

**Submission by Kimberley Community Legal Services Inc. to the Treasury Options Paper on
Regulating Buy Now, Pay Later in Australia**

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KCLS contacts for this submission:

Lauren Reed

Financial Counsellor & Solicitor

PO Box 622, Kununurra WA 6743

T: (08) 9169 3100

E: Lauren_reed@kcls.org.au

Lachlan Withnall

Acting Principal Solicitor (East Kimberley)

PO Box 622 Kununurra WA 6743

T: (08) 9169 3100

E: Lachlan_withnall@kcls.org.au

We acknowledge that we work on Aboriginal land, traditionally the home of the Yawuru people of the West Kimberley and Miriwoong people of the East Kimberley. We pay respect to all elders past and present.

Contents

<i>Introduction</i>	3
<i>Harms caused by BNPL</i>	4
RLOs needed to improve financial literacy and wellbeing	4
RLOs needed as BNPL products disproportionately impact the most vulnerable consumers.....	5
<i>Option 1 – Strengthening the BNPL Industry Code plus an affordability test</i>	7
<i>Option 2 – Limited BNPL regulation under the Credit Act, including licensing and scalable unsuitability test</i>	9
<i>Option 3 – Regulation of BNPL under the Credit Act</i>	10
<i>Conclusion</i>	12
<i>Appendix 1: Alex’s story</i>	13

Introduction

1. Kimberley Community Legal Services Inc. ('KCLS') is a non-profit community legal centre based in Kununurra and Broome, servicing financially disadvantaged persons throughout the Kimberley region of Western Australia. We provide legal advice in most civil law matters, including family law, child protection, tenancy, credit and debt, criminal injuries compensation and redress, as well as tenancy and family violence social support, financial counselling, and law reform advocacy. We conduct regular outreach to Halls Creek, Fitzroy Crossing, Derby, Wyndham and more than a dozen remote communities in the Kimberley.
2. Aboriginal and Torres Strait Islander people make up 41.1% of the population in the Kimberley region, compared to 3.3% of the Western Australia population.¹ 89.1% of our clients are Aboriginal or Torres Strait Islander and 88.5% are living in financial poverty.²
3. We believe the Government can take steps to close the gap by ensuring regulatory protection is offered in industries where the most vulnerable consumers, specifically Aboriginal consumers residing in regional areas, are known to be at risk of exploitation. Buy-Now-Pay-Later ('BNPL') products in their current unregulated form have caused immense harm to our clients, who have been left overcommitted and further entrenched in a cycle of financial disadvantage.
4. Accordingly, this submission recommends the implementation of Option 3, regulation of BNPL under the Credit Act with ordinary Responsible Lending Obligations ('RLOs'). Where the other Options create complexity, offer sub-par consumer protection and risk preferencing industry interests at the expense of vulnerable consumers, Option 3 ensures consumers are protected consistently across the financial services industry.

¹ Australian Bureau of Statistics, *Kimberley 2021 Census QuickStats* (online, 2021) <<https://www.abs.gov.au/census/find-census-data/quickstats/2021/51001>>.

² Kimberley Community Legal Services, *Annual Report 2021-22* (Report, 2022) 7.

5. This submission references a case study of a KCLS client, Alex³ found at Appendix 1. This case study is a good representation of many of KCLS' financial counselling clients. By sharing Alex's story, we hope to demonstrate the harm BNPL is causing on the ground and encourage reflection on the significant improvement to Alex's financial wellbeing if BNPL providers were regulated under the Credit Act.

Harms caused by BNPL

RLOs needed to improve financial literacy and wellbeing

6. It is one thing to seek to protect consumers from harm, and another to actively support the capacity of vulnerable consumers to achieve financial wellbeing. We propose the guiding principles consider this distinction. Regulation should seek to create a foundation on which consumers can access the right support services and resources and build their financial literacy and end the cycle of disadvantage.
7. There are large disparities in financial literacy among Australian consumers, and there are many reasons a consumer may be experiencing financial disadvantage.
8. For many Aboriginal people, the concept of money as a medium of economic exchange is new. It only became mandatory to pay Aboriginal people wages in 1968 – 55 years ago. Before this time, many Aboriginal people in the Kimberley worked on cattle stations in exchange for tea, tobacco and rations. When wages for Aboriginal people were introduced, station owners evicted Aboriginal workers and their families from the stations and by extension, from their traditional lands. The end result was a sudden and devastating fracturing of family groups and large congregations of 'squalid refugee camps at Fitzroy Crossing, Halls Creek, Broome and Derby'.⁴

³ This case study has been de-identified.

