arrangement to customers.[23] Merchants are required to comply with the provider's advertising guidelines, with some providers requiring merchants to distribute any promotional material supplied to them.[24]

2. Consumer demographics and behaviour

The number of consumers using buy now pay later arrangements amounts to around 10% of Australia's adult population.[25] Many users are relatively young, with 60% of users between the ages of 18 and 34.[26] Females are more frequent users of buy now pay later arrangements, representing 57% of users.[27]

62% of first time users of buy now pay later arrangements noted that they had purchased the goods or services online.[28] 19% of users believed a sales assistant had encouraged them to use the arrangement for the first time.[29]

As a result of the younger demographic, two in five users earn under \$40,000 per annum, with 40% of these users being students or part-time workers.[30] 19% of users had two or more other forms of credit facilities, and 31% of users had no other credit facility,[31] most likely due to the young age of consumers. When making repayments, 74% of users paid by debit card or direct debit from a transaction account, despite 51% of users having a credit card.[32]

The Report found that these arrangements have influenced the spending habits of some consumers, with 86% of consumers intending to use the arrangement again,[33] and over 50% stating they are spending more money than usual.[34]

74% of users reported never having missed a repayment.[35] For those who did miss repayments, reasons included forgetting to put money into an account (11%), needing to prioritise paying other bills (9%) and buying multiple items and losing track (5%).[36] Five of the six providers suspended the use of arrangements for new purchases if a user had not remedied a missed payment, with Brighte indicating that it will also commence suspending new purchases.[37]

3. Over-commitment risk

The Report found that buy now pay later arrangements can create some risks for consumers if they take on debt that they may have difficulty repaying.[38] Over-commitment is a risk for some users, with one in six users having overdrawn, delayed other bill payments or borrowed additional money to make payments.[39] Interestingly, the number of users of buy

now pay later arrangements that have missed multiple repayments for one transaction is lower than the number of credit card users with problematic credit card debt.[\[40\]](#)

Some providers are mitigating the risk of user over-commitment by capping or limiting the missed payment fees that can be charged and preventing consumers from making another purchase using an arrangement if they have not remedied a missed payment for an existing purchase.[\[41\]](#)

4. Conduct of providers

ASIC believes that providers take some steps to act fairly towards consumers, but can do more. ASIC considers providers should ensure consumers adequately understand the arrangement and make complaints and financial hardship services visible.[\[42\]](#) Each provider demonstrated a readiness to work with ASIC by improving their practices in response to ASIC's recommendations.[\[43\]](#)

Although some providers present prospective repayment terms to consumers in a straightforward and plain English manner,[\[44\]](#) not all consumers understand their arrangement. Only 56% of consumers considered that they had been made fully aware of the terms and conditions when they signed up for the arrangement[\[45\]](#) and 31% of consumers indicated that they did not understand at least one of the key repayment terms.[\[46\]](#)

4.1 Hardship and complaints

As providers are not subject to the responsible lending requirements under the *NCCP Act*, only one of the six providers involved in the review said they examined the income and existing debts held by consumers before providing their services.[\[47\]](#)

As these arrangements are not covered by the *NCCP Act*, the hardship provisions under the Act do not apply and are instead a partly contractual right. From July 2017 to March 2018, three providers received no hardship requests, whilst one provider had received 10 requests.[\[48\]](#) This suggests that users may have limited knowledge that they can request such assistance.[\[49\]](#) In ASIC's view, most providers failed to adequately inform consumers that hardship assistance was available.[\[50\]](#)

The Report noted that many users have a limited understanding about their ability to complain. Since ASIC's recommendations, two providers have voluntarily become members of the Australian Financial Complaints Authority (**AFCA**),[\[51\]](#) meaning all six providers are now members of the external dispute resolution scheme.

4.2 Unfair contract terms

ASIC's review found that providers include potentially unfair terms in their contracts, including:

- (a) giving the provider a very broad unilateral discretion to vary the contract
- (b) providing a very broad range of circumstances where the customer will be regarded as in 'default'
- (c) limiting and excluding the liability of the provider for goods and services supplied by the merchant
- (d) holding the consumer liable for unauthorised transactions, even when the providers is aware of or suspects the transaction may be unauthorised, and
- (e) very broadly indemnifying the provider against losses, costs, liabilities and expenses.[\[52\]](#)

ASIC has raised its concerns with each provider to highlight potentially unfair terms, with each provider currently reviewing their contracts to amend or remove potentially unfair terms.[\[53\]](#)

5. Summary

ASIC's Report 600 into the buy now pay later industry provides a detailed overview of the increasingly popular service. With the industry unregulated by the *NCCP Act*, the Report's findings allude to potential issues with responsible lending and responsible borrowing. Although ASIC has not committed to taking action to increase regulation of the industry, it has indicated its commitment to extend its new product intervention power to the industry. It will be interesting to see ASIC's approach to enforcement as providers continue to enter the thriving market.

[\[1\]](#) Afterpay Pty Ltd, zipMoney Payments Pty Ltd, Certegy Ezi-Pay Pty Ltd, Oxipay Pty Ltd, Brighte Capital Pty Ltd and

[2] Australian Securities and Investments Commission, *Report 600: Review of buy now pay later arrangements* (November 2018) <https://download.asic.gov.au/media/4947835/rep600-published-28-11-2018.pdf> [70].

[3][3] Ibid [18].

[4] Ibid.

[5] Ibid [21].

[6] Ibid [69].

[7] Ibid [25].

[8] Ibid [82].

[9] Ibid [84].

[10] Ibid [27].

[11] Ibid [25].

[12] Ibid [85].

[13] Ibid [86].

[14] Ibid [36].

[15] Ibid [37].

[16] Ibid [38].

[17] Ibid [91].

[18] Ibid [89].

[19] Ibid [90].

[20] Ibid [97].

[21] Ibid [101].

[22] Ibid [102].

[23] Ibid [98].

[\[24\]](#) Ibid [99].

[\[25\]](#) Ibid [2].

[\[26\]](#) Ibid [39].

[\[27\]](#) Ibid [105].

[\[28\]](#) Ibid [115].

[\[29\]](#) Ibid [116].

[\[30\]](#) Ibid [40].

[\[31\]](#) Ibid [112].

[\[32\]](#) Ibid [137].

[\[33\]](#) Ibid [42].

[\[34\]](#) Ibid [44].

[\[35\]](#) Ibid [140].

[\[36\]](#) Ibid.

[\[37\]](#) Ibid [144].

[\[38\]](#) Ibid [4].

[\[39\]](#) Ibid [49].

[\[40\]](#) Ibid [50].

[\[41\]](#) Ibid [75].

[\[42\]](#) Ibid [61].

[\[43\]](#) Ibid [6].

[\[44\]](#) Ibid [58].

[\[45\]](#) Ibid [164].

[\[46\]](#) Ibid.

[\[47\]](#) Ibid [54].

[\[48\]](#) Ibid [171].

[\[49\]](#) Ibid.

[\[50\]](#) Ibid [172].

[\[51\]](#) Ibid [63].

[\[52\]](#) Ibid [65].

[\[53\]](#) Ibid [66].