



National Legal Aid

Regulating Buy Now, Pay Later in Australia

Submission to Treasury Consultation

Consumer Credit Unit

Financial System Division

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Introduction and Recommendations

National Legal Aid (NLA), representing the directors of the eight Australian state and territory legal aid commissions (LACs), welcomes the opportunity to contribute to The Treasury's Options paper *Regulating Buy Now, Pay Later in Australia*, November 2022. The individual LACs are also generally referred to as Legal Aid.

NLA aims to ensure that the protection or assertion of the legal and related rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

This submission:

- is based on LAC experience
- includes illustrative client stories¹ such as:
 - a client who presented to a Legal Aid financial counsellor with multiple BNPL debts, and who was already experiencing acute financial hardship and rental stress;
 - a young client in custody who was unable to access a hardship arrangement through his BNPL provider as the provider only allowed customers to make contact online;
 - a client from regional Australia who was pressured to enter two substantial BNPL debts for solar panels that he did not need.
- makes the following recommendations:

RECOMMENDATIONS

Recommendation 1

NLA recommends that wage advance products be considered within the scope of Treasury's review.

Recommendation 2

NLA recommends that the interaction between BNPL and remedies under the Australian Consumer Law be considered in the scope of Treasury's review.

Recommendation 3

NLA recommends that Treasury adopt Additional Guiding Principles 1-5 of this submission in developing a BNPL regulatory framework.

Recommendation 4

NLA recommends that BNPL be regulated under the *National Consumer Credit Protection Act 2009*.

Recommendation 5

NLA recommends that an enforceable and independently monitored BNPL code of practice operate alongside regulation of BNPL under the *National Consumer Credit Protection Act 2009*.

¹ Names have been changed.

About the work of Australia's legal aid commissions

LACs are independent, statutory bodies established under respective state or territory legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance services to the public, with a particular focus on the needs of people who are economically and/or socially disadvantaged.

The work of LAC solicitors focusses on assisting the most vulnerable consumers in our community, including persons with disability and cognitive impairment, persons with low literacy, young persons, First Nations persons, Culturally and Linguistically Diverse persons, and consumers who are experiencing or have experienced domestic and family violence. Often people who need to access LAC services are experiencing multiple intersecting circumstances of disadvantage.

We also acknowledge research, which is consistent with the LAC experience, that indicates everyone is likely to experience vulnerable circumstances at some point in their lives, due to common, unavoidable and unpredictable life events such as illness, job loss, financial shocks, the death of a loved one and natural disaster.²

LACs with consumer protection units have extensive experience in providing specialist advice to clients as well as lawyers and financial counsellors in relation to mortgage stress, housing repossession, debt, contracts; loans; telecommunications and unsolicited consumer agreements.

Low-income consumers and consumers in circumstances of vulnerability make up a significant proportion of Buy now, pay later (BNPL) customers. A 2018 ASIC report found that 44% of BNPL users had income less than \$40,000.³ The use of BNPL products among consumers with low income and other points of disadvantage is reflected in our client work.

LAC casework experience shows that BNPL products as currently regulated disproportionately impact vulnerable and disadvantaged people, leading to poor consumer outcomes, exacerbating financial hardship, and further entrenching social disadvantage.

Typically, the following effects on vulnerable consumers are seen:

- (a) Vulnerable consumers become repeat or roll over BNPL borrowers. This process sees the consumer obtain a new BNPL loan as soon as their existing loan finishes or sees them obtaining multiple BNPL loans at the same time.
- (b) Vulnerable consumers are seen prioritising paying BNPL instead of rent, utilities, or other bills.
- (c) Vulnerable consumers are seen entering unaffordable or unsuitable BNPL contracts which place them into financial hardship.
- (d) Vulnerable consumers who have defaulted on unaffordable loans.
- (e) Further lenders approach the vulnerable consumers to obtain further BNPL loans, in situations where they are already in financial hardship.

² O'Neill, Emma, 'Exploring regulatory approaches to consumer vulnerability: A report for the Australian Energy Regulator', *Consumer Policy Research Centre*, 1 November 2019.