⁴ Fiona Skyring, 'Low Wages, Low Rents, and Pension Cheques: The Introduction of Equal Wages in the Kimberley, 1968-1969' in Natasha Fijn, Ian Keen, Christopher Lloyd and Michael Pickering (eds), *Indigenous Participation in Australian Economies II* (Australian National University Press, 2012) 153.

9. When we consider how much of our financial literacy is gained through observation and experience within our family group, we can appreciate the relevance of this history to understanding the particular disadvantage of KCLS' client base. Our Aboriginal clients have disproportionately low financial literacy which increases their vulnerability to exploitation, overcommitment, and debt cycles.⁵ These issues are exacerbated by remoteness; people in regional areas are more likely to be in BNPL-related debt than those living in an urban area.⁶
10. If vulnerable consumers, like Alex, are continually exploited by poor and unregulated business practices within the financial services industry, we threaten overall consumer confidence and reduce the potential of individuals to build intergenerational financial wellbeing.
11. By implementing Option 3 and regulating BNPL in the same way other credit products are regulated, the Government will protect consumers from harm and create the necessary information symmetry to support financial literacy.

RLOs needed as BNPL products disproportionately impact the most vulnerable consumers

12. We encourage the government to consider the impact of regulation on the most financially disadvantaged consumers, who are already and will continue to be disproportionately impacted by BNPL products that are not subject to RLOs.
13. As it currently stands, BNPL 'has the impact of increasing the Gap on First Nations communities'.⁷ Additionally, 'low and inadequate incomes appear to be driving BNPL use'.⁸ Care Inc reported in 2019 that the BNPL business model 'encourages people with

⁵ See also Mark Holden, 'Afterthoughts on the Financial Services Royal Commission and Aboriginal Communities', *Community Legal Centres NSW* (Blog Post, July 2019) <<https://www.clcnsw.org.au/afterthoughts-financial-services-royal-commission-and-aboriginal-communities>>.

⁶ NSW Council of Social Service, 'New Research into Young People and Buy Now Pay Later Products Reveals Largely Positive Experience, But Questions Remain' (Media Release, 17 September 2021).

⁷ Consumer Action Law Centre, 'Buy Now Pay Later Changes Must Go All the Way, Consumer Groups Say' (Media Release, 21 November 2022).

⁸ *Ibid.*

limited financial capacity to purchase goods that they cannot afford upfront, increasing the likelihood of future financial stress'.⁹

14. BNPL products have a regressive fee structure, meaning the effective interest rate charged increases the less a consumer owes.¹⁰
15. Despite being marketed as a low- or no-cost credit alternative, late and other hidden fees (including account fees) make the cost of BNPL credit extraordinarily expensive. In Alex's case, if they were to continue accruing \$20 to \$50 in late fees per fortnight, late fees alone could cost anywhere between \$520 to \$1300 annually. On a \$6000 credit limit this represents an annual interest of 8.6% - 21.6%.
16. Late fees earned Afterpay \$87.3 million in 2020-21, representing an increase of 27% from the previous financial year.¹¹ ASIC estimates that between 9-15% of BNPL transactions each month incur late fees, and BNPL revenue from late fees between June 2016-June 2019 represented 15% of the industry's total revenue.¹² To assert that providers have an interest in avoiding late payments is untrue. In reality, 'BNPL providers profit from high effective interest rates disguised as late payment and account-keeping fees'.¹³
17. The harm caused by high effective interest rates is compounded when consumers take out additional debt to pay for BNPL debt, or have multiple BNPL accounts: for example, 55% of BNPL users have used at least 2 different BNPL arrangements in the last 6 months,¹⁴ and 22% of users rely on credit cards to pay for BNPL debt.¹⁵

⁹ Senate Economics References Committee, Parliament of Australia, *Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (Final Report, 22 February 2019), quoting Care Inc, Submission No 11 to Senate Economics Reference Committee, *Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (October 2018) 4.

