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ASIC review of ‘buy now pay later’ industry

On 28 November, ASIC released its much anticipated report into the ‘buy now pay later’ industry (industry), Report 600: Review of buy now pay later arrangements (Report). The industry is relatively unregulated, as companies are exempt from the NCCP Act either because they offer continuing credit contracts that are exempt from NCCP Act regulation under s 6(5) of the Act, or they do not charge the consumer for providing the credit.[1] The Report, which provides an overview of the industry and its customers, states that ASIC will take regulatory action to address misconduct and will monitor the industry and risks to consumers.

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The eight key findings of the Report are as follows:

1. The industry is rapidly growing, with the customer base increasing from 400,000 in the 2016 Financial Year to 2 million, and the number of transactions per month growing from over 50,000 in April 2016 to 1.9 million in June 2018.[2] The total balance of outstanding debt from these arrangements grew from $476 million in April 2016 to $903 million by June 2018.[3] Total revenue has also increased from $32 million in the April to June 2016 quarter, to $78 million during the April to June 2016 quarter.[4]
2. The industry is diverse and evolving, with a variety of providers offering different arrangements. Consumers are able to choose from providers with different credit limits, late fees, repayment terms and account fees.
3. Some arrangements result in the price of goods being inflated, especially for high value purchases, goods with less transparent and ‘negotiable’ prices, and services.[5] ASIC found that this inflation may be misleading if not disclosed, as retailers are obscuring the actual cost of using the arrangement.[6] ASIC is currently reviewing the legal position of price inflation, and have taken action against providers for attempting to avoid the NCC by establishing artificial business models.[7]
4. Many users are relatively young, with 60% of users between the ages of 18 and 34.[8] Two in five users earn under $40,000 per annum, with 40% of these being students or part-time workers.[9]
5. These arrangements have influenced the spending habits of some consumers, with 86% of consumers planning to use the arrangement again[10] and over 50% stating they are spending more.[11]
6. Over-commitment can be a risk for some consumers, with one in six users having overdrawn, delayed other bill payments or borrowed additional money.[12] Interestingly, less than 10% of customers of five providers were charged late fees more than once on the same transaction in each quarter, compared with 19% of credit card holders with problematic debt.[13]
7. Providers take some steps to act fairly, but can do more. Two providers have voluntarily become members of the Australian Financial Complaints Authority (**AFCA**)[14] and engage in measures to help consumers make informed decisions about purchases and repayments.[15] ASIC considers providers should ensure consumers adequately understand the arrangement and make complaints and financial hardship services visible.[16]
8. Providers include potentially unfair terms in their contracts, including:

8.1 giving the provider a very broad unilateral discretion to vary the contract

8.2 providing a very broad range of circumstances where the customer will be regarded as in 'default'

8.3 limiting and excluding the liability of provider for goods and services supplied by the merchant

8.4 holding the consumer liable for unauthorised transactions, even when the providers is aware of or suspects the transaction may be unauthorised, and

8.5 very broadly indemnified the provider against losses, costs, liabilities and expenses.[17]

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[1] ASIC, *Report 600: Review of buy now pay later arrangements* (November 2018) https://download.asic.gov.au/media/4947835/rep600-published-28-11-2018.pdf 8.

[2] Ibid [25].

[3] Ibid [25].

[4] Ibid [27].

[5] Ibid [36].

[6] Ibid [37].

[7] Ibid [38].

[8] Ibid [39].

[9] Ibid [40].

[10] Ibid [42].

[11] Ibid [44].

[12] Ibid [49].

[13] Ibid [50].

[14] Ibid [63].

[15] Ibid [57].

[16] Ibid [61].

[17] Ibid [65].

[18] ASIC, 'UBS Securities pays $120,000 infringement notice' (Media Release 18-349MR) 20 November 2018 https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-349mr-ubs-securities-pays-120-000-infringement-notice/.