³ ASIC Report 600, 'Review of buy now pay later arrangements', November 2018, [40].

- (f) There are readily available BNPL loans meaning that vulnerable consumers are purchasing minor products on the BNPL loan such as coffee and takeaway.
- (g) Vulnerable consumers use BNPL to pay for household bills including utilities without accessing the utility provider's hardship arrangements prior.
- (h) Vulnerable consumers using BNPL to buy gift cards to allow them to purchase basic groceries.

Response to Options Paper questions

Question:

Can you provide examples of other areas of consumer harm or industry behaviour this paper has not discussed?

Wage advance products

Acknowledging the Options Paper is intended to address BNPL, a related concern is wage advance products which allow consumers to 'borrow' money before their next payday and have the potential to cause similar significant consumer harm.

Like BNPL, wage advance is a form of credit and should be regulated as such.

Examples of the kind of consumer harm that can arise from the use of wage advance products include:

- High fees of up to 5% of the amount borrowed;
- A tendency for consumers to overspend;
- Financial difficulty where a consumer signs up with several wage advance products at once.⁴

Recommendation 1 – That wage advance products be considered within the scope of Treasury's review.

Interaction between BNPL and remedies under the Australian Consumer Law

The Options Paper does not contemplate issues that may arise where a consumer uses BNPL to purchase goods that are later revealed to be faulty.

With an ordinary purchase, a consumer is entitled to a repair, refund or replacement under the Australian Consumer Law where the product is revealed to be faulty.

An issue may arise where a consumer purchases a product using BNPL, and a merchant then has to instruct the BNPL provider to affect a refund.

Recommendation 2 – That the interaction between BNPL and remedies under the Australian Consumer Law be considered in the scope of Treasury's review.

⁴ <https://moneysmart.gov.au/other-ways-to-borrow/pay-advance-services>

Question:

What are the main contributors to consumer harm? What evidence supports this view?

The main contributors to consumer harm are:

1. Unaffordable lending practices
2. Hardship assistance and complaints handling not fit for purpose
3. 'Frictionless' BNPL sign-up processes resulting in unwanted or inappropriate debts.

The evidence is found in reported client experience and the experience of legal, financial, and social support service providers working with clients since these products came on the market.

The issues experienced by LAC clients are very similar to those they experience when dealing with small amount credit contract providers.

LAC experience shows that consumer harm from BNPL products is most likely to arise in the following circumstances.

Unaffordable lending practices

Because BNPL products are not defined as 'credit' for the purpose of the *National Consumer Credit Protection Act 2009* (the Credit Act), BNPL providers are not bound by responsible lending obligations that require credit providers to conduct a suitability assessment to determine whether a loan is '*not unsuitable*' before lending money to a consumer.

The overriding purpose of the responsible lending provisions in the Credit Act is to ensure that consumers borrowing money from a credit provider have the capacity to repay the contract.⁵

Consumers who enter a BNPL agreement are not protected by these important provisions.

There is a risk of harm to consumers where BNPL providers conduct affordability assessments that do not properly consider the real-life circumstances of the consumer who has asked for credit.

For example, where a consumer applies for a BNPL product, providers are not obliged to take any steps to verify whether a consumer already has other BNPL products, other credit products or other significant debts or defaults.

Further, BNPL providers are not required to take any steps to check whether a proposed BNPL purchase is in line with the consumer's requirements and objectives.

Case study – Rose's story

Rose is a 42-year-old woman who was living alone in public housing. She was facing eviction due to substantial rental arrears of over \$10,000.

⁵ Explanatory Memorandum, *National Consumer Credit Protection Bill 2009* (Cth), 81.

She also had an \$18,000 car loan debt and a \$3,000 credit card debt.

Rose reached out to a Legal Aid Financial Counsellor⁶ who discovered that Rose also had four BNPL debts with different providers amounting to almost \$1,500.

Rose entered into these BNPL arrangements to pay for household essentials while already in considerable debt to her housing provider and other creditors.

Because BNPL is not regulated under the Credit Act, the BNPL providers were not required to assess whether Rose was able to afford to repay the BNPL debts or was only able to do so with substantial hardship.