¹⁰ Lien Duong, Grantley Taylor and Baban Eulaiwi, *Comparative Analysis of Credit Card Interest Rates vs BNPL Fees in the Consumer Credit Market* (Report, July 2022).

¹¹ Afterpay, *Unlock: Afterpay Limited FY21 Annual Report* (Report, 2021).

¹² ASIC, *Buy Now Pay Later: An Industry Update* (Report No 672, November 2020).

¹³ Good Shepherd, *Safety Net for Sale: The Role of Buy Now Pay Later in Exploiting Financial Vulnerability* (Report, November 2022).

¹⁴ ASIC, *Buy Now Pay Later: An Industry Update* (Report No 672, November 2020).

¹⁵ NSW Council of Social Service, 'New Research into Young People and Buy Now Pay Later Products Reveals Largely Positive Experience, But Questions Remain' (Media Release, 17 September 2021).

18. Below is an example of a payment schedule for 2 purchases made in a 3-week period. In our experience, clients are more likely to miss payments where they fall due outside of a pay week. Due to the fee structure of BNPL products, a payment will fall due outside a pay week where the purchase has been made outside a pay week (as quarterly payments are due fortnightly thereafter). Logically, consumers who are relying on BNPL for every day purchases are more likely to rely on BNPL outside of their pay week. This results in an ongoing cycle of fee accumulation.

No.	Date of purchase + First payment due	Second payment due	Third payment due	Fourth payment due
1	14 July (pay day)	28 July (pay day)	11 August (pay day)	25 August (pay day)
2	3 August	17 August <i>(next pay day is 25 August - likely to incur late fees)</i>	31 August <i>(next pay day is 8 September - likely to incur late fees)</i>	14 September <i>(next pay day is 22 September - likely to incur late fees)</i>

19. We can see that the risks posed by BNPL have the greatest impact on people who are already experiencing financial hardship. To fail to properly regulate BNPL products by excusing providers from RLOs, the Government risks pushing these individuals into further hardship as living costs increase.

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

20. We do not support Option 1 for reasons outlined below:

- (a) History has demonstrated industry self-regulation alone is inadequate at protecting consumers. Self-regulation should complement, not substitute, government regulation. Government regulation should seek to protect the most vulnerable consumers in the market.

- (b) The current BNPL Industry Code ('the Code') has failed to protect consumers, owing to its lack of enforceability, optional nature, and limited requirements. As identified in the Banking Royal Commission, industry codes are limited by a lack of resources for effective monitoring and enforcement of compliance, limited consequences for breaches, and inadequate standards set by the code.¹⁶ It follows that merely strengthening the provisions of the Code will not sufficiently remedy its inherent shortcomings.
- (c) Amending the Code to identify some provisions as enforceable by ASIC and some unenforceable will lead to unnecessary complexity and poor compliance with the unenforceable provisions.
- (d) Breaches of unenforceable provisions will not attract sufficient penalties to produce an adequate deterrent effect, so 'systemic breaches of consumer protections that put many people at risk' will continue.¹⁷ A 'naming and shaming' regime, as exists now, is clearly ineffective. Naming and shaming 'sets an inappropriately low bar for a growing industry'.¹⁸
- (e) To date, only 9 of 16 Australian BNPL providers are signatory to the Code,¹⁹ indicating limited industry confidence in its suitability.
- (f) Self-regulation is more appropriate in circumstances where there is 'no strong public interest concern', where the problem is low risk (e.g., where 'the consequences of self-regulation failing ... are small'), and where 'there is an incentive for institutions or groups

¹⁶ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1 ch 2.6.

¹⁷ Good Shepherd, *Safety Net for Sale: The Role of Buy Now Pay Later in Exploiting Financial Vulnerability* (Report, November 2022).

¹⁸ Consumer Action Law Centre, 'Buy Now Pay Later Sector Must Be Regulated By Government Not Itself' (Media Release, 24 February 2021).