Rose was evicted from her home and still has outstanding debts to BNPL providers.

Hardship and complaints handling arrangements are not fit for purpose

The Credit Act⁷ requires credit providers to consider and respond to a consumer's request for hardship assistance within set timeframes.

Credit providers are also required to be members of the Australian Financial Complaints Authority (AFCA), an external dispute resolution forum for consumers who are unable to reach satisfactory hardship arrangements with lenders.

These statutory consumer protections do not apply to BNPL providers. While many BNPL providers subscribe to the Buy Now Pay Later Code of Practice (BNPL Code), the BNPL Code is voluntary, is not enforceable and does not attract penalties for breaches. Further, the hardship obligations as contained in the BNPL Code are not as robust as those that exist under the Credit Act.

LAC experience highlights instances where BNPL providers' hardship and complaints handling arrangements are not fit for purpose and fail to adequately consider the real-life circumstances of our clients.

Case study – Bruno's story

Bruno is in custody and has intellectual disability. He has several debts, but no ability to pay them while he is in gaol.

Bruno told Legal Aid that he has a debt with a BNPL provider, but that he has not been able to contact the provider because it does not have a phone number.

Bruno says that the only timely way for him to make contact with a person or organisation on the outside whilst in gaol is by telephone.

The BNPL provider only receives requests for hardship assistance via an online form, meaning Bruno had no way of applying for hardship.

⁶ Legal Aid Commissions either have inhouse financial counsellors and/or social support workers, and/or partner with financial counsellors and/or social support workers as appropriate.

⁷ Schedule 1 to the *National Consumer Credit Protection Act 2009*.

In Bruno's case, the BNPL provider's hardship processes were inadequate to address the specific needs of a particularly vulnerable consumer cohort – a person in custody living with intellectual disability.

In the next case study, a BNPL provider's hardship arrangement was not sufficiently tailored to our client's unique circumstances and vulnerabilities.

Case study – Saha's story

Saha spoke to Legal Aid about her multiple BNPL debts while completing an in-patient drug and alcohol rehabilitation program. One of the BNPL debts had been referred to a debt collector who was contacting Saha regularly by email.

Saha was planning to spend 6 months in the in-patient program. Saha tried to tell the BNPL providers that she would not have an income for at least 6 months so she could not repay the debts for that time. With Legal Aid's advocacy, the providers agreed to pause collections on the debts, but only for 3 months.

This was not a fitting hardship arrangement for Saha given her health circumstances. In our experience, a regulated credit provider would have been more likely to agree to a 6 month moratorium on collection activity in these circumstances.

'Frictionless' BNPL sign-up processes resulting in unwanted or inappropriate debts

LAC experience shows that easy or 'frictionless' BNPL sign-up processes can lead to negative outcomes and significant consumer harm, including:

- Debts for unwanted and unaffordable products;
- Pressure selling to vulnerable consumers; and
- Exploitation of BNPL systems to a consumer's detriment.

Because BNPL is increasingly being used to purchase medium to high-cost goods, the consequences of being left with an unaffordable debt can be significant, particularly where the consumer did not want or need the supplied goods in the first place.

Case study – Jim's story

Jim lives in regional Australia. In 2020, Jim received unsolicited contact from a solar panel provider who told him that he could buy solar panels using BNPL. Jim saw how easy it was to sign up so agreed, and had the solar panels installed. The total BNPL contract amount was around \$10,000.

Several months later, Jim was approached by a second solar panel provider who told him that his existing solar panels were faulty and that they could install new ones at no charge.

The provider asked Jim to sign something, which he did. He later found out that he had entered into another BNPL contract for a second set of solar panels.

He now owes two separate BNPL providers a total of around \$20,000

Young people and people with low literacy may be especially at risk of harm from the 'frictionless' BNPL sign-up processes, as is demonstrated in the case studies below.

Case study – Juno's story

Juno is a young person who is unable to read or write.

Juno signed up for a BNPL contract to help out a friend, Alex. Alex told Juno that she needed several thousand dollars.

Alex organised the contract with the BNPL provider and put Juno on the phone to the provider briefly at the end of the process to confirm the contract. This was Juno's only contact with the provider, Juno wasn't involved otherwise in the application process.

Juno was working at the time of taking out the contract, but now is receiving a pension from Centrelink.

Juno has not received a financial benefit from the contract. The agreement was that Alex would pay the provider, not Juno.

Juno approached Legal Aid when she was contacted by the provider to pay the debt.

Case study – Arun's story

Arun is experiencing financial hardship. He wanted to take out a loan with a bank for \$10,000 but was refused because he has a poor credit history.

Arun is undertaking an apprenticeship. Arun's boss became aware that Arun needed some money. The boss organised a BNPL contract for \$10,000 by making Arun a fake client of his business. Arun was the borrower, the boss' business was the merchant and the lender was the BNPL provider.

The \$10,000 was paid to the boss, rather than Arun although Arun's name is on the contract as the borrower. The boss gave Arun \$7,000 and promised to pay the rest later. The boss has still not given Arun the remaining \$3,000.

Arun found out recently that he owes more than \$11,000 to the provider. Arun's hardship has been significantly exacerbated by this arrangement.

'Frictionless' processes and domestic violence

Economic abuse is a common form of domestic and family violence in which perpetrators seek to control a victim's money, finances, and ability to access economic resources. This form of domestic and family violence sometimes involves a perpetrator using the personal details of a victim to take out a loan or credit card either jointly, or in the victim's name alone.

As with other credit products, LAC experience shows that BNPL arrangements are vulnerable to exploitation by perpetrators of domestic and family violence relationships.

The prevalence of BNPL contracts in the context of family violence has been identified as a growing trend.

In a 2022 report, Good Shepherd notes that BNPL products are liable to financial abuse because accounts can be easily opened and operated online from a victim's phone using basic personal information.⁸

The ease with which a person can apply for a BNPL contract and the minimal checks at the commencement of a BNPL contract can be particularly impactful in circumstances of domestic and family violence, as is demonstrated in Linh's case study below.

Case study – Linh's story

Linh came to Legal Aid for help after she received a Statement of Claim from a debt recovery firm on behalf of a BNPL provider in relation to an outstanding debt of around \$5,000. The provider told Linh that the BNPL contract was taken out to purchase some exercise equipment.

Linh told us that she was unaware of the account and had never entered into a BNPL contract in her life.

Linh had just left a violent relationship in which her ex-partner was physically and economically abusive. She was experiencing significant financial hardship.

After making further enquiries, Legal Aid discovered that Linh's ex-partner had applied for a BNPL product online using Linh's personal details without her knowledge and had the entire benefit of the exercise equipment, leaving Linh to deal with the debt.

'Frictionless' processes support BNPL products being used to pay for essentials

Some LAC clients have used BNPL as a means of paying for essentials.

In Rose's story (highlighted earlier in this submission), Rose was already in significant rental arrears and had debts with other credit providers when she took out several BNPL debts.

Rose told Legal Aid's financial counsellor that she took out the BNPL contracts to pay for basic household essentials, like food.

Consumers who need finance for essentials would be better directed to financial counselling and social support services or No Interest Loans (NILS).

⁸ Good Shepherd report, 'Safety net for sale: The role of Buy Now Pay Later in exploiting financial vulnerability', November 2022, p.14.

Question:

Are the guiding principles appropriate and fit for purpose to inform the development of a BNPL regulatory framework? What other factors should be considered?

The Guiding Principles are broadly appropriate and fit for purpose to inform the development of a BNPL regulatory framework, subject to our comments below.

Recommendation 3 – That Treasury adopt Additional Guiding Principles 1 – 5 of this submission in developing a BNPL regulatory framework.

Additional Guiding Principle 1 – BNPL is credit

BNPL should be seen as credit and regulated as such.

Principles for informing the development of a BNPL regulatory framework should align with the original aims of the Credit Act.⁹

Additional Guiding Principle 2 – recognise the universal availability of BNPL products

Improving consumer protections by addressing the main instances of consumer harm ought to be seen in the context of the universal availability of BNPL products in the marketplace.