¹⁹ Letter from Financial Counselling Australia et al to Parliament of Australia, 12 May 2022 <<https://www.financialcounsellingaustralia.org.au/docs/open-letter-making-bnpl-safer/>>.

to develop and comply with self-regulating arrangements'.²⁰ None of these circumstances are present in the BNPL market.

- (g) While self-regulation plays an important role in setting industry standards 'particularly in areas such as ethics',²¹ they alone are seldom effective at achieving the goals of regulation: 'maximising efficiency, promoting stability and consumer protection'.²² Where harm to vulnerable consumers is systemic, more must be done.

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

21. We do not support Option 2 for reasons outlined below:

- (a) As above, this option cannot provide adequate protection to consumers, will lead to unnecessary complexity within the regulatory framework and continues to place undue reliance on the Code. Most importantly, the information asymmetry created will reduce the ability of individuals with low financial literacy to understand their rights and responsibilities within the financial services industry.
- (b) BNPL's exemption from the RLOs is one of the primary drivers of consumer harm. There is no persuasive reason BNPL should be treated differently to other credit products, when it '...is credit, plain and simple, so it needs to be regulated in the same way as other credit products to provide people with adequate safeguards'.²³ Voluntary engagement with the credit reporting framework and less stringent affordability checks will exacerbate

²⁰ Ray Finkelstein and Rodney Tiffen, 'When Does Press Self-Regulation Work?' (2015) 38 *Melbourne University Law Review* 944, citing Taskforce on Industry Self-Regulation, 'Industry Self-Regulation in Consumer Markets' (Final Report, Treasury, 1 August 2000).

²¹ Gail Pearson, 'Business Self-Regulation' (2012) 20(1) *Australian Journal of Administrative Law* 34, quoting Greg Medcraft, 'Address to the Abacus Chairs and CEO's Forum' (Speech, 30 August 2011) 5.

²² Ibid, citing Pamela Hanrahan, 'Improving the Process of Change in Australian Financial Sector Regulation' (2008) 27 *Economic Papers* 6.

²³ Consumer Action Law Centre, 'Buy Now Pay Later Changes Must Go All the Way, Consumer Groups Say' (Media Release, 21 November 2022).

consumer harm, as BNPL users will continue to overcommit without immediate consequence.

- (c) Giving BNPL a more lenient set of rules signals to consumers that it is less risky than other credit – a misunderstanding that has already caused significant harm.
- (d) Consumer protection should be the key guiding principle in the development of financial market regulation.²⁴ Option 2 represents an inappropriate preferencing of cost-saving for multi-million-dollar firms over the interests of vulnerable Australians. Requiring full compliance with the *Credit Act* would not appreciably detriment BNPL providers. These organisations are well-placed to adapt their service offering to incorporate regulatory requirements.

Option 3 – Regulation of BNPL under the Credit Act

22. In addition to reasons already outlined, we base our support of Option 3 on the following:

- (a) The Credit Act has been instrumental in bolstering consumer confidence in the Australian financial services industry by providing an effective consumer protection mechanism. This has in turn fostered a consumer protection focused culture within many financial service organisations, who have remained profitable within the framework of RLO's.
- (b) 87% of Australians believe BNPL companies should be bound by the same credit check requirements as other credit providers.²⁵
- (c) BNPL is a form of credit and should be regulated as such. It carries the same risks as any other credit product and carries a momentum which threatens to disrupt confidence in

²⁴ Pamela Hanrahan, 'Improving the Process of Change in Australian Financial Sector Regulation' (2008) 27 *Economic Papers* 6.