The normalisation of BNPL combined with the ‘frictionless’ sign-up process, means strong consumer protections are needed to reduce the risk of consumer harm, particularly for vulnerable and disadvantaged consumers.

Additional Guiding Principle 3 – flexibility in regulatory framework should not come at the expense of consumers

Any flexibility in the regulatory framework to allow for new BNPL products, providers and models should not come at the expense of protecting consumers from harm and should not dilute the impact and enforceability of the regulatory regime.

Additional Guiding Principle 4 – focus on vulnerable consumers

A BNPL regulatory framework should directly address the needs of vulnerable and disadvantaged consumers and should aim to improve industry conduct over time, recognising the fact that vulnerability and disadvantage are ever evolving concepts.¹⁰

The guiding principles should emphasise the importance of responsible lending practices among BNPL providers with respect to vulnerable and disadvantaged consumers.

Additional Guiding Principle 5 – consistent regulation

A BNPL regulatory framework should be consistent, accessible, and easy to understand for both consumers and BNPL providers.

⁹ As contained in the Explanatory Memorandum to the National Consumer Credit Protection Bill 2009 (Cth).

¹⁰ Productivity Commission Inquiry Report No. 45, ‘Review of Australia’s Consumer Policy Framework’, 30 April 2008, p.301.

Question:

Of the three options below, which option do you think is most appropriate? Would you change any aspects of that option?

NLA supports Option 3: Regulation of BNPL under the Credit Act. BNPL is credit, and ought to be regulated as such.

Recommendation 4 – That BNPL be regulated under the Credit Act (Option 3).

Client stories detailed earlier in this submission highlight the poor consumer outcomes that arise when a consumer enters into a BNPL contract that they cannot afford, or that is inappropriate for their needs.

Regardless of the legal status of a debt, the outcome for a vulnerable consumer is the same: the consumer owes money to a creditor that the consumer cannot afford to pay or can only afford to pay with acute financial hardship. In our view much of the harm experienced by consumers in our practice, is similar to the harm experienced by consumers using small amount credit products. In that regard, the regulatory response also ought to be similar.

Currently, BNPL products avoid regulation under the Credit Act via a number of exemptions in the Credit Act.

BNPL providers are exempt from regulation under the Credit Act where they:

- Do not provide a *charge* for credit (s5 National Credit Code NCC Schedule 1 to the Credit Act);
- Provide *short term credit* (s6(1) NCC); and/or
- Provide a *continuing credit contract* (s6(5) NCC).

To prevent ongoing consumer harm, the Credit Act should be amended to prevent BNPL providers from relying on these exemptions to provide unregulated credit to consumers.

Responsible lending obligations

Regulating BNPL under the existing Credit Act would mean that BNPL providers would be required to comply with the responsible lending obligations imposed on lenders under Chapter 3 of the Credit Act.

These obligations represent an important safeguard for consumers. As BNPL is essentially no different from other forms of credit, BNPL providers should be subject to the same responsible lending obligations imposed on other credit providers.

If BNPL providers were regulated under the Credit Act, they would be required to make an assessment as to whether a BNPL contract is unsuitable for a particular consumer by:

- Making reasonable inquiries about the consumer's financial situation;
- Taking reasonable steps to verify the consumer's financial situation; and

- Making reasonable inquiries about the consumer's requirements and objectives.

BNPL providers are not currently required to check or verify whether a consumer applying for a BNPL product also has other BNPL debts, credit card debts or any other credit products.

This means that for a consumer who wants to purchase a solar panel system using BNPL, the BNPL provider is not required to check that the instalments are affordable by, for example, checking whether the consumer has any current credit card or personal loan debts that they are struggling to pay.

New Zealand's BNPL discussion paper¹¹ notes that consumers with both BNPL and credit cards are more likely to be in arrears with their credit card debt compared to consumers who only hold credit cards.

Requiring BNPL providers to undergo responsible lending checks required under the Credit Act would help avoid the kinds of negative consumer outcomes illustrated in our client's stories detailed earlier in this submission.

It is important that regulation of BNPL retains flexibility to account for the vast diversity of transactions for which BNPL contracts are entered into. For our clients, even small amounts of debt can cause significant financial distress.

ASIC's Regulatory Guide 209 makes clear that the kinds of inquiries that a credit provider is required to undertake for a particular consumer will vary and are scalable depending on a range of different circumstances relevant to the particular application.

The existing system of responsible lending in the Credit Act is therefore well equipped to deal with the many and varied BNPL contracts that consumers with a range of different characteristics enter into.

Independent BNPL credit reporting data base

Treasury's options paper notes that BNPL providers in New Zealand have established a credit reporting-like BNPL database to address concerns of vulnerable consumers signing up to multiple BNPL accounts and suggesting that a similar approach could be progressed in Australia.

BNPL providers in New Zealand have established a credit reporting-like BNPL database to address the concerns of vulnerable consumers signing up to multiple BNPL accounts. This database holds information about BNPL consumer defaults and is designed to be used by BNPL providers to check if prospective consumers are not already in default with another BNPL product. A similar approach could be progressed in Australia noting that this would not be the same as participating in the comprehensive credit reporting regime. Further, positive credit information would not be reported, and the data would not be available to non-BNPL lenders, meaning the impact of the database using this approach may be limited.

¹¹ New Zealand Government, Ministry of Business, Innovation & Employment, [Buy-Now, Pay-Later: Understanding the triggers of financial hardship and possible options to address them](#), Discussion Document November 2021, 15.

There was a similar proposal advanced by small amount credit providers some years ago to save costs in accessing credit reporting.

Small amount credit providers had reported in the past that the cost to access information on credit reports was a real issue for them given the amount of credit extended to consumers and was one of the reasons why they chose not to participate in credit reporting.

It is considered that the better solution is for government to work with the industry to make access to credit reporting economical, and not to create another scheme. Rather than the development of a BNPL credit reporting data base, NLA favours the adoption of a holistic approach to conducting an affordability assessment. Such an approach could be achieved by regulating BNPL as credit and requiring providers to conduct responsible lending checks that would capture a consumer's true financial position (including the existence of other BNPL debts).

Code operating alongside legislation

Recommendation 5 – An enforceable and independently monitored BNPL code of practice operate alongside regulation of BNPL under the Credit Act.

A BNPL code of practice should sit alongside and compliment regulation of BNPL under the Credit Act.

In LAC experience, industry codes can be effective where they sit alongside legislation and offer consumer protections that go above and beyond obligations under law.

Any BNPL code should be enforceable and independently monitored.

Linked credit contracts

For regulation of BNPL under the Credit Act to be effective, it is important that the linked credit provider provisions are strengthened. In LAC experience, there are many BNPL contracts which are used to buy goods such as a solar hot water system or other basic household goods and the issues are with the product rather than the financing arrangement.

To protect consumers, it is important that the “linked credit provider” provisions of the National Credit Code are improved so that returning the goods to the merchant, for reasons including reliance on any of the Australian Consumer Law provisions, will automatically cancel the arrangement with the BNPL provider. Cancellation of the arrangement would require the BNPL provider to repay the customer any amounts paid to it for the purchase of the product.

Question:

What do you think are the issues with the other two options?

As indicated above, there ought to be consistency in the regulation of credit products.

Option 1: Strengthening the BNPL Industry Code plus an affordability test

NLA does not support Option 1, as this approach would continue to see BNPL products exempt from regulation under the Credit Act.

Strengthening the BNPL Code will not adequately address issues causing consumer harm that are detailed earlier in this submission.

Firstly, the BNPL Code is not law, is voluntary, and is unenforceable. It therefore has limited utility for consumers seeking redress for poor conduct by BNPL providers.

This approach would be ineffective in preventing consumer harm. Under Option 1, only certain provisions of the BNPL Code would be enforceable on application by industry and subject to approval by ASIC. Self-regulation will not achieve sufficient protection for consumers.

Secondly, provisions in the BNPL Code are problematic in a number of respects and are unlikely to be improved by industry alone.

The BNPL Code's suitability assessment process¹² is inadequate and not fit-for-purpose in preventing consumer harm.