²⁵ CHOICE, 'Global Alliance Calls for Regulation of Harmful Buy Now, Pay Later Industry' (Media Release, March 2022). See also Consumer Law Action Centre (n 38).

the market. Requiring compliance with the *Credit Act* will bring BNPL in line with competing products, fostering better consumer outcomes, innovation, and competition.²⁶

- (d) It should not be onerous for BNPL providers to comply with regulation under the credit act. Some BNPL providers already conduct formal ID and credit checks to determine a consumer's spending limit.²⁷ ZipPay Chief Operations Officer Peter Gray has stated compliance with the *Credit Act* 'would have a very minimal impact on our day-to-day operation' as they're 'already undertaking the majority of the things we would need to do to comply'.²⁸ Responsible lending practices should be mandated for all industry members.
- (e) Requiring BNPL providers to hold an Australian Credit Licence would represent an opportunity for them to expand into other markets and offer complementary products.²⁹
- (f) In 2021, the UK's Financial Conduct Authority released a report into the unsecured credit market which recommended that 'BNPL products which are currently exempt from regulation should be brought within the regulatory perimeter as a matter of urgency' due to the 'significant potential for consumer harm'.³⁰ The Woolard Review found that such regulation 'is appropriate to ensure that the product develops in a way which is beneficial to the end consumer'.³¹

²⁶ Rod Sims, 'Protecting and Promoting Competition in Australia' (Speech, Law Council of Australia Competition and Consumer Workshop 2021, 27 August 2021).

²⁷ Nassim Khadem, 'Australians Ditch Credit Cards as Millennials Turn to "Buy Now, Pay Later" Players Like Afterpay, Zip', ABC News (online, 17 August 2020) <<https://www.abc.net.au/news/2020-08-17/credit-cards-ditched-millennials-buy-now-pay-later-coronavirus/12534560>>, quoting Consumer Action Law Centre chief executive Gerard Brody.

²⁸ Senate Economics References Committee, Parliament of Australia, *Credit and Financial Services Targeted at Australians at Risk of Financial Hardship* (Final Report, 22 February 2019), quoting Evidence to Senate Economics References Committee, Parliament of Australia, Canberra, 22 January 2019, 15 (Peter Gray, Co-Founder and Chief Operations Officer of ZipCo).

²⁹ See, eg, Tom Richardson, 'CBA to Fire Up Competition in Buy Now, Pay Later', *Australian Financial Review* (online, 12 July 2021) <<https://www.afr.com/markets/equitymarkets/cba-to-fire-up-competition-in-buy-now-pay-later-20210712-p588ve>>, quoted in Mike Callaghan, *Independent Review of the Banking Code of Practice 2021* (Final Report, November 2021).

³⁰ Financial Conduct Authority UK, 'FCA Publishes Review into Unsecured Credit Market' (Media Release, 2 February 2021), citing Financial Conduct Authority UK, *The Woolard Review: A Review of Change and Innovation in the Unsecured Credit Market* (Report, 2 February 2021).

³¹ Financial Conduct Authority UK, *The Woolard Review: A Review of Change and Innovation in the Unsecured Credit Market* (Report, 2 February 2021).

Conclusion

23. BNPL products are prolific and have already demonstrated their potential to cause harm to vulnerable consumers. Without RLOs, BNPL providers are able to gain access to a market that would not otherwise be able to access credit. This has proven to be most beneficial to the industry and most detrimental to individuals experiencing pre-existing financial disadvantage.
24. Our current regulatory framework for credit products has been successful in protecting consumers. In passing the Credit Act in 2009, the Government has already demonstrated an understanding that credit affordability is an imperative aspect of consumer protection and industry regulation. It is illogical to excuse BNPL products from enforceable RLOs under the Credit Act when it is recognised that BNPL is, in the ordinary sense of the word, credit.
25. Living costs are increasing and the impact of this on the ground are already evident. Now more than ever do we need consistent, fair, and enforceable regulatory framework of the financial products causing the most harm to vulnerable consumers. Accordingly, KCLS support the implementation of Option 3 and strongly believe this Option is the only available that will offer adequate protection to our client base.

Appendix 1: Alex's story

Alex is an Aboriginal person living in a remote area of Western Australia. They are single and have no dependent children. Alex works full time. Their take home pay is approximately \$60,000, including travel allowances. They own their home, valued at approximately \$300,000 and a car valued at an estimated \$12,000.

Alex visits a financial counsellor at their local community legal centre. Alex tells their financial counsellor they have the following debts:

- \$11,000 mortgage arrears
- \$10,000 council rates arrears
- \$15,000 strata fee arrears
- 2 credit card debts amounting to more than \$40,000
- 3 BNPL accounts: Zip, Afterpay and Humm. The limit on these accounts is \$2000, \$1500 and \$2000 respectively.