For example, the BNPL Code:

- Does not require a BNPL provider to make inquiries about a consumer's requirements and objectives, leaving consumers vulnerable to pressure selling and entering into agreements for products that the consumer does not want;
- Only requires providers to conduct a credit check in determining the suitability of a BNPL contract. A credit check alone is unlikely to reveal the real-life circumstances of a consumer's financial situation and will lead to poor lending practices.
- Contains fewer safeguards for consumers entering into BNPL contracts for transactions less than \$2000. This does not recognise the profound financial impact of even a relatively small debt for some financially vulnerable consumers.

Finally, a dual regulatory regime in which BNPL products are regulated separately from other forms of credit is confusing for both consumers and BNPL providers.

Even if the BNPL Code were to be strengthened, poor consumer outcomes are likely to continue.

¹² AFIA Buy Now Pay Later Code of Practice, 1 March 2022, p. 6.

To ensure that consumers, and especially vulnerable and disadvantaged consumers, are protected from financial harm, BNPL must be regulated under the Credit Act alongside other credit products.

Option 2: Limited BNPL regulation under the Credit Act, including licensing and scalable unsuitability test

NLA does not support Option 2. A tailored version of responsible lending in the Credit Act for BNPL providers will not adequately protect consumers from harm.

Under Option 2, requirements such as verifying a person's financial documents and checking that BNPL credit aligns with a person's needs and objectives could be removed.

For the reasons explained earlier in this submission, these checks represent important consumer safeguards and should apply to BNPL providers in the same way that they apply to other forms of credit.

We also note that the existing responsible lending regime under the Credit Act is already scalable and flexible, as outlined in ASIC Regulatory Guide 209.

Further, a system where BNPL products are treated differently to other forms of credit under the Credit Act is likely to be confusing and complicated for both providers and consumers.

Recommendation 7.3 of the Financial Services Royal Commission says that *'exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated'*.¹³

It is not in the best interests of consumers to create a new, potentially confusing and complex regulatory framework for BNPL.

A carve out in the Credit Act for BNPL products would represent such an exception and should be avoided.

The existing regulatory regime in the Credit Act should apply to BNPL products as it does to other forms of credit.

Other concerns

Characterisation of current limitations of accessing credit reporting by BNPL providers

NLA would like to clarify the following information that has been provided in the Options paper relating to the accessing of credit reporting by BNPL providers:

For example, consumers may find it harder to demonstrate they have good repayment history if BNPL providers cannot participate in comprehensive credit reporting, impacting their ability to

¹³ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, p.42.

access credit in the future (e.g., when applying for a mortgage).

BNPL providers can access most comprehensive credit reporting data and provide data to the credit reporting agency if they are a member of the Credit Reporting Agency and a member of an external dispute resolution EDR scheme such as AFCA.

BNPL providers cannot however access Repayment History information RHI which is one piece of information that is available under the comprehensive credit reporting regime. The reason a BNPL provider cannot access that information is because they do not have responsible lending obligations and hold an Australian Credit Licence. If BNPL providers are regulated by the Credit Act they will be able to access all comprehensive credit reporting data.

Similarly, BNPL providers (and other lenders) cannot see debts from other lenders, including other BNPL providers, as well as payday loans and consumer leases, limiting their ability to conduct credit assessments using this data, and appropriately provide credit to consumers. Australia's credit reporting framework is required by law to be reviewed and a report provided to the relevant ministers by 1 October 2024. This review could consider these and other matters.

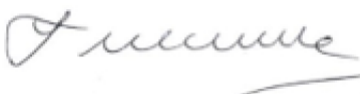
All lenders who are members of a credit reporting agency and have membership of an approved EDR scheme can see what accounts a person has with every lender who reports to the Credit reporting agency including whom the person owes money to, the amount and type of credit lent and whether the person is in default. The only information that they cannot access is Repayment history information if the BNPL does not hold an ACL.

Conclusion

Thank you for the opportunity to provide a submission to this consultation.

Should you require any further information from us please be in touch with the NLA Secretariat on 03 6236 3813 or nla@legalaid.tas.gov.au

Yours sincerely,



LOUISE GLANVILLE
Chair, National Legal Aid