Alex is in the habit of using the BNPL accounts for day-to-day expenses as they often have very little cash flow after all debts are paid. They say they feel shame every time they need to use one of these accounts at the supermarket checkout, because it makes them feel like they will never get on top of things. In addition, Alex says it is difficult to remember when each one is due. Many times, an account requires a payment on Alex's non-pay week. They are unable to make these payments when they fall due and will wait for payday to make a payment. By that time, they can have accumulated anywhere between \$20 and \$50 of late fees. This pattern repeats fortnightly.

See below for a copy of Alex's Statement of Financial Position.

INCOME & EXPENDITURE

FOR

FORTNIGHTLY

NAME: Alex - Case Study

CLIENT'S SIGNATURE

DATE:

ISSUE NO. 1

INCOME	
Wages after tax	\$1,390.00
Travel Allowance	\$ 200.00
Sal Sacrifice	\$ 730.00
Interest	
Rental Income	
Other	
TOTAL	\$2,320.00

PERSONAL	
Clot hing	\$ 20.00
Sport/Recreation	
Lot to / Gambling	
New sp /Magazin es	
Birt hdays	\$ 20.00
Christ mas	\$ 20.00
Cultural Events / funerals	\$ 45.00
Holid ays	
Haircut s	\$ 15.00
Club Mem bersh ip	
Pet Expenses	
Entert ainment s	
TOTAL	\$ 20.00

DEBTS		
	Total	Owing
Mortgage	\$230	\$11,000
Rates	\$100	\$10,000
Strata	\$100	\$15,000
Child Support		
Tenant liability		
Outstanding Utilities		
Elect ricity		
Gas		
Water	\$50	\$800
Telecom m unicat ions		
Fines		
Tax Debts		
Centrelin k debt		
Personal Loans		
Other Loans		
Credit Card 1	\$10	\$6,000
Credit Card 2	\$10	\$37,000
Credit Card 3		
Credit Card 4		
BNPL 1		\$150
BNPL 2		\$1,800
BNPL 3		\$1,400
BNPL 4		
Other		
TOTAL	\$500	\$83,150

EXPENDITURE	
ACCOMMODATION	
Mortgage rep ayment s	\$ 595.00
Strata fees	\$ 101.00
Council Rates	\$ 105.00
Water Rates	\$ 46.00
Water Bills	\$ 13.00
Insurance	
(House/content s Insurance)	
House Maintenance	\$ 11.00
Yard Maintenance	\$ 11.00
Security	\$ 8.00
Other	
Other	
TOTAL	\$ 890.00

EDUCATION/HEALTH	
Fees	
Books	
Unif orm s	
General School Exp .	
Kin der/Crèche	
Personal Life Insurances	
Healt h Insurance	
Med/Dent /Chem ist	\$ 20.00
Scholarship fund s	
Am b ulance	
TOTAL	\$ 20.00

HOUSEHOLD	
Gas Bott les	
Gas	
Elect ricity	\$ 150.00
Home phone	
Telstra bundle - mob + internet	\$ 175.00
Internet	
TOTAL	\$ 325.00
GROCERIES	
Food - superm arket	\$ 180.00
Cigaret tes	
Alcohol	\$ 40.00
Takeaway	\$ 50.00
TOTAL	\$ 270.00

VEHICLE	
Loan/s	
Regist rat ion /s	\$ 38.00
Car insurance	\$ 50.00
RAC Mem bersh ip	\$ 5.00
Other	
TOTAL	\$ 93.00
TRANSPORT	
Fuel cost s	\$ 60.00
Parking	
Public Transport	
Maint enance/Ser vice	\$ 45.00
TOTAL	\$105.00

SURPLUS/DEFICIT	
INCOME \$	\$2,320
LESSEX P \$	\$2,323
BALANCE \$	-\$3

LIST of ASSETS	Estimate	Comment/Details
Cash at Bank	NA	
Vehicle	12k	
Property	300k	
Investments		
Superannuation		TBC
Tools of Trade		
Household misc		
Other		